

COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal No. 2010-AP-2721-LV

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

SEAN DILWEG and OFFICE OF THE
COMMISSIONER OF INSURANCE,

Plaintiffs-Respondents,

AMBAC ASSURANCE CORPORATION,

Interested Party-Respondent,

v.

ACCESS TO LOANS FOR LEARNING
STUDENT LOAN CORPORATION and,
LLOYDS TSB BANK PLC,

Interested Parties/Petitioners.

AURELIUS CAPITAL MANAGEMENT LP,
FIR TREE INC., KING STREET CAPITAL MANAGEMENT LP
MONARCH ALTERNATIVE CAPITAL LP,
STONEHILL CAPITAL MANAGEMENT LLC, RMBS
POLICYHOLDERS, EATON VANCE MANAGEMENT,
NUVEEN ASSET MANAGEMENT, RESTORATION
CAPITAL MANAGEMENT LLC, STONE LION CAPITAL
PARTNERS LP, LVM BONDHOLDERS, THE BANK OF
NEW YORK MELLON, FEDERAL HOME LOAN
MORTGAGE CORPORATION, WELLS FARGO BANK/
TRUSTEE FOR RMBS CERTIFICATE HOLDERS,
DEUTSCHE BANK NATIONAL TRUST COMPANY,
DEUTSCHE BANK TRUST COMPANY AMERICAS,
US BANK NATIONAL ASSOCIATION, BANK INSUREDS,
BANK OF AMERICA NA, DEPFA BANK plc, ASSURED
GUARANTY CORPORATION AND GOLDMAN SACHS &
COMPANY, INC., KNOWLEDGEWORKS FOUNDATION,
ONE STATE STREET LLC, PNC BANK NA AND

CUSTOMER ASSET PRODUCTION COMPANY,

Defendants.

Dane County Circuit Court Case No. 2010-CV-1576-I
The Honorable William D. Johnston,
Lafayette County Circuit Court, Presiding by Judicial Assignment

**RESPONSE BRIEF
OF THE WISCONSIN OFFICE OF THE COMMISSIONER OF
INSURANCE AND SEAN DILWEG, COMMISSIONER OF INSURANCE
OF THE STATE OF WISCONSIN, AS COURT-APPOINTED
REHABILITATOR OF THE SEGREGATED ACCOUNT OF AMBAC
ASSURANCE CORPORATION, TO PETITION FOR PERMISSIVE
APPEAL AND REQUEST FOR STAY BY ACCESS TO LOANS FOR
LEARNING STUDENT LOAN CORPORATION AND
LLOYDS TSB BANK PLC**

(Appendix Filed Separately)

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The Wisconsin Office of the Commissioner of Insurance (“OCI”), as the regulator of Ambac Assurance Corporation (“Ambac” or the “General Account”), and the Commissioner of Insurance of the State of Wisconsin, as the court-appointed rehabilitator (the “Rehabilitator”) (collectively “OCI”) of the Segregated Account of Ambac (the “Segregated Account”) objects to the November 3, 2010 Petition for permissive appeal and request for stay of the rehabilitation proceeding filed by Access to Loans for Learning Student Loan Corporation and Lloyds TSB Bank plc (collectively “Lloyds”).

INTRODUCTION

In Lloyds’ view, the way to bring the rehabilitation proceeding “under control” (*see* Pet. at 13) is to give *each* of the *thousands* of trustees, policyholders and policy beneficiaries who have an interest in the outcome of the proceeding the right to formally intervene as parties, the right to conduct discovery directed at OCI and Ambac, and the right to immediately appeal (on a permissive basis) *any* decision of the rehabilitation court, *including scheduling orders*, irrespective of principles of finality, judicial efficiency or deference to the trial court’s case management or docket control.

Suffice it to say that it is Lloyds’ view that is “out of control.” (*Id.*) As the Wisconsin legislature made clear, Chapter 645 rehabilitation proceedings are non-adversarial regulatory management actions to rehabilitate the business of a domestic insurer, Wis. Stat. Ann. §§ 645.01 & 645.32 cmts., and were never

intended to devolve into the type of policy- or claim-specific litigation that Lloyds seeks to pursue.

Unlike Lloyds, whose interests are both self-centered and extremely narrow, OCI's task as court-appointed rehabilitator is far more complex: it has to weigh *all* competing interests and considerations, and determine what is in the best interest of the insurer, policyholders, creditors and the public *as a whole*. Wis. Stat. § 645.01(4). Because OCI has no self-interest or financial stake in the outcome, the legislature accorded it great deference in making the complex and in many cases difficult rehabilitation choices necessary to achieve the statutory objectives in Chapter 645. *See generally* Wis. Stat. Ann. §§ 645.01 & 645.32 cmts.; Wis. Stat. § 645.33(2).

The rehabilitation court—which is presided over by a judge with more than 20 years of experience in dealing with complex insurance rehabilitation matters¹—understands the nature of this proceeding. As the court explained at a July hearing:

¹ By statute, all Wisconsin delinquency proceedings involving insurance companies must be commenced in Dane County Circuit Court or the circuit court for the county in which the insurer is located. Wis. Stat. § 645.31. Because of the specialized nature and complexity of delinquency proceedings under Chapter 645, and because of the extraordinary amount of court time and specialized expertise needed to efficiently administer such proceedings, the Chief Judge for the Fifth Judicial Administrative District has for the past 20 years assigned all such cases to Judge William D. Johnston (who normally sits as the sole Circuit Court Judge for the Circuit Court of Lafayette County). (OCI App. 250-51.) Approximately a decade ago that informal tradition was reduced to a standing order. (OCI App. 250-51, 253-54.) Consequently, Judge Johnston has been handling all of these demanding insurance proceedings for the past 20 years and has developed substantial, recognized judicial expertise in the field. (*Id.*)

[T]he purpose of [Chapter] 645 would be frustrated certainly if the protection of those insureds, of those creditors, of the public was allowed to be interfered with. A rehabilitation proceeding is not an adversarial proceeding. I recite that again. It is not an adversarial proceeding designed to adjudicate the diverse and divergent interest of each policyholder. It is a formal remedial measure to rehabilitate the business of a domestic insurer. . . .

[T]here is a great deal of power . . . in Chapter 645, the power and authority given to the Rehabilitator and to the Commissioner outside the scope of a judicial proceeding in the sense that the Court is there to review, but they have authority to take over a company, to create these accounts, to manage the company, to make decisions on policies, and then they may develop a plan of rehabilitation. . . .

[T]here isn't an adversarial process that says you can now go in and challenge each and every decision [of the Rehabilitator]. If this were the case, it would be unable to be handled. There would be such a morass of litigation, discovery and everything, all the energy would be spent in these adversarial proceedings.

(July 9, 2010 Hearing Tr. at 22-25 (OCI App. 79-82).)

If granted, Lloyds' stay request would derail and delay confirmation proceedings on OCI's rehabilitation plan, affecting approximately \$67 billion of insured policy exposures and the thousands of policy beneficiaries covered by those policies, all of whom are presently subject to a claims payment moratorium until a Plan can be confirmed. Moreover, such a stay would be especially inappropriate given: (1) Lloyds' small likelihood of success on appeal of a rehabilitation court scheduling order and an order denying its motion to modify an injunction order; (2) the rehabilitation court's ongoing, open invitation to those

affected by the proceeding to be heard; and (3) Lloyds' acceptance of that invitation, through its recent filings of written objections to the Plan, 49 separate factual questions it would like the Rehabilitator to answer at the upcoming Plan confirmation hearings, and a list of three witnesses Lloyds intends to call at that hearing to comment on the Plan. (OCI App. 217-48.)

Finally, while trial court orders denying intervention generally are treated as final and appealable orders in typical adversarial proceedings, the rationale for doing so is that the order forecloses the movant from having any further participation in the proceeding. By contrast, in the non-adversarial insurance rehabilitation context, this rationale is absent. Despite having had its motion to intervene denied, Lloyds continues to fully participate (and be heard) in the rehabilitation proceeding. Therefore, the denial of intervention in the specific rehabilitation context at issue here should not be deemed final or appealable as of right (or by permission).

For the reasons stated below, Lloyds' stay request and petition for permissive appeal of the rehabilitation court's Scheduling Order and its October 25, 2010 Order should be denied.

PROCEDURAL HISTORY²

I. THE REHABILITATION PROCEEDING AND OCI'S PLAN OF REHABILITATION

1. On March 24, 2010, OCI initiated a Chapter 645 statutory rehabilitation of the Segregated Account. On that date, OCI filed a Verified Petition for Rehabilitation, a Motion for Temporary Injunctive Relief and a number of supporting documents ("First-Day Filings") with the Dane County Circuit Court. The case was assigned to Judge Johnston.

2. In the First-Day Filings, OCI explained Ambac's declining financial situation, OCI's monitoring of that decline over a lengthy period, and OCI's conclusion that it was necessary to rehabilitate the Segregated Account, which was allocated less than 1,000 of Ambac's almost 15,000 policies.³ OCI also laid out a roadmap as to how the rehabilitation would proceed, noting:

The Commissioner plans to complete and seek approval of a final form of a plan of rehabilitation

² The court-approved website, www.ambacpolicyholders.com, includes a section entitled "Court Filings," which is a publicly accessible repository of all substantive court filings, affidavits and documents, and it provides an extensive chronology of the rehabilitation proceeding. The website also includes a section on the Plan of Rehabilitation, which contains detailed documents relating to OCI's proposed Plan. This Court may take judicial notice of the documents on the website because it is a source whose accuracy cannot reasonably be questioned under Section 902.01. *See State v. Harvey*, 2001 WI App 59, ¶ 8, 242 Wis. 2d 189, 625 N.W.2d 892 (taking judicial notice of information provided on city's official website), *aff'd*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189.

³ This is an enormous proceeding. The policies subject to the Segregated Account rehabilitation process involve approximately \$67 billion in net par outstanding exposures, and the approximately 14,000 policies in the Ambac General Account involve over \$300 billion in net par outstanding. (OCI App. 40, at ¶ 10.)

from this Court within approximately *six months*. The Commissioner, as rehabilitator, will *temporarily freeze further claim payments* under policies allocated to the Segregated Account pending approval of a final plan of rehabilitation.

(Verified Pet. ¶ 12(b) (OCI App. 9) (emphasis added).)

3. On March 24, 2010, OCI also sought and obtained a temporary injunction, which, among other things, imposed a moratorium on claims payments while OCI developed a rehabilitation plan and presented it to the court for confirmation. (Injunction Order ¶ 8 (OCI App. 21).)

4. OCI provided information regarding its proposed plan of rehabilitation as it became available. In the First-Day Filings, OCI noted:

The plan of rehabilitation will set forth a payment plan for policies allocated to the Segregated Account. As presently formulated, the plan would call for the payment of claims as they arise in the form of a cash/note split, with a percentage of the claim paid in cash immediately and the remainder paid in interest-bearing surplus notes.

(Verified Pet. ¶ 12(c) (OCI App. 9-10).) On May 20, 2010, OCI provided additional details regarding the proposed plan of rehabilitation:

As reflected in its initial rehabilitation filings, OCI is in the process of crafting a plan of rehabilitation to submit to this Court which will provide a pay-as-you-go claim procedure for policyholders. [OCI] expect[s] that, under that plan, policyholders will receive approximately a split of 25% in cash and 75% in surplus notes on their allowed claims.

(5/20/10 Affidavit of Roger A. Peterson, OCI's Director of the Bureau of Financial Analysis and Examination ("Peterson Aff.") ¶ 33 (OCI App. 51).)

5. The rehabilitation court has been a constructive forum for settling disputes and/or reaching policy compromises or commutations with various counterparties such as JP Morgan, Lehman Bros. and the Weinstein Companies. *See* <http://ambacpolicyholders.com/court-filings>.

6. Numerous entities (i.e., trustees, policyholders, bondholders, policy beneficiaries) have filed and continue to file motions in the rehabilitation proceeding. Certain of those parties-in-interest raise a variety of objections: to the creation or rehabilitation of the Segregated Account; to the allocation of their specific policies to the Segregated Account; to the scope of the Injunction Order; to settlement agreements between Ambac and other policyholders regarding policies that had not been allocated to the Segregated Account; and to various procedural and scheduling matters.

The objections themselves highlight the divergent viewpoints of the entities who claim to have interests in the nearly 1,000 policies that are in the Segregated Account. For example, Lloyds argues that the creation of the Segregated Account violated Wisconsin law. (Pet. at 16.) Other movants, who hold interests in bonds relating to the Las Vegas Monorail (“LVM”), argued that the creation of the Segregated Account was both lawful and laudable, but that the specific LVM policy covering them should not have been allocated to the Segregated Account. (OCI App. 92.) Over the past several months, the rehabilitation court has ruled on these and other objections. (*See generally* OCI App. 59, 83, 89, 192, 196.)

7. In the meantime, OCI worked diligently to meet the deadline it set for itself in the March 24 First-Day Filings: to present a Segregated Account rehabilitation plan for confirmation within “approximately six months.”

On October 8, 2010, OCI filed its Plan of Rehabilitation (“Plan”), a motion for confirmation of the Plan, and a large number of supporting documents to provide interested entities with information to assess the merits of the Plan. Among those documents, OCI prepared a 75-page Disclosure Statement, which discussed the background and events leading to rehabilitation, the Segregated Account, significant post-petition actions, a detailed summary of the Plan (which, consistent with OCI’s earlier disclosures, would pay policyholders a split of 25% in cash and 75% in surplus notes on their allowed claims), details about the surplus notes, the rationale for the cash and surplus note percentages, recovery analysis, and tax consequences if the Plan were confirmed. (*See* Disclosure Statement, *available at* <http://ambacpolicyholders.com/overview#documents>.) As exhibits to the Disclosure Statement, OCI provided several different scenarios regarding projected financial and operating results. OCI also made voluminous additional financial documents available on the court-approved, publicly accessible Web site for this rehabilitation, www.ambacpolicyholders.com.

8. On October 14, 2010, the rehabilitation court held a lengthy hearing regarding the schedule and hearing dates for OCI’s motion to confirm the Plan. At the hearing, OCI requested that an evidentiary hearing be held on mid-November, with staggered written submissions preceding the hearing. In support, OCI noted

its concern regarding the unfairness of further delaying claims payments, which were enjoined in March in order to allow the rehabilitation to proceed in an orderly fashion:

[W]e have a very onerous [claims] payment moratorium in place as part of the first day injunction order in this case. OCI takes very seriously the power it wielded in coming to you in March of this year to request that payment moratorium. It allowed the time-out and the breathing room to accomplish what we have to date and to put together this plan

. . . [T]hat claims-paying moratorium has placed a heavy burden, heavy toll on many of the claimants who aren't here. It has suspended monthly distributions to literally hundreds and hundreds of substantial creditors and thousands of their beneficial holders of notes and bonds, and there's a deferral rate that varies by month, but we put in the aggregate numbers.

From the start of the – the rehabilitation in March, you know, through the last hearing we had, it was like 700 or 800 million dollars, but it's roughly . . . in excess of like \$150,000,000 a month, and that there's a very strong desire on OCI's part to get to the confirmation process as expeditiously as possible so that these folks can get going on receiving the types of distributions under our plan that are called for.

The more that we get embarked on a lengthy discovery and a protracted discovery fight about what information we should be providing, et cetera, the longer it's going to take to start the payment process, which ultimately is at the heart of what we're here about. And so every month that goes by, give or take, claimants of 150,000,000, you know, ballpark, are not receiving any kind of claims-paying cash or notes on those claims.

(10/14/10 Hearing Tr. at 22:17-23:24 (OCI App. 119-120.))

OCI also noted that the Plan structure (and claims payment structure of 25% cash/75% surplus notes) took the same form as was disclosed in March in the First-Day Filing (*id.* at 18:3-20:8 (OCI App. 115-17)), that the Disclosure Statement (and exhibits) “tried fairly and fully to anticipate the types of information that would be helpful to [the court] and help . . . policyholders and general claimants understand the plan and why OCI believes it’s fair and reasonable” (*id.* at 20:9- 22:15 (OCI App. 117-19)), and that OCI “engaged in a very rigorous preconfirmation effort to inform, clarify and educate claimants and interested parties about our plan[,]” including meeting with many of the institutional trustees and larger stakeholders to answer their questions (*id.* at 24:8-25:8 (OCI App. 121-22)).

In response, several entities objected to OCI’s proposed hearing schedule. Some proposed no date for a hearing regarding Plan confirmation, arguing that discovery directed at Ambac and OCI should precede any scheduling of a confirmation hearing. (*Id.* at 48:7-50:16, 67:4-8 (OCI App. 145-147, 164.) Others proposed a hearing date in late-February 2011, which again would be preceded by a period of discovery. (*Id.* at 53:12-54:3 (OCI App. 150-51).)

In reply, OCI noted that it had met with various entities regarding requests for further information, disagreed about the relevance and appropriateness of many of the requests, expressed concerns about third-party confidentiality and privilege issues related to the requests, and believed that the proposal regarding

discovery would devolve into discovery fights that would take “a long, long time” to resolve. (*Id.* at 75:2-77:17 (OCI App. 172-74).)

In adopting OCI’s proposed schedule, the court stated:

I think the issues . . . OCI [raises] as to the urgency and the necessity of doing this when looking at the individual claimants or group of claimants here and their proposal ultimately to have the information and when you start going down the discovery, then when you start testing every theory and that can drag on and be years in the making to resolve, and with the idea of coming up with an alternate suggestion for a plan, that really invades what the province of the OCI is under statutes here and their particular duty.

In this particular case, I think sooner is better. I think with all of the dealing we have been doing, the motions that are filed, appeals have been taken, tremendously extensive briefing that has occurred, everybody I think is up to speed on their particular issues and we can go forward with the proponents of the plan giving their testimony and being examined as to that testimony and then, upon completion of that, come to the point of making a decision as to whether the plan they have proposed and are proponents for the court would find to meet the statutory standards of being a proper exercise of their discretion.

(*Id.* at 82:15-83:11 (OCI App. 25-26).)

9. In its October 18, 2010 Order, the rehabilitation court set a schedule for briefing on the Plan, followed by a five-day evidentiary hearing on OCI’s motion to confirm the Plan beginning on Monday, November 15, 2010 and ending on Friday, November 19, 2010. The court also set aside November 29 and 30 as dates for further hearing and/or argument. (OCI App. 192-195.)

II. PROCEDURAL HISTORY SPECIFIC TO LLOYDS

10. On June 22, 2010, Lloyds filed a motion to modify the injunction and to intervene, which challenged the legality of the Segregated Account and sought to have its policy removed from the Segregated Account and reallocated to Ambac's General Account.⁴

11. Lloyds has taken full advantage of opportunities to have its views heard in the rehabilitation proceeding. It appeared at court hearings held on July 9 (also seeking postponement of the proceedings), September 9, September 13 and October 14, 2010. (*See generally* OCI App. 83-85, 91-92, 103.)

12. On October 14, 2010, counsel for Lloyds attended the hearing to set a schedule regarding OCI's motion for confirmation of the Rehabilitation Plan. (OCI App. 103.) After the court announced the schedule, under which a confirmation hearing would commence on November 15, 2010, Lloyds did *not* ask the court to reconsider its ruling or request a stay of the schedule while Lloyds took a permissive appeal. (OCI App. 184-90.)

13. After the written Scheduling Order was filed on October 20, 2010, Lloyds did *not* move the rehabilitation court for a stay of the Scheduling Order while it pursued a permissive appeal.

⁴ Lloyds' specific challenge was assigned no. 10CV1576-I, with the letter "I" distinguishing it from challenges by other entities. (*See* July 13, 2010 Scheduling Order (OCI App. 83-88).)

14. In a lengthy written decision filed on October 26, 2010, the rehabilitation court denied Lloyds' June 22, 2010 motion to modify the injunction and to intervene. (*See generally* OCI App. 192-196.)

15. Again, Lloyds did *not* file a motion with the rehabilitation court, seeking a stay of the rehabilitation court proceedings while it pursued a permissive appeal.

16. On November 3, 2010, Lloyds filed a "Petition for Permissive Appeal and Appendix, and Request for Stay Pending Disposition of Petition" in this Court, seeking permission to appeal the rehabilitation court's October 20, 2010 Scheduling Order and its October 26, 2010 Order denying its motion to modify the injunction and to intervene. Lloyds also sought a stay of the rehabilitation proceeding, including the scheduled evidentiary hearings regarding the proposed Plan, during the pendency of its appeal.

17. On November 5, 2010, OCI wrote this Court a letter, indicating that it opposed Lloyds' request to stay the rehabilitation court proceedings and intended to file a full response brief in opposition within the time period allotted by statute.

ARGUMENT

I. LLOYDS' REQUEST FOR A STAY OF THE REHABILITATION PROCEEDING SHOULD BE DENIED.

A. Lloyds Failed To Comply With Wis. Stat. § 809.12.

Lloyds argued that, if the Court grants its Petition, the rehabilitation proceeding should be stayed in its entirety pending appeal. (Pet. at 2.) However, even if the Petition were denied, any provisional stay would interfere with the rehabilitation proceeding by significantly delaying the Plan confirmation hearings scheduled to begin November 15, and would inconvenience the dozens if not hundreds of attorneys, witnesses, and others who have made travel arrangements to attend that hearing.

By seeking a stay of the rehabilitation proceeding in this Court, without first seeking the same relief from the court below, Lloyds failed to comply with Wis. Stat. § 809.12. That section provides that a person seeking relief pending appeal “*shall file* a motion in the trial court unless it is impractical to seek relief in the trial court.” Wis. Stat. § 809.12 (emphasis added). A motion in the court of appeals “must show why it was impractical to seek relief in the trial court or, if the motion had been filed in the trial court, the reasons given by the trial court for its action.” *Id.*

Lloyds' Petition is silent about the requirements of Section 809.12, and it offers no reason why it was impractical to seek a stay in the rehabilitation court

first.⁵ Therefore, Lloyds' request for a stay pending appeal should be denied for failure to comply with Section 809.12.

B. Lloyds Fails To Satisfy The Four-Part Test For Obtaining A Stay.

Lloyds fails to cite or even mention the factors that guide this Court's determination whether relief pending appeal is justified, as set forth in *Leggett v. Leggett*, 134 Wis. 2d 384, 396 N.W.2d 787 (1986) (per curiam). Under *Leggett*, the four factors governing whether to grant a stay pending appeal are:

- (1) a strong showing that the moving party is likely to succeed on the merits of the appeal;
- (2) a showing that, unless a stay is granted, the moving party will suffer irreparable injury;
- (3) a showing that no substantial harm will come to other interested parties; and
- (4) a showing that a stay will do no harm to the public interest.

Id. at 385, 396 N.W.2d at 788 (brackets omitted). Lloyds' request fails to satisfy any of the four requirements.

1. No likelihood of success on the merits

There is no likelihood of success on appeal, let alone a "strong showing" sufficient to warrant a stay. "The standard of appellate review is one aspect of the likelihood of success on appeal. When the decision is entirely discretionary, and

⁵ By circumventing the statutory requirement of seeking relief first in the trial court, Lloyds prevented this Court from having the benefit of being able to review the basis for the trial court's exercise of discretion on the issue. See *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995).

the circuit court applied the correct legal standard to the facts and explained its reasonings, the deference given such decisions makes reversal more difficult.” *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 19, 237 Wis. 2d 498, 614 N.W.2d 565.

Wisconsin law leaves the scheduling of court hearings (such as the hearings regarding confirmation of a plan of rehabilitation) to the full discretion of the circuit court: “Upon application of the rehabilitator for approval of the plan, *and after such notice and hearing as the court prescribes*, the court may either approve or disapprove of the plan proposed” Wis. Stat. § 645.33(5) (emphasis added). The circuit court here exercised its statutory and inherent discretion in setting the schedule for the plan approval process and explained its rational reasons for enacting that schedule. Because this is all the law requires, Lloyds has no likelihood of success on appeal.

With regard to the other legal challenge Lloyds seeks permission to make (regarding the capitalization of the Segregated Account), two layers of discretionary authority exist: (1) the discretionary authority of OCI over insurers it regulates as part of the state’s broad police power in the area of insurance,⁶ including determining the adequacy of their capitalization, Wis. Stat. Ann. § 611.19 & cmt., and whether to approve their creation of segregated accounts,

⁶ See, e.g., Wis. Stat. § 601.01; *Cal. State Auto. Ass’n Inter-Ins. Bureau v. Maloney*, 341 U.S.105, 109 (1951); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940).

Wis. Stat. § 611.24(2); and (2) the discretionary authority of rehabilitation courts in their supervision of rehabilitation proceedings, *see* Wis. Stat. Ann. § 645.32 cmt.; Wis. Stat. § 645.33(2), (5). Again, Lloyds offers no plausible argument for why it is likely to prevail in arguing that the Court and OCI, the office “that is an expert in the field of insurance, and able to enforce chs. 600 to 655” of the Wisconsin Statutes, Wis. Stat. § 601.01(4), abused their discretion.

2. No irreparable injury

Lloyds also has identified no irreparable injury that would support a stay to prevent the circuit court from hearing further testimony and argument regarding the Plan through confirmation hearings. If, as Lloyds contends, OCI’s Plan defies “common sense “(Pet. at 17), it will have an opportunity to make that case to the rehabilitation court at the hearings beginning on November 15. To the extent Lloyds seeks or needs further explanation of the bases for OCI’s exercises of discretion (in addition to the numerous briefs, affidavits, and other materials on file in the circuit court proceeding), it may elicit such further testimony. Indeed, as evidenced by its recently filed written objections to the Plan, witness list, and list of questions for the Rehabilitator regarding the Plan (OCI App. 217-48), it appears that Lloyds intends to fully avail itself of that opportunity, along with many others who filed other objections, witness lists, and questions. It is difficult to understand Lloyds’ urgency to stop the circuit court process when most of its complaints on appeal, such as the proclaimed need for more information and professed doubts or misunderstandings regarding OCI’s prior statements, are more

readily resolved through the scheduled, open evidentiary hearings than in rounds of appellate briefing on a substantial but necessarily finite record.

3. Substantial harm to others

Lloyds does not and could not assert that a stay would not cause substantial harm to other interested parties. As noted in the circuit court, the claims payment moratorium imposed in March 2010 has resulted in policyholder claims in excess of \$700 million remaining unpaid, with further claims accumulating at a rate of approximately \$150 million per month. (OCI App. 120.) These claims will remain unpaid until a Plan is confirmed. (*Id.* at 119-20.) Thus, the delay that Lloyds seeks works to the detriment of all policyholders. Lloyds makes no offer to bond the enormous damages that further delay in payment would cause to policyholders of the Segregated Account in the likely event that Lloyds' appeal is unsuccessful.⁷

4. Harm to the public interest

For many of the same reasons, Lloyds cannot show that a stay would not harm the public interest. It would instead require cancellation of public hearings regarding the merits of a plan of rehabilitation affecting thousands of policy beneficiaries, and force them to patiently await claims payments while Lloyds litigates its own narrow interests before this Court. Moreover, well over a dozen

⁷ As reflected in the record below, Lloyds may cause even greater damages if its proposed appeal *is* successful, *see* Peterson Aff. ¶¶ 20-23 (OCI App. 67-68), another factor weighing against the likelihood of a reversal of the circuit court's approval of OCI's discretion here.

litigants and groups of litigants have raised other challenges to various aspects of this rehabilitation and how it impacts their particular interests, and future challenges will undoubtedly arise. The “very flexible procedure” of rehabilitation, designed to allow the rehabilitator to employ “[i]mproved methods for rehabilitating insurers” by taking actions “he or she deems necessary or expedient to reform and revitalize the insurer” without unduly “cumbersome procedures,” Wis. Stat. Ann. § 645.32 cmt. & § 645.33(2), would be thwarted as any one of the thousands of persons and entities with an interest in the proceedings could halt them based on nothing more than its own dissatisfaction with a given ruling, schedule, discretionary act or business decision of the Rehabilitator.

II. LLOYDS’ PETITION TO APPEAL THE REHABILITATION COURT’S SCHEDULING ORDER SHOULD BE DENIED.

A. The Rehabilitation Court Has Broad Discretion To Set Hearing Dates, And Lloyds Identifies No Basis To Challenge That Discretion.

Circuit courts have inherent and statutory power to control their dockets. *Parker v. Wis. Patients Comp. Fund*, 2009 WI App 42 ¶ 9, 317 Wis. 2d 460, 767 N.W. 2d 272. Deciding whether a scheduling order will be modified is within the circuit court’s discretion and its decision will only be reversed for an abuse of discretion. *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 162 Wis. 2d 296, 305-06, 470 N.W.2d 873, 876 (1991). “An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a

conclusion that a reasonable judge could reach.” *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

Lloyds has not shown (and cannot show) any erroneous exercise of discretion by the rehabilitation court in its October 20 Scheduling Order. As the transcript of the October 14 scheduling conference makes clear, the court weighed the competing proposals in terms of a schedule for hearing OCI’s motion for confirmation of the Plan, and set a schedule based on its belief that “sooner is better.” Specifically, the court stated that it shared OCI’s concern about the potential delay and prejudice to hundreds or thousands of claimants who have been subject to the claims payment moratorium since March, noted that litigants such as Lloyds were “up to speed on the issues” in light of prior briefing and hearings, recognized that further discovery and the inevitable disputes that would accompany it could significantly delay the rehabilitation proceeding, and asserted its reasonable belief that the five days of evidentiary hearings (beginning November 15) during which witnesses would be subject to cross-examination—along with OCI’s Disclosure Statement and other documents and filings by OCI and other entities—would clarify whether OCI’s Plan met the statutory criteria for approval. (OCI App. 179-80.)

Moreover, Lloyds cites no case authority where an appellate court granted permissive or interlocutory appeal of a scheduling order, which by its nature is highly discretionary and relates to the trial court’s inherent authority to control its own case and docket management.

B. Lloyds Fails To Satisfy The Criteria For Interlocutory Review.

For many of the same reasons, Lloyds' petition for review of the October 20, 2010 Scheduling Order fails to meet any of the criteria for permissive appeals under Wis. Stat. § 808.03(2).

Petitions for permissive appeals are not “lightly grant[ed].” Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.5, at 3 (4th ed. 2010). As this Court has recognized, it “cannot continue to function at its current size without adhering to strict principles of appellate review.” *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 270, 569 N.W.2d 45, 47 (Ct. App. 1997).

Such principles are particularly important in complex proceedings such as this one, in which liberally allowing permissive appeals by any and all of the hundreds of well-financed entities with their own interests in this rehabilitation regarding any interlocutory ruling with which any one of them disagrees would drown the Rehabilitator and this Court in serial appellate briefing and interfere with the administration of the proceeding, a result Chapter 645 seeks to avoid. Wis. Stat. § 645.05(1)(k); Wis. Stat. Ann. § 645.32 cmt. Contrary to Lloyds' assertion (Pet. at 14), its permissive appeal will not conserve judicial resources, either in this Court or the court below. As noted in the Introduction above, the rehabilitation court has accurately characterized the risks and disruptions associated with the policy- and claim-specific litigation that Lloyds seeks to

pursue. (See July 9, 2010 Hearing Tr. at 22-25 (OCI App. 79-82).)⁸ See also *Minor v. Stephens*, 898 S.W.2d 71, 76 (Ky. 1995) (“The Commissioner is best qualified to perform the rehabilitation/liquidation process as he has no special interest in the outcome except to administer the matter for the maximum benefit of all interested parties.”).

Permissive appeals are appropriate only when they will (1) materially advance the termination of the litigation or clarify further proceedings, (2) protect the petitioner from substantial or irreparable injury, or (3) clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2). The most crucial requirement for permissive appeals, however, is whether the appeal is meritorious:

The most important criterion for determining whether an appeal should be granted is not expressly included among the statutory criteria listed in section 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. Only in this context can the general criteria listed in section 808.03(2) be given much significance.

Heffernan, *supra* § 9.4. This requirement serves to “ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings.” *Id.*

⁸ The circuit court went on to acknowledge that the movants at that hearing would have the right to be heard on their objections to the Rehabilitator’s actions, but denied the right to formally intervene as litigants and to engage in formal discovery. (OCI App. 95-96; see also OCI App. 83-88 (Scheduling Order for June 22 Objections).)

With regard to the Scheduling Order, Lloyds does not satisfy any of the criteria for permissive appeals, particularly the most critical one. For the reasons described in the preceding section, it has no likelihood of prevailing in its attempt to reverse a scheduling order. To the extent its appeal of the Scheduling Order represents an attempt to appeal the Court's refusal to permit open-ended, adversarial discovery of a distressed insurer and its regulatory Rehabilitator, Lloyds has no likelihood of success on that ground either. The law does not permit each entity with an interest in a distressed insurer to determine for itself when, and whether, the circuit court has sufficient information to approve, modify, or reject a plan of rehabilitation, or to approve or disapprove of actions the Rehabilitator deems "necessary or expedient to reform and revitalize the insurer." Wis. Stat. § 645.33(2), (5). It instead leaves such determinations to the rehabilitation court, with the admonishment that its control over the Rehabilitator should "be liberal, not strict," should "emphasize flexibility," and should "avoid cumbersome procedures." Wis. Stat. Ann. § 645.32 cmt.

Moreover, even if Lloyds' appeal had some likelihood of success, it is at no risk of substantial or irreparable injury due to the Scheduling Order. The plan of rehabilitation proposed provides for an annual review and reporting process to the circuit court and a liberal process for proposing post-confirmation modifications and adjustments based on reevaluation of the insurer's financial condition over time. (*See* Plan at Art. 7 & Art. 10.04, *available at* ambacpolicyholders.com.) In short, the confirmation hearings are by no means the final step in this

rehabilitation, but merely the initial process by which to begin resumption of claims payments for the benefit of all policyholders, under regulatory and judicial supervision.

III. LLOYDS' PETITION TO APPEAL THE ORDER DENYING ITS MOTION TO MODIFY THE INJUNCTION AND TO INTERVENE SHOULD BE DENIED.

A. Lloyds' Challenge To The Creation Of The Segregated Account Fails To Meet The Criteria For Permissive Appeal.

Lloyds' challenges to OCI's approval of Ambac's establishment of the Segregated Account have a similarly small likelihood of success on appeal, both on their merits and based on the standard of review.

As noted above, "the rehabilitator is given broad powers" under Chapter 645 and the circuit court's review of OCI actions is "liberal, not strict, and should be provided without cumbersome procedures." Wis. Stat. Ann. § 645.32 cmt. "Statutorily, the Commissioner is the appointed person in exclusive control over the proceedings, with guidance and approval provided by the court." *Minor*, 898 S.W.2d at 76.

A discretionary determination involving OCI's "expert[ise] in the field of insurance" and its enforcement of Wisconsin insurance law, whether in OCI's capacity as regulator or rehabilitator, may be overturned "only if it is arbitrary and capricious. An agency decision is arbitrary and capricious if it lacks a rational basis." *Nat'l Motorists Ass'n v. Office of Comm'r of Ins.*, 2002 WI App 308, ¶ 25, 259 Wis. 2d 240, 655 N.W.2d 179 (citation omitted) (regulatory capacity). *See*

also 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 the rehabilitator’s actions only when they are shown to be arbitrary [and] capricious”); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1092 (Pa. 1992) (same); 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 5.22 (3d ed. 2008) (noting the “broad discretion” of the rehabilitator).

As the circuit court noted below in its decision denying Lloyds’ motion challenging OCI’s approval of the Segregated Account, OCI provided substantial affidavits explaining the rationality of its decisions in light of its statutory duties. While Lloyds expresses befuddlement at how the Segregated Account is capitalized, the circuit court had no such confusion:

The plan of operation, the secured note and the reinsurance agreement that has been provided by the OCI [gives] 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 claims-paying assets. The net effect of this is that the Segregated Account is capitalized at 98 percent of Ambac’s current assets despite having liabilities of less than 1000 of Ambac’s 15,000 insurance policies.

(OCI App. 204-05.) The circuit court had no reason to overturn OCI’s rational, discretionary determination that such capitalization was adequate. *See Wis. Stat. § 227.57(8)* (“[T]he court shall not substitute its judgment for that of the agency on an issue of discretion.”); *Maple Leaf Farms, Inc. v. Dep’t of Natural Res.*, 2001

WI App 170, ¶ 35, 247 Wis. 2d 96, 633 N.W.2d 720 (holding that Wisconsin courts “cannot rule . . . on the wisdom of an agency’s decision”).

B. Lloyds’ Identifies No Basis To Challenge The Rehabilitation Court’s Conclusion That Claimants Have The Right To Be Heard, But Not To Formally Intervene.

As the court below correctly held, although Chapter 645 special proceedings give those affected no right to “intervene” in the traditional sense of being recognized as formal parties to an adverse litigation, all persons and entities with an interest have the opportunity to be heard before the rehabilitation court. (OCI App. 76-82, 95, 96 ¶ 4.)

In light of the rehabilitation court’s invitation for those claiming an interest to be heard—an invitation that has been accepted by movants ranging from Kentucky inmates (Appeal No. 2010AP2164) to Wall Street hedge funds (Appeal Nos. 2010AP1291 & 2022) to institutional trustees such as Wells Fargo (Appeal No. 2022) to investment banks (Notice of Appeal of Depfa Bank, plc, filed Nov. 5, 2010) to Ambac’s landlord (Notice of Appeal of One State Street, LLC, filed Nov. 9, 2010), and has led to more than 560 circuit court docket entries in less than eight months—the court struck the proper balance that the Wisconsin legislature intended: because rehabilitation proceedings are meant to be streamlined, non-adversarial proceedings, claimants have the ongoing right to be heard, but do not have the right to formally intervene or to conduct discovery. (OCI App. 79-82, 95, 96 ¶ 4.)

Absent such a ruling, there continues to be a risk that any and all of the countless entities with an interest in these proceedings will continue to each file substantive motions with needless (given the acknowledged right to be heard) requests for formal intervention, in order to secure a cost-free ticket for their own individualized appellate reviews of each circuit court order in these expansive proceedings, which are still in their infancy as rehabilitations go. *See, e.g., Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 688 A.2d 233, 234 (Pa. Commw. Ct. 1996) (granting motion to conclude rehabilitation after 10 years). The intended economy and efficiency of rehabilitation for the benefit of all policyholders, managed by an agency with “no special interest in the outcome except to administer the matter for the maximum benefit of all interested parties,” *Minor*, 898 S.W.2d at 76, will be undermined, to the ultimate detriment of all policyholders.

C. In The Insurance Rehabilitation Context, The Denial Of Formal Intervention Is Neither Final Nor Appealable.

OCI recognizes that Lloyds moved to formally intervene under Chapter 803 of the Wisconsin Statutes, and the denial of such intervention (at least in traditional, adversarial civil proceedings) generally constitutes an appealable final order. The rationale for this rule, however, is that, in the adversarial context, the denial of intervention shuts the courthouse door to the movant-intervenor; the case is “final” as to them.

By contrast, as discussed above, this rationale is absent in the insurance rehabilitation context. Even without formal intervention, the rehabilitation court has acknowledged that parties-in-interest can continue to participate and be heard in the proceeding. (OCI App. 28-29 ¶ 12, 79-82, 95, 96 ¶ 4; *see also* OCI App. 83-88, 192-95 (scheduling orders on substantive motions).) Lloyds itself is a case in point. On October 26, 2010, the rehabilitation court denied Lloyds' motion to intervene, *after* writing a detailed decision addressing the substance of Lloyds' challenges to the Segregated Account on their merits. (OCI App. 196-216.) Nevertheless, on November 8, 2010, Lloyds lodged lengthy and detailed written objections to the Plan, identified three witnesses it intended to call at the November 15 Plan confirmation hearing, and proposed dozens of questions for OCI, which will be addressed through direct and cross examination at the hearing. (*See* OCI App. 217-48.) Lloyds' November 8 filings directly contradict its November 3 Petition, which suggested that absent intervention and discovery, it lacked sufficient information to meaningfully participate in the rehabilitation proceeding. The November 8 filing also shows that the issues Lloyds seeks to pursue in its permissive appeal are subject to further review and record development in the court below (*i.e.*, are "non-final").⁹

⁹ All of those entities who have filed notices of appeal arising out of these rehabilitation proceedings, save the Kentucky inmates, also filed written objections to the Plan, witness lists, and other documents on November 8, indicating their intent to participate in the Plan confirmation hearings. Moreover, the appellants in Appeal No. 2010AP1291 were granted the right to appeal in a June 18 Order in that case on this

Because the rationale for treating orders denying intervention as final and appealable in the adversarial litigation context is wholly absent in the insurance rehabilitation context, the October 26, 2010 Order denying Lloyds' motion to intervene should be treated as neither final nor appealable.

Finally, and in the alternative, if Lloyds' request for review of the "denial" of its motion to intervene is final and appealable, it should be consolidated with two already-consolidated pending appeals: Nos. 2010AP1291 and 2010AP2022. As Lloyds acknowledges (Pet. at 16), its challenges to the establishment of the Segregated Account overlap with those raised by certain holders of interests in residential mortgage-backed securities in Appeal No. 1291, and OCI expects that its legal arguments in response will be substantially the same. There is no reason to incur the time and expense of a separate appeal.

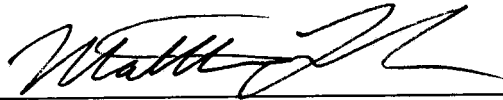
Court's prior understanding—based on the representations by those appellants to this Court—that "[t]he litigation between these parties has ended" and "[c]onsequently, the entire order is final and appealable as of right." Since entry of the circuit court order that they are appealing in 2010AP1291, the two primary groups of appellants (the Las Vegas Monorail ("LVM") bond holder group and the residential mortgage-backed securities ("RMBS") note holder group) have brought *additional* motions for intervention and other substantive relief in the circuit court. They were heard on those motions, one of which is now on appeal (number 2010AP2022)—purportedly as another "final" order—and still they continue to actively participate and be heard in the rehabilitation court, including the Plan confirmation proceedings. (*See, e.g.*, OCI App. 147-56, 164-68 (Oct. 14 hearing); *see also* <http://ambacpolicyholders.com/court-filings> (list of parties-in-interest filing objections, witness lists, and questions to the Plan on Nov. 8, including the LVM and RMBS appellants).)

CONCLUSION

For the foregoing reasons, OCI respectfully requests that this Court deny Lloyds' request to stay the rehabilitation proceedings in the court below as well as its petition for permissive appeal.

Dated this 10th day of November, 2010.

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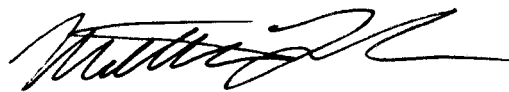
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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 7,486 words.

Dated this 10th day of November, 2010.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

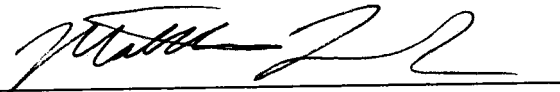
I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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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