STATE OF WISCONSIN CIRCUIT COURT FILED COPY DANE COUNTY

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CIRCUIT COURT
DANE COUNTY WI

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

DECISION ON MOTIONS CHALLENGING THE LEGALITY OF THE ESTABLISHMENT AND STRUCTURE OF THE SEGREGATED ACCOUNT; THE CHALLENGES TO THE TEMPORARY INJUNCTION CONCERNING THE EXERCISE OF CONTROL RIGHTS, WITHHOLDING OF PREMIUMS AND OTHER OBJECTIONS; AND MOTIONS TO FORMALLY INTERVENE AS PARTIES TO THIS REHABILITATION ACTION

The verified petition for order of rehabilitation for the Segregated Account of Ambac Assurance Corporation was filed March 24, 2010. By order for rehabilitation entered March 24, 2010, the Segregated Account was placed in rehabilitation pursuant to Sec. 645.32, Wis. Stats. The rehabilitation related only to the Segregated Account and the policies, contracts, rights, assets, equity ownership interests, and liabilities allocated to Segregated Account pursuant to Wis. Stats. Sec. 611.24. The Order for Rehabilitation specifically stated that it did not relate to the policies, contracts, assets, equity ownership interests, and liabilities that remained in Ambac's General Account.

Also, on March 24, 2010, the Office of the Commissioner of Insurance (OCI) moved this Court for immediate injunctive relief to protect the interests of insureds and creditors of the Segregated Account under Wis. Stats. Sec. 645.01(4) and 645.05(1). On March 24, 2010 this Court entered the order for temporary injunctive relief. The order for temporary injunctive relief

applied only to the Segregated Account which was the subject of the petition for rehabilitation stating at Paragraph 12:

> "12. This Order shall remain effective until further order of the Court. If any interested parties believe any portion of this Order is unwarranted by the facts or the law, such parties may seek modification or dissolution of part or all of this Order by filing a written motion with this Court no later than 90 days following the issuance of this Order. If one or more such timely motions are received, the Court may set a schedule for responsive briefing and a hearing regarding the modifications or dissolutions sought..."

On April 30, 2010, a group of owners or managers of funds that owned residential mortgage-backed securities ("RMBS") which consisted of Aurelius Capital Management, LP, Fir Tree, Inc., King Street Capital Master Fund, Ltd., Monarch Alternative Capital LP, and Stonehill Capital Management LLC, filed a motion titled "Emergency Motion to Modify order for Temporary Injunctive Relief Filed by Certain RMBS Policyholders and Motion Seeking Expedited Relief."

On May 5, 2010, a motion titled "Emergency Motion to Enjoin Consumption of the Proposed Settlement Agreement Between Ambac and Certain DCDS Counter Parties," was filed by owners or managers of funds that held Las Vegas Mono Rail Project Revenue Bonds (LVM Bonds). These consisted of Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners L.P. The Court heard these motions on May 25, 2010. On May 27, 2010, this Court made Findings of Fact and Conclusions of Law regarding these motions. The order of the Court denied the RMBS Policyholders' and LVM Bondholders' Emergency Motions for Injunctive and Other Relief.

In the Court's March 24, 2010 order, a deadline was set regarding injunctive relief. Any party in interest was to file any challenges pertaining to that order for injunctive relief on or before June 22, 2010. Certain movants filed motions as follows:

"1. Depfa Bank, plc;

2. Wells Fargo Bank, N.A., solely in its capacity as trustee for certain RMBS certificateholders;

3. Bank of America, N.A., solely in its capacity as trustee for certain RMBS certificateholders;

4. PNC Bank, N.A.;

5. One State Street, LLC;

6. Deutsche Bank National Trust Company, solely in its capacity as trustee, and Deutsche Bank Trust Company Americas, solely in its capacity as trustee;

7. U.S. Bank National Association, solely in its capacity as trustee for certain securitization trusts;

8. Access to Loans for Learning Student Loan Corporation & Lloyds TSB Bank plc;

9. The Bank of New York Mellon; and

10. KnowledgeWorks Foundation and the Treasurer of the State of Ohio"

This Court by order dated June 3, 2010 scheduled the LVM motion and Wells Fargo Bank, NA's motion to modify temporary injunction and for an order allowing them to intervene for Friday, July 9, 2010. Following hearing, the Court signed its order dated July 16, 2010 on said motions which order, in denying the motions, did so on the following basis:

"1. Certain emergency motions filed seeking the Court to limit its ruling on the LVM and Wells Fargo, N.A. motions at the July 9, 2010 hearing, or to postpone or delay said motion hearings, for reasons stated above, those motions ARE DENIED.

2. This Court's May 27, 2010 Decision, Findings of Fact and Conclusions of Law are reaffirmed in this matter (particularly Findings 19-31 and 36 and Conclusions 2-5 and 8-9.)

3. The allocation of the LVM Bond Policy to the Segregated Account was lawful, and did not violate any provision of the Constitutions of either the State of Wisconsin or the United States of America.

4. Movants' motion to intervene or conduct discovery in regard to their motion is denied. Movants have not established legal grounds or other good cause for such relief to be granted. This denial of intervention does not preclude these Movants from asking to be heard in this matter at future proceedings pertaining to the Rehabilitator's plan of rehabilitation."

By order entered July 13, 2010, this Court scheduled briefing and hearing on the June 22, 2010 motions on injunctive relief in related matters. By that order, this Court directed that non-policy-specific "common" issues raised in the various motions pursuant to the Court's March 24, 2010 injunction order would be heard September 9, 2010. These included (July 13, 2010 order at Page II A.):

"...including challenges as to the scope or duration of the injunctive relief, specific provisions of the injunction order or the authority of the Court to issue such relief, issues raised by any of the Movants pertaining to the appropriateness, lawfulness or constitutionality of the Segregated Acount; motions seeking intervention or discovery, and any other issue not specified below to be addressed at the September 13, 2010 hearing."

The July 13, 2010 order directed that motions dealing with specific issues pertaining to the allocation of a liability or policy to the Segregated Account or a specific contract disagreement pertaining to servicing or a commercial real estate lease would be heard September 9, 2010. These included:

> "1. One State Street, LLC – This Movant's contention that the disputed contingent liability regarding the New York commercial real estate office lease was improperly allocated to the Segregated Account, including all issues raised by this Movant pertaining to the lease.
>
> 2. Access to Loans for Learning Student Loan Corporation & Lloyds TSB Bank plc – Movants' policy-specific allegations regarding allocation of a particular policy or policies to the Segregated Account (as opposed to more generalized allegations noted above about the injunction or the lawfulness of the Segregated Account).
>
> 3. KnowledgeWorks Foundation and the treasurer of the State of Ohio – Movants' policy-specific allegations regarding the allocation or possible future allocation of those particular policies to the Segregated Account (as opposed to more generalized allegations noted above about the injunction or the lawfulness of the Segregated Account).
>
> 4. PNC Bank's contentions regarding termination of its servicing contract – (as opposed to more generalized allegations noted above about the injunction or the lawfulness of the Segregated Account)."

Also in the July 13, 2010 Scheduling Order there were case tracking letter designations assigned to each of these movants as follows:

> "10CV1576-B Depfa Bank, plc
>
> 10CV1576-C Wells Fargo Bank, N.A., solely in its capacity as trustee for certain RMBS certificateholders

10CV1576-D Bank of America, N.A., solely in its capacity as trustee for certain RMBS certificateholders

10CV1576-E PNC Bank, N.A.

10CV1576-F One State Street, LLC

10CV1576-G Deutsche Bank National Trust Company, solely in its capacity as trustee, and Deutsche Bank Trust Company Americas, solely in its capacity as trustee

10CV1576-H U.S. Bank National Association, solely in its capacity as trustee for certain securitization trusts

10CV1576-I Access to Loans for Learning Student Loan Corporation & Lloyds TSB Bank plc

10CV1576-J The Bank of New York Mellon

10CV1576-K KnowledgeWorks Foundation and the Treasurer of the State of Ohio"

I. AUTHORITY APPLICABLE TO THE SEPTEMBER 9, 2010 AND SEPTEMBER 13, 2010 MOTIONS.

In deciding the motions of the certain RMBS policyholders and certain LVM bondholders, this Court on May 27, 2010 made Findings of Fact and entered Conclusions of Law upon the completion of the hearing of argument on those motions. Those findings have various applications to the specific September 9 and September 13 motions heard by this Court. In deciding those motions, this Court adapts and makes part of its decision on the September 9 and 13 motions its Findings of Fact, Conclusions of Law and Order dated May 27, 2010. By order entered July 16, 2010, this Court denied motions of Wells Fargo Bank and certain LVM bondholders on emergency motions to postpone the July 9, 2010 hearing on the motions. Upon the record of that hearing, the Court by order dated July 16, 2010, determined that the allocation

of the LVM bond policy to the Segregated Account was lawful and did not violate any provision of the Constitutions of either the United States of America or the State of Wisconsin. Further based upon that record, this Court denied movants' motion to intervene or conduct discovery in regard to their motion. This Court's determinations in entering those orders in the July 16, 2010 order have application to various of the motions heard on September 9 and September 13th. That order is adopted by this Court as part of its basis for its decision on the September 9 and 13th motions and incorporates that order in this decision as though fully set forth.

As this Court noted in its July 16, 2010 order, Wis. Stats. Sec. 611.24(2) comments note that (2) does provide for optional Segregated Accounts under any circumstance the corporation wishes, if the Segregated Account meets with the Commissioner's approval. The Segregated Account created in this matter has been approved by the Commissioner of Insurance.

The purpose of rehabilitation is succinctly set out by the Officer of the Commissioner of Insurance brief in support of the entry of the order of rehabilitation at Pages 9-11 as follows:

> "The overarching goals of rehabilitation are to save an insurance company from liquidation, to preserve and maximize claims-paying resources, and to treat policyholders equitably while the insurer is in a financially precarious state. *See* Am. Jur. 2d Insurance § 5:24 (3d ed. 2008) ("In general, the rehabilitation statutes place upon the conservator the responsibility of devising a plan for rehabilitation that will result in the successful continuation of the business of the insurer."). "The rehabilitation statutes intend to preserve the business of an insolvent company, or of a company which is threatened with insolvency, regardless of whether the difficulties of the company were caused by its own mismanagement or by general economic conditions beyond its control." *Id.* § 5:18. In rehabilitation proceedings, it is the duty of the Commissioner of Insurance to "try to remove the causes of [an insurer's] difficulties." *Id.*
>
> The Commissioner "has broad discretion to structure a plan of rehabilitation" to meet these objectives. *Id.* § 5:22. Chapter 645 of the Wisconsin Statutes reinforces the substantial grant of authority to the Commissioner as Rehabilitator. Indeed, the Wisconsin legislature has stated that "[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 exercising the "full power . . . to deal with the property and business of the insurer." Wis. Stat. § 645.33(2). As noted by a New Jersey appellate court operating under rehabilitation statutes similar to those in Wisconsin,

> While 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. HIP 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, 333 (N.Y. App. 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); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091-92 (Pa. 1992) (recognizing the "broad supervisory powers" of the Insurance Commissioner in rehabilitation proceedings, noting that "judicial discretion is not to be substituted for administrative discretion," and holding that "the involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator's discretion") *Kueckelhan v. Fed. Old Line U.S. Co.*, 418 P.2d 443, 453 (Wash. 1966) ("The court's sole and proper function in rehabilitation proceedings is to direct—that is, to supervise and review—the actions of the Insurance Commissioner while he is operating the seized insurance company.");*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.").

In furtherance of the Commissioner's exercise of his authority, the Court also has broad power to implement injunctions to facilitate, and to avoid interference with, a Commissioner's plan for rehabilitation. As stated in Chapter 645, a Court may rant any injunctions deemed necessary and proper to prevent "waste of the insurer's assets," "the institution or further prosecution of any actions or proceedings," and "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," among other reasons. Wis. Stat. § 645.05(d), (f), (k). Further description of the specific injunctive relief the Commissioner seeks, together with supporting legal authority, appear in the

brief in support of the Motion for Temporary Injunctive Relief and proposed order granting such relief."

Wis. Stats. Sec. 645.32(1) was cited by this Court in its July 16th order for the principal that a rehabilitation proceeding is not an adversarial litigation which serves to adjudicate diverse and divergent interest of each policyholder. It is a formal remedial measure to "rehabilitate the business of a domestic insurer." Interests of movants yields to the policy decision and business decisions of the Rehabilitator who, by statute, is the public official that is best qualified to perform the rehabilitation/liquidation process. The reason for this is that the Rehabilitator has no special interests in the outcome except to administer the matter for the maximum benefit of all interested parties which the Rehabilitator has done in securing the temporary injunction in this matter. See *Minor v. Stephens*, 898 S.W. 2nd 71, 76 (Ky. 1995). Movants in the September 9, and September 13, 2010 hearings have been given an opportunity to be heard. As established by the comments to Wis. Stats. Sec. 645.32, the right of movants to be heard is subject to the discretion of the Court. Movants have had the opportunity to file motions, brief the motions, and have oral argument on their motions.

The capitalization requirements for the Segregated Account is within the discretion of the Office of the Commissioner of Insurance. Wis. Stats. Sec. 611.24(3)(a) provides that the Commissioner is to require the corporation to have and maintain an adequate capital and surplus in the Segregated Account. The Commissioner of Insurance has discretion to set minimum capital and surplus requirements for an individual corporation based on its own plans. The Commissioner is to demand only so much capital as is needed. The plan of operation, the secured note and reinsurance agreement that has been provided by the OCI is the Segregated Account access to all of the assets of Ambac on par with the general account policyholders unless the

payment of claims would cause Ambac's assets to fall below $100,000,000.00, which is less than two percent of Ambac's claim paying assets. The net effect of this is that the Segregated Account is capitalized at 80 percent of Ambac's current assets despite having liabilities of less than 1000 of Ambac's 15,000 insurance policies. The OCI has exercised reasonable discretion in requiring the Segregated Account policyholders have access to virtually all of the resources available to pay their claims prior to the allocation of their policies to the Segregated Account. Under Wis. Stats. Sec. 611.24, the Segregated Account is to have an adequate share of the corporation's capital and surplus. No legal basis in this matter has been shown on which to require additional capitalization of the Segregated Account.

Challenges are made by movants to the injunction Paragraphs 6, 9, and 7, that the injunction generally creates and grants the Rehabilitator excessive authority. Wis. Stats. Sec. 645.05(1)(k) does empower the OCI to seek injunction relief against any 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, and creates a broad array of injunctive relief in a rehabilitation action such as this. The Commissioner of Insurance is charged under Wis. Stats. Sec. 601.15 to act within the public interest, and its decisions are to be granted considerable deference by the Court. See Wis. Stats. Sec. 227.57(10).

The amendment movants seek of Paragraph 6 and 9 of the injunction order, the RMBS institutional trustees, would have the effect of lessening the value of the insurer's assets and prejudice the rights of policyholders and certainly would interfere with the administration of the proceeding within the contemplation and meaning of Wis. Stats. Sec. 645.05(1).

The Rehabilitator's ability to carry out his statutory duties, to manage the business of the insurer, to protect the insured's interests as well as the interests of the creditors and

the public with minimum interference with the normal prerogatives of proprietors (Wis. Stats. Sec. 645.01(4), 645.33(2)), would be severely damaged if Paragraphs 6 and 9 were amended to prevent the retention of control rights in the Rehabilitator. Control rights have been defined by the parties as including the exercise of control over the loan servicer (including the right to receive information such as loan files, and the right to terminate the servicer for failure to meet performance criteria), authority to direct the trustee to assert rights under the transaction documents, the right to consent to amendments and waivers under the transaction documents, and the right to declare events of default, trigger events and early amortization events. (See Peterson Affidavit, Paragraph 11 and Rehabilitator's Brief, Page 38)

The fourth Peterson affidavit at Paragraph 13 and 14 sets out why retention of these control rights in the Rehabilitator is vital to the rehabilitation and the carrying out of the Rehabilitator's duties. As the Rehabilitator notes in its brief at Page 40:

> "The Trustees do not, and cannot, contest that their holders' contractual rights are "subject to the reasonable exercise of the state's police power[,]" and "[t]he only restriction on the exercise of this power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory." *Carpenter*, 74 P. 2d at 774-75. *Accord Minor*, 898 S.W.2d at 80 ("Neither the insurance company nor policyholders have inviolate rights that characterize ordinary private contracts. The policyholders' contracts as well as others with interest in the company, are subject to a reasonable exercise of state police power."); *Foster*, 614 A.2d at 1095 (confirming a plan that altered contractual rights because it "foster[ed] the legitimate public purpose of safeguarding the public interest from the potentially innumerable consequences of [the insurer's] insolvency"). There is nothing arbitrary or unfairly discriminatory in uniformly enjoining the transfer and exercise of certain contract rights that would be detrimental to the rehabilitation as a whole."

The Injunction Order recognizes the trustee right to indemnification for actions taken at the direction of the Rehabilitator as controlling party. The Trustees object that they would receive indemnification in the form of an administrative claim against the Segregated Account which they wish to have amended by the Court. Again, both the General Account and Segregated Account have access to the same assets; the creditworthiness then would not be significantly different.

Modification by movants of Paragraph 7 is sought by three of the Trustees, Deutsche Bank, US Bank, and BNY. They seek to be allowed to escrow the premiums pending judicial review of these proceedings. Deutsche Bank has done this without first obtaining relief from the Court from the provisions of the Injunction Order. Movants seeking this amendment of Paragraph 7 of the Injunction Order wish to be authorized to cease contributing to Ambac's liquid claims paying resources without any consequence to them. This has an affect on all policyholders. It is not permitted under Wis. Stats. Sec. 645.56(2)(d) which does not allow setoff or counterclaim where the obligation of the person is to pay premiums, whether earned or unearned, to the insurer. This is also dealt with in *In re Liquidation of All-Star Ins. Corp.,* 112 Wis.2d 329, 326, 332 N.W.2d 828, 831 (Ct. App. 1983). Chapter 645 does not permit this setoff right sought by these movants. This action violates the Injunction Order.

Movants also challenge the authority given the Rehabilitator by the Injunction Rehabilitation Orders. This Court's Rehabilitation Order under Wis. Stats. Sec. 645.33 – 645.35 granted the Rehabilitator full power and authority under those statutes and other laws as would be reasonable and necessary to fulfill the Rehabilitator's duties and responsibility under the order. There was no grant of such powers to Ambac. This Court concurs with and adopts the

position of the Rehabilitator on the extensive nature of the Rehabilitator's authority as set forth on Page 44 and 45 of the Rehabilitator's brief as follows:

> "Second, the Rehabilitator's authority is indeed expansive, as it must be in order to serve the purposes of rehabilitation proceedings. As noted in the commentary to Chapter 645, and universally echoed in rehabilitation proceedings in other jurisdictions:
>
> > It is essential that [rehabilitation] be regarded as a management rather than as a legal task. Though it is called a formal proceeding because it begins with a formal petition to a court and a hearing, thereafter it should be essentially informal in operation. The order is formulated to emphasize flexibility and informality, and the Rehabilitator is given broad powers. He must act under the supervision of the court, of course, but the court's control should be liberal, not strict, and should be provided without cumbersome procedures.
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> Wis. Stat. § 645.32 cmt. *See Matter of Mills v. Fla Asset Fin. Corp.*, 818 N.Y.S. 2d 333, 334 (N.Y. App. Div. 2006) ("[C]ourts will generally defer to the Rehabilitator's business judgment and disapprove of the Rehabilitator's actions only when they are shown to be arbitrary, capricious or an abuse of discretion."); *LaVecchia v. HIP of N.J., Inc.*, 734 A.2d 361, 364 (N.J. Super. Ct. Ch. Div. 1999) ("[T]he Rehabilitator's determination concerning the manner in which to proceed [rehabilitating an insurer] will not be set aside unless it is shown to be arbitrary and unreasonable.") *Minor,* 898 S.W.2d at 76 ("Statutorily, the Commissioner is the appointed person in exclusive control over the proceedings, with guidance and approval provided by the court."); *Foster*, 614 A.2d at 1092 ("[I]t 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."); 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 5:22 (3d ed. 2008) (noting the "broad discretion" of the Rehabilitator). Thus, this Court's "expansive grant of power and authority" to the Rehabilitator is not merely permissible, but required under the established law.

Movants argue that the rehabilitation proceeding is like a federal bankruptcy proceeding and a principal from bankruptcy, referred to as new debtor syndrome, would have application to

the actions of the Rehabilitator in this case. As noted by Ambac Assurance Corporation in its first brief in opposition to various motions at Page 19:

> ". . . Depfa acknowledges that "Wisconsin's insurance insolvency law does not directly address the propriety of the Commissioner's actions" (Depfa I Br. at 9), but nonetheless argues that they are improper based upon something referred to as the "new debtor syndrome." Depfa I Br. at 10-13. The "new debtor syndrome" is a federal bankruptcy doctrine, which is designed to prevent a single-asset entity recently created or revitalized from making a bad-faith bankruptcy filing on the eve of foreclosure to thwart secured creditors. *See Trident Assocs. Ltd. P'ship v. Metropolitan Life Ins. Co. (In re Trident Assocs. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995); *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1073 (5th Cir. 1986) (finding lack of bad faith). This doctrine has no application here where a state regulator, not a private party, must make the delinquency filing.
>
> Additionally, as the primary case relied upon by Depfa explains, such a claim exists only where encumbered property has been transferred. *In re N.R. Guaranteed Ret., Inc.,* 112 B.R. 263, 273 n.8 (Bankr. N.D. Ill. 1990)."

Fair and equitable treatment and operation of the Segregated Account under Wis. Stats. Sec. 601.01(2) does not create a private right of action. Rather, it indicates that policyholders must receive at least the liquidation value of their claims from a plan of rehabilitation.

> "*See Krnzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 75-76, 307 N.W.2d 256, 265 (1981) ("[Section 601.01(2)] does not by express language confer upon any group a right of action. Indeed, it does not by its terms impose a duty, the breach of which could be actionable."); *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 778 (Cal. 1938), *aff'd sub nom Neblett v. Carpenter*, 305 U.S. 297 (1938) (policyholders must receive at least the liquidation value of their claims in a plan of rehabilitation)."

The allocation of certain movants' policies to the Segregated Account by the Commissioner was not a novation without consent. As the parties note, a novation involves usually the substitution of obligations between the same parties or the substitution of parties. That did not occur in this proceeding. Under Chapter 645, a Segregated Account is not formally a separate corporation. See *Wis. Stats. Sec. 61.24(3)(g) and (2)* comments. The creation of the Segregated Account did not modify Ambac's contractual obligations, and no new contract is shown to have been substituted. Basically, Ambac's assets also remain available to satisfy claims of the Segregated Account. As noted by Ambac in its first brief in opposition to various motions at Page 26, Footnote 28:

> "[28]None of the novation cases that ALL cites concerned a rehabilitation proceeding or anything like it. To the contrary, each involved a dispute between private parties. *See Navine v. Peltier*, 48 Wis. 2d 588, 180 N.W.2d 613, 614 (1970) (promissory note); *Siva Truck Leasing Inc. v. Kurman Distribs.*, 166 Wis. 2d 58, 479 N.W. 2d 542 (1991) (lease obligations); *M & I Marshall & Ilsley Bank v. New England Builders, Inc.*, 2010 WI App 33, 18, 323 Wis. 2d 822, 781 N.W.2d 550 (agreement for plumbing and fire protection). KnowledgeWorks cites an additional case, also not involving rehabilitation, which *upheld* a transfer of liability from one insurer to another. *See State Dep't of Pub. Welfaire v. Cent. Standard Life Ins. Co.*, 19 Wis. 2d 426, 120 N.W.2d 687 (1963)."

The implementation of Wis. Stats. Sec. 611.24 cannot be argued to have altered movants' contract rights. As Ambac Assurance Corporation in its first brief directly observe at Page 27-28, the movants' policies became effective at a time Wis. Stats. Sec. 611.24 existed and parties to a contract incorporate existing principles of law into their agreement:

> "*See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934) (upholding emergency relief from mortgage foreclosures); *Norfolk & W.R. Co. v.*

Am. Train Dispatchers' Ass'n, 499 U.S. 117, 130 (1991) (terms of existing statutes are part of a contract "as fully as if they had been expressly referred to or incorporated in its terms") (internal citation omitted)."

Argument is made by movants that the Segregated Account is a taking of private property without just compensation. This they allege to be in violation of the Federal and Wisconsin Constitution. As noted by this Court in prior rulings, no movant has served the Attorney General with notice of any constitutional challenges. This has to be done before those challenges can be made. They have to show the segregation statute to be unconstitutional to a standard of beyond a reasonable doubt. *Richland Sch. Dist. v. Wis. Dep't. of Indus., Labor and Human Relations*, 174 Wis. 2d 878, 905, 498 N.W.826, 836 (1993). As Ambac argues in its brief at Pages 28 and 29, this constitutionality argument has been raised on numerous occasions:

> "First, there is a strong presumption that Wisconsin statutes are constitutional, and Movants did not serve the Attorney General with notice of their constitutional challenges, which is a prerequisite to making them. In order to demonstrate that the segregated account statute is unconstitutional, Movants must remove all reasonable doubt as to its unconstitutionality. *See Richland Sch. Dist. v. Wis. Dep't of Indus., Labor & Human Relations*, 174 Wis. 2d 878, 905, 498 N.W.2d 826, 836 (12993) (holding that "[t]he burden is on the [appellant] to prove the statute's unconstitutionality beyond a reasonable doubt").
>
> Similar arguments have been rejected repeatedly in insurance delinquency proceedings because the state has such a vital and overriding interest in the rehabilitation of insurers that policyholders lack "the inviolate rights that characterize private contracts." *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 774-75 (Cal. 1938), *aff'd sub nom Neblett v. Carpenter*, 305 U.S. 297 (1938). Insurance is so highly regulated that the further exercise of the state's police powers in this realm can reasonably be anticipated. *See Serrano v. Aetna Ins. Co.*, 664 A.2d 279, 287 (Conn. 1995) ("In view of the highly regulated nature of the insurance industry and the foreseeability of the legislature's remedial action, the defendant, in order to establish a contractual interference of constitutional magnitude, was required to demonstrate that the challenged legislation gave rise to an impairment of overriding severity."); *State v. All Prop. & Cas. Ins. Carriers*, 937 So. 2d 313, 324 (La. 2006) (the more regulated an

industry, the more diminished are the expectations of parties to a contract in that industry).

OCI's approval of the creation of the Segregated Account cannot constitute a taking because "[t]here is no property right, in the constitutional sense, in any form of remedy. All that the law requires as to a dissenter is that he receives the liquidated value of his contract rights without unreasonable delay – he has no vested right to immediate payment." *Carpenter*, 74 P.2d at 778 (citation omitted), *aff'd,* 305 U.S. at 305 ("The petitioners have no constitutional right to a particular form of remedy."). Thus, Movants have no "property right" to avoid having t heir policies allocated to a segregated account, as authorized by Section 611.24, or to obtain future payments on any particular schedule. Without such a property right, there can be no taking. [30]"

This Court concurs with that analysis and that set forth in response to arguments of State Street in its motion contained in Footnote 30 as follows:

"[30]For this reason, State Street's reliance on *Kelo v. City of New London,* 545 U.S. 469 (2005) and *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1987) is misplaced. *See* State Street Br. at 21. Those cases concern interests in real property, and therefore the existence of a constitutionally-protected property interest was not in dispute. *See Kelo*, 545 U.S. at 483 (transfer of real property for development plan); *Chicago, B. & Q. Co.*, 1266 U.S. at 257-58 (apportionment of a railroad company's right of way). State Street also relies on *Wis. Retired Teachers Ass'n, Inc. v. Emp. Trust Funds Bd.,* 207 Wis. 2d 1, 558 N.W.2d 83 (1997), which is inapposite for the reasons discussed *infra*."

Movants raise a further constitutional challenge to the allocation of their policies to the Segregated Account on the theory that OCI did this without prior notice which violates the due process clauses of the Wisconsin and Federal Constitutions. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) holds that a due process claim depends upon the deprivation of a protected interest. To prevail on this argument, movants would have to establish that the

policyholders, in fact, have a property interest in either not being allocated to a Segregated Account or in avoiding rehabilitation. There is no vested property right established by movants. *Capounrevoc Trust v. Ansari*, 200 Wi. App. 83, 234 Wis.2d 335, 610 N.W.2d 192. *Ansari* did hold that due process was flexible and required only such procedural protections as the particular situation demands.

The particular situation in this case is one of Ambac having some 15,000 policies and some 900 to 1000 were allocated to the Segregated Account. Being required to provide notice to the policyholders would have been an extreme burden for OCI. As OCI and Ambac argue in their briefs, such a requirement would have heightened the risk of policyholders exercising triggers which would have led to the potential collateral damage discussed by OCI and Ambac which was sought to be avoided.

KnowledgeWorks raises a further constitutional argument in alleging that the Commissioner's allocation of policies to the Segregated Account violated the constitutional prohibition against interference with contracts. This argument references U.S. Const. Art. I, Section 10 and Wis. Const. Art. I, Section 12. A reading of these sections establish the principle that they operate to protect against impairment of contract caused by legislative action, but not executive or judicial. *Am. Insurance Co. v. Wis. Ins. Sec. Fund* (In re Liquidation of American Eagle Insurance Co.), 205 Wis. App. 177. Knowledge Works to further this argument has to show that the law changed after the contract was formed, thereby impairing the contract and causing it harm. That simply is not the case here. See *Dairyland Greyhound Park, Inc. v. Doyle* 206 Wis. 107, 297 Wis.2d 1, 719 N.W.2d 408. It is undisputed that the Segregated Account Statute was enacted before the movants' policies were issued. The affect of that is as argued by Ambac and OCI in their briefs that these policies then would have incorporated existing

principles of law. *Home Bldg. & Loan Ass'n v. Blaisdel*, 290 U.S.398, 429-30 (1934). The insurance industry is heavily regulated. *Serrano v. Aetna Ins. Co.*, 644 A.2d 279, 286 (1995). Here, the Court held that when considering the State's pervasive and long-standing regulation of the insurance industry, there was no Contracts Clause violation.

Even if creation of the Segregated Account did impair contracts as contended by movants as noted by Ambac in its brief, Pages 34 and 35, governments can do this to protect public welfare, particularly in the area of insurance:

> "Even if the KnowledgeWorks policies had been impaired, state and local governments are permitted to modify private contracts in order to protect the public welfare, particularly in the context of insurance. *See Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 74 P.2d 761, 774-775 (Cal. 1938), *aff'd sub nom Neblett v. Carpenter*, 305 U.S. 297 (1938) ("It is no longer open to question that the business of insurance is affected with a public interest. The state has an important and vital interest in the liquidation or reorganization of such a business. Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power."). Moreover, "unless the State itself is a contracting party, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Grp., Inc.*, 459 U.S. at 412-13. (citation and quotation omitted). Chapter 645 plainly exists to protect the public. *See* Wis. Stat. §645.01(4)-(4)(a) (a central purpose of Chapter 645 is "the protection of . . . the public generally"). Knowledgeworks makes no showing that the segregated account statute is unreasonable for promoting this purpose. *Energy Reserves Grp., Inc.*, 459 U.S. at 412."

II. ORDER

On September 9, 2010 and September 13, 2010, this Court heard oral argument on the above described motions. The Court has reviewed the extensive briefing filed by the parties both in support of those motions and in opposition. The Court has considered its prior rulings and

orders. The Court has considered the materials and affidavits filed by the various parties on the filed motions, and based upon the law as cited above, and in its prior decisions, enters the following orders:

A. Case No. 10CV1576-B. Depfa Bank, plc motion to intervene as a party under Wis. Stats. Sec. 803.09 and to modify the order for temporary injunctive relief, and relating to Student Loan Policies, **ARE DENIED.**

B. Case No. 10CV1576-C. Wells Fargo Bank, N.A. motion filed as trustee for certain RMBS trusts and on behalf of those trusts' certificateholders, seeking modification of the order for temporary injunctive relief **IS DENIED.**

C. Case No. 10CV1576-D. Bank of America, N.A., as trustee for certain RMBS trusts and on behalf of those trusts' certificate holders motion to modify the court's order for temporary injunctive relief **IS DENIED**.

D. Case No. 10CV1576-F. One State Street LLC's motion to dissolve or modify this Court's order for temporary injunctive relief and motion to intervene pursuant to Wis. Stats. Sec. 803.09 **ARE BOTH DENIED.**

E. Case No. 10CV1576-G. Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas, each acting solely in its capacity as trustee for certain securitization trust motions to intervene pursuant to Wis. Stats. Sec. 803.09 and to modify this Court's order for temporary injunctive relief **ARE BOTH DENIED.**

F. Case No. 10CV1576-H. U.S. Bank National Association, as trustee for certain securitization trust motions to intervene pursuant to Wis. Stats. Sec. 803.09 and to modify this Court's order for temporary injunctive relief **ARE BOTH DENIED.**

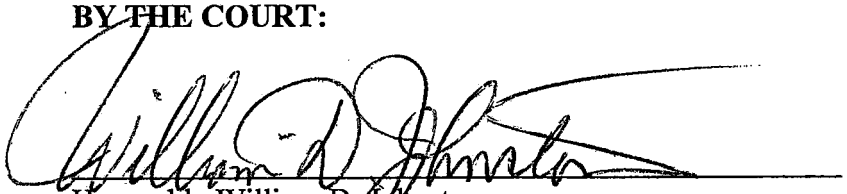
G. Case No. 10CV1576-I. Access to Loans for Learning Student Loan Corporation & Lloyds TSB Bank plc motions to intervene pursuant to Wis. Stats. Sec. 803.09 and to modify this Court's order for temporary injunctive relief **ARE BOTH DENIED.**

H. Case No. 10CV1576-J. The Bank of New York Mellon in its capacity as trustee, indenture trustee, or collateral agent, motions to intervene pursuant to Wis. Stats. Sec. 803.09 and to modify this Court's order for temporary injunctive relief, and relating to Student Loan Policies, **ARE DENIED.**

I. Case No. 10CV1576-K. KnowledgeWorks Foundation and the Treasurer of the State of Ohio motions to intervene as parties pursuant to Wis. Stats. Sec. 803.09 and to modify the temporary injunctive order of this Court, and relating to Student Loan Policies, **ARE DENIED.**

Dated October 25, 2010.

BY THE COURT:



Honorable William D. Johnston
Lafayette County Circuit Court Judge
Presiding by Judicial Appointment

cc: To All Parties