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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

REHABILITATOR'S MOTION FOR CONFIRMATION OF PLAN OF REHABILITATION

Pursuant to Wis. Stat. § 645.33(5), the Commissioner of Insurance of the State of Wisconsin, in his capacity as Court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the "Rehabilitator"), hereby moves the Court for confirmation of the Plan of Rehabilitation (the "Plan") for the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac") filed today. It is the informed judgment of the Rehabilitator, in accordance with the authority and discretion delegated to him by the State of Wisconsin and this Court, that the Plan serves the purposes of rehabilitation and fairly protects the interests of policyholders, creditors and the public in light of the events and conditions that necessitated the restructuring of Ambac and the rehabilitation of the Segregated Account.

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The context for the Plan is explained in the accompanying Disclosure Statement, as well as in the Rehabilitator's prior motions, briefs, affidavits, and other papers on file in this proceeding and in the Court's decisions to date. Those facts and analyses may be supplemented by the Rehabilitator further at the hearing(s) on confirmation of the Plan. The legal framework for this Court's consideration of the Plan appears in part in prior briefs filed by the Rehabilitator, and is hereby summarized as follows:

1. The Commissioner "has broad discretion to structure a plan of rehabilitation" to meet the objectives of rehabilitation proceedings. 1 *Couch on Insurance* § 5:22

(3d ed. 2009). The legislative comments to the rehabilitation sections of Chapter 645 repeatedly emphasize that rehabilitation should be "regarded as a management rather than as a legal task" and that "the court's control should be liberal, not strict, and should be provided without cumbersome procedures." Wis. Stat. § 645.32, official cmt. (cited with approval by at page 7 of this Court's July 16, 2010 decision in this matter). The rehabilitation statutes do not restrict the good-faith exercise of the Rehabilitator's discretion in preparing and implementing a plan of rehabilitation and do not limit or dictate the terms of such a plan. Indeed, "[s]ubject to court approval, the rehabilitator may take the action he or she deems necessary or expedient to reform and revitalize the insurer[,]" including "full power . . . to deal with the property and business of the insurer." Wis. Stat. § 645.33(2).

2. Chapter 645 permits, but does not require, the Rehabilitator to submit a formal rehabilitation plan to the Court. Wis. Stat. § 645.33(5). If the Rehabilitator creates a rehabilitation plan and applies to the Court for approval, the Court may, "after such notice and hearing as the court prescribes, . . . approve or disapprove the plan proposed, or may modify it and approve it as modified." *Id.* Nothing in Chapter 645 generally or Section 645.33(5) specifically indicates that the Court's review of the Plan should be more stringent or less deferential than its review of any other discretionary actions or proposals by the Rehabilitator.

3. The law of other authorities and jurisdictions confirms that the Court's role in reviewing a rehabilitation plan is narrow: "it is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator. Rather, the involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator's discretion." *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992). Accordingly, "[t]he court's review of the rehabilitator's proposed plan is generally a

limited one, subjecting the rehabilitator's proposal to an abuse of discretion standard." National Association of Insurance Commissioners, *Receivers Handbook for Insurance Company Insolvencies*, at 448 (2009). As noted by a New Jersey appellate court operating under rehabilitation statutes similar to those in Wisconsin:

> [W]hile the Commissioner's plan for rehabilitation cannot be implemented without a court finding that it is fair and equitable, deference is given to the means the Commissioner chooses to utilize in going forward with rehabilitation. As such, the Rehabilitator's determination concerning the manner in which to proceed will not be set aside unless it is shown to be arbitrary or unreasonable.

LaVecchia v. HIIP of N.J., Inc., 734 A.2d 361, 364 (N.J. Super. Ct. Ch. Div. 1999). *See also Matter of Mills v. Fla. Asset Fin. Corp.*, 818 N.Y.S.2d 333, 334 (N.Y. App. Div. 2006) ("The courts will generally defer to the rehabilitator's business judgment and disapprove the rehabilitator's actions only when they are shown to be arbitrary, capricious, or an abuse of discretion."); *Med. Society of N.J. v. Bakke*, 892 A.2d 728, 735 (N.J. Super. Ct. App. Div. 2006) ("Extending due deference to the Commissioner's expertise in the technical subject matter" of insurance); *cf.* Wis. Stat. 227.57(10) ("Upon such review [of agency actions] due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.").

4. This Court has no duty to consider any alternative or modified plans for rehabilitation of the insurer proposed by any policyholder or any other entity or person other than the Rehabilitator. 1 *Couch on Insurance* § 5:24 (noting that, absent "proof of illegality, abuse of discretion, or gross inequity, the trial court's approval of a particular plan of rehabilitation is not subject to review") (footnotes omitted) (citing, *inter alia*, *Carpenter v. Pac. Mut. Life Ins. Co.*, 74 P.2d 761 (Cal. 1937), *aff'd*, *Neblett v. Carpenter*, 305 U.S. 297 (1938)); *State ex rel. Hunt v. Green*, 508 P.2d 639, 642 (Okla. 1973) (where the insurance commissioner commences

delinquency proceedings against an insurer and applies for the approval of a rehabilitation plan, "the Court . . . cannot, as in this case, put off making a ruling on the [plan] to allow officers of the insolvent insurer to submit a plan of rehabilitation of their own for his approval[.]"). Only after finding that a rehabilitation plan as formulated constitutes an abuse of discretion may the Court "prevent[] any further abuse of discretion by either rejecting the plan or modifying the plan and then approving it as modified." *Foster*, 614 A.2d at 1092.

5. In sum, the Wisconsin legislature has granted broad discretion to the Rehabilitator to craft plans of rehabilitation for insurers, and the Plan cannot be rejected or modified absent a showing that he has abused that discretion. As evident in the Plan, the Disclosure Statement, and other briefs, affidavits, exhibits, and papers on file herein, the Plan is the product of careful analysis and the sound exercise of the broad discretion granted to the Rehabilitator, with due consideration of the purposes of this rehabilitation proceeding and the interests of policyholders, creditors and the public.

6. The Rehabilitator has provided extensive evidence showing the rational basis for this exercise of discretion. Although not required to do so, the Rehabilitator has submitted a thorough Disclosure Statement explaining the terms and operation of the Plan, many of the reasons the Rehabilitator concluded that those terms were appropriate and necessary, and information regarding the Segregated Account's current and projected financial conditions. In conjunction with other filings in this case, the Disclosure Statement is more than sufficient to educate policyholders regarding the Plan and the basis for the Rehabilitator's exercise of his discretion in formulating it. The Disclosure Statement amply justifies the rational basis for the Plan, and further time-consuming discovery is unnecessary and inappropriate in this

rehabilitation proceeding for the reasons expressed at page 7 of the Court's July 16, 2010 decision in this matter.

7. As expressed in several prior briefs and affidavits of the Rehabilitator in this matter, and as found by this Court,

> The formation of the Segregated Account, the allocation of less than 1,000 of Ambac's almost 15,000 policies thereto, and the commencement of this rehabilitation of the Segregated Account was a fair and reasonable response to Ambac's financial condition. It addresses the serious financial hazards the allocated policies presented to Ambac and all of its policyholders (including those in the Segregated Account), maximizes claims-paying resources, and avoids the unpredictable and potentially substantial collateral damage to Ambac, its policyholders, and the public that would accompany a full rehabilitation of Ambac. . . .
>
> The Segregated Account was formed in compliance with Wisconsin law.
>
> . . . OCI acted well within its discretion in approving the establishment of the Segregated Account.

(May 27, 2010 Findings of Fact and Conclusions of Law, Findings ¶ 36, Conclusions ¶¶ 2-3.) The Rehabilitator reiterates his determination, as informed by the legislatively recognized expertise of the Wisconsin Office of the Commissioner of Insurance, that (1) the Segregated Account was legally established; (2) the rehabilitation of the Segregated Account is lawful and appropriate; and (3) the establishment and rehabilitation of the Segregated Account at this time provides equal or better protection of the interests of policyholders, creditors, and the public than the broader rehabilitation or liquidation of Ambac as a whole.

8. As detailed more fully in the accompanying Disclosure Statement at Section V.H.1, there are certain conditions precedent to the Plan taking effect. Certain of those conditions pertain to the issuance of the Surplus Notes described more fully in the Plan and Disclosure Statement. For the Plan to take effect, among other things, the Confirmation Order

must specifically approve the procedural and substantive fairness of the terms and conditions of the issuance of the Surplus Notes under Section 4.04(d) of the Plan in form and substance reasonably satisfactory to the Rehabilitator and consistent with the representations in the pending No-Action Letter Request to the Securities & Exchange Commission. For the reasons detailed more fully in the Plan and Disclosure Statement, the Rehabilitator submits that it is appropriate for the Court to specifically approve the procedural and substantive fairness of the terms and conditions of the issuance of the Surplus Notes under Section 4.04(d) of the Plan.

9. The Rehabilitator requests that the Confirmation Order include the specific approval of the procedural and substantive fairness regarding the Surplus Notes detailed in the prior paragraph of this Motion and such other findings of fact and conclusions of law the Court deems just and appropriate. The Rehabilitator shall provide the Court with a proposed form of Confirmation Order for the Court's convenience.

NOW, THEREFORE, the Rehabilitator respectfully requests that the Court confirm the Plan in its entirety, following such notice and hearing as the Court prescribes pursuant to Wis. Stat. § 645.33(5).

Dated this 8th day of October, 2010.

FOLEY & LARDNER LLP

By: _____

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