COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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.

WELLS FARGO BANK/Trustee of Bondholders,

Defendant/Co-Appellant,

BANK OF NEW YORK MELLON, DEUTSCHE BANK NATIONAL TRUST COMPANY, FEDERAL HOME LOAN MORTGAGE CORPORATION, AURELIUS CAPITAL MANAGEMENT, LP, FIR TREE, INC., KING STREET CAPITAL, L.P., KING STREET CAPITAL MASTER FUND, LTD., MONARCH ALTERNATIVE CAPITAL, LP, STONEHILL CAPITAL MANAGEMENT LLC,

Defendants,

EATON VANCE MANAGEMENT, NUVEEN ASSET MANAGEMENT, RESTORATION CAPITAL MANAGEMENT, LLC, STONE LION CAPITAL PARTNERS, LP,

Defendants/Appellants.

Appeal No. 2010-AP-2022
(Consolidated with Appeal No. 2010-AP-1291)

Circuit Court No. 10 CV 1576

APPEAL FROM THE ORDER DATED JULY 16, 2010 OF THE CIRCUIT COURT OF DANE COUNTY CASE NO. 10 CV 1576, THE HONORABLE WILLIAM D. JOHNSTON PRESIDING

JOINT BRIEF AND APPENDIX OF APPELLANTS THE LVM BONDHOLDERS AND WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE LVM BONDS

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Appellants Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners L.P. (collectively, the "LVM Bondholders"), and Wells Fargo Bank, National Association ("Wells Fargo"), in its capacity as Trustee for the LVM Bonds (as defined below), submit this joint brief in support of their appeal from the Circuit Court's Order dated July 16, 2010 (the "July 16 Order"). That Order denied the LVM Bondholders' motion, in which Wells Fargo joined, challenging the allocation of the insurance policy and related surety bond supporting the LVM Bonds (the "LVM Bond Policy") to the segregated account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac").

STATEMENT OF ISSUES PRESENTED

1. Did the allocation of the LVM Bond Policy to the subordinated Segregated Account based solely on its status as a defaulted policy, while leaving virtually all of Ambac's other municipal bond policies in the General Account, violate Wisconsin's segregated account statute, Wis. Stat. § 611.24?

The Circuit Court said no.

2. Did the allocation of the LVM Bond Policy to the subordinated Segregated Account based solely on its status as a defaulted policy, while leaving virtually all of Ambac's other municipal bond policies in the General Account, constitute impermissible discrimination in

violation of the Equal Protection Clauses of the United States and Wisconsin Constitutions?

The Circuit Court said no.

3. Did the findings of fact and conclusions of law entered by the Circuit Court on May 27, 2010 dispose of the LVM Bondholders' statutory and constitutional challenges to the LMV Bond Policy's allocation to the Segregated Account, when none of those issues were before the Circuit Court at the time of its May 27 ruling?

While the Circuit Court's ruling on this issue is unclear, it appears that the Circuit Court may have said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By the Court's Order dated October 8, 2010, this appeal was consolidated with appeals filed by the LVM Bondholders and others, under case number 2010-AP-1291, from the Circuit Court's Order dated May 27, 2010 (the "May 27 Order"). The LVM Bondholders and Wells Fargo respectfully submit that oral argument of these consolidated appeals is warranted because the appeals raise important and novel issues of law. For the same reason, the LVM Bondholders and Wells Fargo respectfully submit that publication of the Court's decision would be appropriate.

Because of the significant impact these consolidated appeals could have on the pending rehabilitation proceeding, the LVM Bondholders and Wells Fargo respectfully submit that expedited treatment of these appeals is

warranted. The LVM Bondholders and Wells Fargo intend to file a motion requesting that the consolidated appeals be advanced on the Court's calendar.

STATEMENT OF THE CASE

I. Nature of the Case

The LVM Bondholders are the owners or managers of funds that, collectively, own a majority of the outstanding "1st Tier" bonds (the "LVM Bonds") issued by the State of Nevada to fund the construction of a four-mile monorail system in downtown Las Vegas (the "Las Vegas Monorail"). Wells Fargo is the trustee for all of the 1st Tier bonds, including those bonds held by the LVM Bondholders. Ambac issued a municipal bond insurance policy that insures payment of the principal and interest, as well as accreted value, on the LVM Bonds when such payment is due. In addition, Ambac issued a surety bond in the amount of $20,991,807.50 guarantying payment of principal and interest on the LVM Bonds. The Ambac insurance policy and surety bond – that is, the LVM Bond Policy – were instrumental to the issuance of the LVM Bonds.

On March 24, 2010, the Commissioner announced that he had approved the creation of a segregated account for certain materially impaired policies of Ambac, including the LVM Bond Policy, and that he had placed the Segregated Account into rehabilitation under Chapter 645 of the Wisconsin statutes.

The LVM Bondholders do not object to the principal actions taken by Ambac and OCI at the commencement of the Rehabilitation: the creation of a Segregated Account and the allocation to that account of the particular types of high-risk structured-finance obligations that were responsible for Ambac's demise – namely, the policies covering residential mortgage-backed securities ("RMBS") and credit default swap agreements ("CDS") other than those that were settled by Ambac. These actions served laudable goals, including the preservation of Ambac's claims-paying resources and the prevention of preferential payments to near-term claimants at the expense of long-term claimants.

However, Ambac's and OCI's actions departed in one crucial respect from bedrock principles of insurance law. At the same time that they (properly) left the vast majority of Ambac's municipal bond policies in the General Account, they allocated at least one municipal bond policy – the LVM Bond Policy – to the Segregated Account. Their express rationale for doing so was that this policy, unlike Ambac's other municipal bond policies, was already in default and had substantial projected claims. In this respect, they said, the LVM Bond Policy was similar to most RMBS policies and CDS agreements, and its allocation to the Segregated Account was consistent with their overall approach of allocating to the Segregated Account policies that were in default or had material projected claims. In other words, Ambac and OCI allocated the LVM Bond Policy to the

Segregated Account on the basis of that policy's claim status (as a defaulted policy with large projected claims), rather than its insurance type (as a municipal bond policy).

In their motion below, the LVM Bondholders demonstrated that the allocation of their policy to the Segregated Account violated the terms and the express purpose of Wisconsin's segregated account statute, Wis. Stat. § 611.24. That section permits an insurer to segregate its business by *type of insurance*, but does not permit an insurer to divide policies of the *same type* (here, Ambac's municipal bond policies) into two groups – one for unimpaired policies, the other for policies that are impaired or expected to be impaired – and to put the latter policies into a segregated account receiving subordinated treatment. In addition, the LVM Bondholders and Wells Fargo argued that the allocation of their policy to the Segregated Account violated the Equal Protection Clauses of the United States and Wisconsin Constitutions. As courts have long recognized, the Equal Protection Clause requires that insureds of substantially the same class, or type, receive similar treatment in a rehabilitation or liquidation proceeding.

In its July 16 Order, the Circuit Court denied the LVM Bondholders' motion and held that the allocation of the LVM Bond Policy to the Segregated Account did not violate either the Wisconsin segregated account statute or the Equal Protection Clause. In so doing, the Circuit Court misinterpreted the governing statute and erroneously disregarded the

constitutional principles that prohibit the sort of discrimination within a class of insureds that has occurred here. The Circuit Court further erred by relying in its decision on prior findings of fact and conclusions of law that had no bearing on the issues presented by the LVM Bondholders' motion.

If permitted to stand, the Circuit Court's decision would establish a dangerous precedent at odds with the most fundamental concepts of insurance law – indeed, at odds with the basic idea of insurance. Parties buy insurance, and policies are priced, based on the risks that exist *at the time the policies are issued*, and on the understanding that the insurance will be there to pay any claims. When an insurance company requires rehabilitation, it has long been recognized that it is fair to give less favorable treatment to particular *types* of insurance that were riskier at the outset, and whose underpricing contributed to the insurer's eventual financial distress. But to single out a policy within a given type for different treatment *solely because it turned out that the policyholder needed the insurance* violates the fundamental bargain that the parties struck when the insurance was purchased. *Post hoc* discrimination of this sort is tantamount to singling out for adverse treatment the life insurance policies of those particular insureds who had developed fatal diseases by the time of the rehabilitation's commencement. Such a result is unlawful and unfair, and it should not be permitted to stand.

II. Statement of Facts

A. Ambac

Ambac is a Wisconsin-domiciled insurer that provides financial guaranty insurance. While Ambac's traditional business was to insure municipal bonds, in the 1990s Ambac began to guaranty riskier and more speculative structured finance obligations, including RMBS, collateralized debt obligations (or "CDOs") of asset-backed securities, and CDS. (R. 2, Rehab. Br. at 1-2, 14-16.) Ambac's investment in these riskier products ultimately proved fatal for Ambac and was a principal reason for the commencement of the rehabilitation proceedings. (R. 70, May 20, 2010 Matanle Aff. ¶ 8; R. 74, May 20, 2010 Peterson Aff. ¶ 3.)

B. The LVM Bondholders and the LVM Bond Policy

The LVM Bonds are municipal bonds that were issued in 2000 by the Director of the State of Nevada's Department of Business and Trust to finance the construction of the Las Vegas Monorail. These bonds, which initially had a triple-A rating (R. 17, Apr. 5, 2010 Wells Fargo Br., Ex. A-1 (Wilkerson Aff.) ¶ 10), were believed to be a conservative municipal bond investment appropriate for college or retirement savings accounts and were widely held for those purposes, either directly or through mutual fund accounts. The Las Vegas Monorail Company ("LVMC") is currently in bankruptcy, having filed a voluntary Chapter 11 petition on January 13, 2010, and the LVM Bonds are currently expected to receive "minimal

recoveries" in that proceeding. (Disclosure Statement Accompanying Plan of Rehabilitation, dated Oct. 8, 2010 ["Discl. St."], Case No. 10 CV 1576, Docket No. 462, at 12.)

As a result, the main source of repayment for the LVM Bonds is expected to be Ambac, under the LVM Bond Policy. Under that policy, Ambac has insured a current outstanding amount of LVM Bonds of more than $500 million. (R. 43, May 5, 2010 Parrett Aff., Ex. A at 3-6.) Ambac estimates that its total exposure for future payments of principal and interest under the LVM Bond Policy is approximately $1.163 billion, minus any payments of principal and interest LVMC may make. (R. 43, May 5, 2010 Parrett Aff., Ex. A at ¶ 13.)

C. The Creation of the Segregated Account and the Commencement of Rehabilitation Proceedings

On March 24, 2010, the Commissioner announced that Ambac, with the Commissioner's approval, had created the Segregated Account pursuant to Wis. Stat. § 611.24, and had allocated to that account certain policies and other liabilities that were considered to have "material projected impairments," such as RMBS, collateralized debt obligations, and CDS other than those covered by the CDS Settlement. (R. 2, Rehab. Br. at 3.)

The same day, the Commissioner commenced rehabilitation proceedings with regard to the Segregated Account by filing a Verified Petition for Order of Rehabilitation (the "Petition"). (R. 1, Rehab. Pet.) In

papers filed in support of the Petition, the Commissioner stated that the condition of the Segregated Account was such that any further transaction of business "would be financially hazardous to many policyholders." (R. 2, Rehab. Br. at 8.) The Commissioner also stated that the anticipated rehabilitation plan would involve an "orderly run-off of the Segregated Account" policies under his supervision. (R. 1, Rehab. Pet. at 7.)

D. The Segregated Account's Subordination to the General Account of Ambac

The Segregated Account has two principal assets: (i) a $2 billion note (the "Secured Note"), secured by the future premiums received by Ambac under policies allocated to the Segregated Account, and (ii) an aggregate excess-of-loss reinsurance policy (the "Reinsurance Policy"). Both the Secured Note and the Reinsurance Policy are issued by Ambac and payable out of its General Account. (R. 1, Rehab. Pet., Tab 1 at 3-4.)

Crucially, Ambac's obligations to the Segregated Account under both the Secured Note and the Reinsurance Policy are effectively subordinated to all of Ambac's other obligations. Ambac is obliged to make payments under the Secured Note only so long as the General Account continues to have a surplus equal to at least $100 million, or such *higher* amount as OCI may set. (R. 1, Rehab. Pet., Tab 1, Ex. G at ¶ 1(c).) Ambac's payment obligations under the Reinsurance Policy – the Segregated Account's only other substantial asset – are limited in the same

manner. (R. 1, Rehab. Pet., Tab 1, Ex. H, § 1.04.) As a result, Ambac will have *no payment obligations whatsoever* to the Segregated Account in the event that the General Account's surplus falls below $100 million. Ambac's payment obligations to the Segregated Account – and, as a result, that account's ability to make payments to its policyholders – will cease before policyholders in Ambac's General Account face any prospect of non-payment.

Policies allocated to the Segregated Account face a substantial risk of non-payment by virtue of that account's subordinated status. The obligations allocated to the Segregated Account are enormous: approximately $68 billion of net par exposure, according to Ambac. (R. 40, Apr. 30, 2010 Nowicki Aff., Ex. A at 4.) These obligations include, among others, the claims of RMBS policyholders, which OCI projected would demand payments in excess of $2 billion in 2010 alone. (R. 74, May 19, 2010 Peterson Aff. at ¶ 6.) In contrast to these "short-tail" RMBS obligations, claims under the LVM Bond Policy are long-term; most do not come due until after 2030, making them particularly vulnerable to a risk of non-payment. (R. 236, July 8, 2010 Parrett Aff. Ex. A at 27.)

It is uncertain, at best, whether Ambac will be able to satisfy its obligations without its surplus dropping below $100 million – in which case, as noted above, its payments to the Segregated Account will cease altogether. In fact, the $100 million minimum surplus amount is uncertain

as well, since OCI is expressly permitted to increase that threshold at any time. (R. 1, Rehab. Pet., Tab 1, Ex. G at ¶ 1(c).) Acknowledging this uncertainty, the Commissioner's proposed plan of rehabilitation for the Segregated Account (the "Plan"), filed with the Circuit Court on October 8, 2010, calls for claims under policies allocated to the Segregated Account to be paid *only 25% in cash*, with the remainder to be satisfied by the issuance of "surplus notes" subordinate to Ambac's other obligations. (Discl. St., Case No. 10 CV 1576, Docket No. 462, at 26; Plan of Rehabilitation dated Oct. 8, 2010, Case No. 10 CV 1576, Docket No. 461, §§ 1.08, 1.62.)[1] To make matters worse, the Plan would permit OCI to reduce this low cash-payment percentage at any time prior to the Plan confirmation hearing (in OCI's sole discretion), and even after the Plan is confirmed (subject to approval of the rehabilitation court). (*See* Discl. St., Case No. 10 CV 1576, Docket No. 462, at 33, and Plan, Docket No. 461 § 10.04 (permitting modification of the Plan and Disclosure Statement).)

[1] This 25% cash percentage is the same percentage that was anticipated by the Commissioner at the outset of the rehabilitation. *See* Andrew Frye & Jody Shenn, *Ambac Clients May Receive 25 Cents on Dollar in Cash*, http://www.businessweek.com/news/2010-03-25/ambac-clients-may-receive-25-cents-on-dollar-in-cash-update1-.html (quoting a Mar. 25, 2010 telephone interview with the Commissioner). (R. 147, June 9 LVM Br. at 7.)

E. The Commissioner's Decision to Place the LVM Bond Policy in the Segregated Account, While Keeping Ambac's Other Municipal Bond Policies in the General Account

The Commissioner has explained that a principal consideration in his selection of Ambac policies to allocate to the Segregated Account was his identification of policies with "material projected impairments." (R. 2, Rehab. Br. at 3-4.) On the basis of this and other factors, approximately 1,000 policies were transferred to the Segregated Account. (R. 74, May 19, 2010 Peterson Aff. at ¶ 10; R. 127, May 27 Order, 12 at ¶ 27.) Conversely, more than 14,000 policies were left in the General Account because (i) they "lacked material projected impairments," (ii) OCI concluded that the "the collateral damage of a rehabilitation proceeding as to those policies could outweigh the benefits of allocation," and/or (iii) the policyholders – namely the CDS Banks – signed a forbearance agreement (and eventually a settlement agreement) with Ambac. (R. 127, May 27 Order, 13 at ¶ 31.)

The LVM Bond Policy was among the policies allocated to the Segregated Account. According to the Commissioner, the LVM Bond Policy fit OCI's criteria for allocation to the Segregated Account because "LVM is in serious financial distress and filed for Chapter 11 bankruptcy in Nevada . . . in January 2010." (R. 74, May 19, 2010 Peterson Aff. at ¶ 13; R. 127, May 27 Order, 12 at ¶ 29.) Ambac has acknowledged that "*virtually the entire insured municipal portfolio remains outside the rehabilitation proceedings*" – *i.e.*, in the General Account. (Ambac Press

Release dated Mar. 25, 2010 (emphasis added) (available at http://www.ambac.com/Press/032510.html; R. 147, June 9 LVM Br. at 8; *see also* R. 74, May 19, 2010 Peterson Aff. at ¶ 15 (stating that "the far greater number" of public finance policies issued to obligors "that were not bankrupt like the LVM . . . were left in the General Account").)

III. Proceedings in the Circuit Court

On June 9, 2010, the LVM Bondholders filed their motion in the Circuit Court, arguing that the allocation of the LVM Bond Policy to the Segregated Account based solely on its status as a defaulted policy, rather than on the basis of policy type, violated both the Wisconsin segregated account statute and the Equal Protection Clauses of the United States and Wisconsin Constitutions. In addition, the LVM Bondholders sought leave (i) to take discovery in connection with their motion, to the extent that the responses submitted by Ambac and OCI raised factual issues that required development of the factual record, and (ii) to intervene as of right, to the extent the court concluded that the LVM Bondholders were not entitled to be heard and to take such discovery without formal intervention. (R. 147, June 9, 2010 LVMB Br. at 1.)[2]

[2] Previously, on April 5, 2010, Wells Fargo had filed a motion challenging the lawfulness of the Segregated Account on a number of grounds, including that the Commissioner's disparate treatment of the LVM Bond Policy violated Equal Protection principles. (R. 16, April 5, 2010 Wells Fargo Br. at 16.) On June 21, 2010, Wells Fargo withdrew that motion to the extent that it advanced arguments other than Equal Protection or sought relief other than the reallocation of the LVM Bond Policy to the General Account, joined

On June 10, 2010, the Circuit Court issued a Notice of Hearing, which scheduled the LVM Bondholders' motion for a hearing on July 9, 2010 and directed that "all briefs regarding the above mention [sic] motion are due by June 30, 2010." (Notice of Hearing dated June 10, 2010, Case No. 10 CV 1576, Docket No. 168.) On June 30, 2010, OCI and Ambac each filed a brief in opposition to the motion, and OCI also filed a proposed order. (R. 222, June 30, 2010 OCI Br. with annexed Prop. Ord.; R. 223, June 30, 2010 Ambac Br.) The June 10 Hearing Notice did not permit the LVM Bondholders to submit a reply brief.

On July 8, 2010, the LVM Bondholders filed with the Circuit Court copies of documents that they intended to offer into evidence at the July 9 hearing, annexed as exhibits to an attorney's affidavit. (R. 236, July 8, 2010 Parrett Aff. Exs. A-V.) At the July 9 hearing, 2010, OCI and Ambac objected to the LVM Bondholders' proffered exhibits, contending that the filing of those exhibits on July 8 was barred by the June 30 deadline contained in the June 10 hearing notice. (R. 271, July 9, 2010 Hearing Tr. at 30, 41.) Counsel for the LVM Bondholders responded that (i) the June 10 hearing notice had addressed only the filing of "briefs" regarding the LVM Bondholders' motion, not the submission of exhibits that a party

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in the LVM Bondholders' June 9, 2010 motion, and adopted the arguments advanced in the LVM Bondholders' brief in support of their June 9 motion. (R. 171, June 21, 2010 Wells Fargo Partial Withdrawal.)

intended to offer into evidence at the hearing; (ii) the exhibits related to factual issues raised for the first time in OCI and Ambac's June 30 briefs; and (iii) the exhibits consisted almost entirely of publicly filed materials, including Ambac's own filings with OCI and the SEC. (*Id.* at 30-31.) Nevertheless, the Circuit Court sustained OCI and Ambac's objections, ruling that the exhibits were "filed outside the deadlines." (*Id.* at 49.)[3]

At the conclusion of the July 9 hearing, the Circuit Court reserved decision on the LVM Bondholders' motion. One week later, on July 16, 2010, the Circuit Court issued its Order, which denied that motion in its entirety.[4] (App. 1-9; R. 258.) In key respects, the July 16 Order is strikingly similar to the Circuit Court's May 27 Order (currently on appeal under case number 2010-AP-1291), in which the court adopted OCI's 17 pages of proposed findings of fact and conclusions of law verbatim, with no explanation of its reasons for doing so. (R. 127, May 27 Order.) The July 16 Order, similarly, adopted the positions taken by OCI and Ambac on all issues, quoting their arguments at length yet providing not a word of

[3] The factual arguments raised by OCI and Ambac in their June 30 submissions were immaterial to the LVM Bondholders' motion, which, as discussed below, turned on questions of law. Nevertheless, to the extent these fact issues are deemed relevant on appeal, it is clear, for the reasons just noted, that the Circuit Court abused its discretion by excluding the exhibits proffered by the LVM Bondholders.

[4] The July 16 Order also denied a number of procedural motions filed by other parties. These motions sought, among other things, a postponement of the court's ruling on the LMV Bondholders' motion until the court could hear the substantive motions that these other parties had filed, which (like the RMBS Policyholders' prior motion) challenged the lawfulness of the Segregated Account's creation.

explanation as to the court's reasons for rejecting the LVM Bondholders' counter-arguments.

The July 16 Order contains only the briefest discussion of the statutory and constitutional challenges raised by the LVM Bondholders to the allocation of the LVM Bond Policy to the Segregated Account. Other than a single paragraph's description of some of the LVM Bondholders' arguments (App. 4-5; R. 258, July 16 Order at 4-5), the court's discussion of these issues consists only of a lengthy quotation from the legislative commentary to the Wisconsin segregated account statute, which OCI and Ambac had quoted in their briefs. (App. 5-6; R. 258, July 16 Order at 5-6.) No explanation is provided as to why the court found the quoted portion of the commentary to be dispositive, much less why it rejected the arguments of the LVM Bondholders based on other portions of the commentary or on the statutory language. Nor did the court say even a word as to why it rejected the LVM Bondholders' Equal Protection arguments. With no further explanation, the July 16 Order held that "[t]he 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." (App. 8; R. 258, July 16 Order at 8.)[5]

[5] The July 16 Order also denied the LVM Bondholders' and Wells Fargo's request to take discovery and (if deemed necessary to that end) to intervene as of right in the Rehabilitation, holding that the "[m]ovants have not established legal grounds or other good cause for such relief." (App. 8; R. 258, July 16 Order at 8.) Again, the Circuit

While the July 16 Order is not clear in this regard, it appears that the court below may have also ruled, as an independent ground for its denial of the LVM Bondholders' motion, that the LVM Bondholders' and Wells Fargo's challenges to the LVM Bond Policy's allocation to the Segregated Account were precluded by the court's May 27 Order.[6] The July 16 Order stated, in passing, that the court's May 27 Order had "specifically addressed the establishment of the Segregated Account at Paragraph 19-31." (App. 5; R. 258, July 16 Order at 5.) Subsequently, the second of the four decretal paragraphs of the July 16 Order (which adopted almost verbatim the decretal paragraphs contained in the proposed order submitted by OCI, *see* R. 222, June 30 OCI Br. with annexed Prop. Ord. ¶ 1)

Court did not explain the rationale for its ruling, except by means of a lengthy quotation from Ambac's brief. (*Id.* at 6-7.)

Because this appeal turns on questions of law, this Court need not reach the question of whether the Circuit Court's denial of intervention and discovery were erroneous. However, to the extent any disputed factual issues are deemed relevant, the LVM Bondholders should have been given a full and fair opportunity to obtain any needed discovery, including, if deemed necessary, by means of intervention as of right. The LVM Bondholders were plainly entitled to intervene because they had a direct interest at stake; that interest was in danger of impairment absent their intervention; and the existing parties did not adequately represent the Bondholders' interests. *See* Wis. Stat. § 803.09(1); *see also* Brief of Co-Appellants the LVM Bondholders in Appeal No. 2010-AP-1291, dated Sept. 13, 2010, Point III.

[6] The May 27 Order denied earlier motions by the LVM Bondholders and RMBS Policyholders addressed to the CDS settlement, as well as a motion by the RMBS Policyholders that challenged the creation of the Segregated Account on a variety of grounds. (R. 127, May 27 Order at 14-17.) However, neither of those motions raised any of the statutory or constitutional issues raised by the LVM Bondholders' June 9 motion, nor did they challenge the allocation of any particular policy to the Segregated Account. (R. 42, May 5, 2010 LVMB Br.; R. 38, April 30, 2010 RMBS Br.; R. 147, June 9, 2010 LVMB Br.)

"reaffirmed" the findings of fact and conclusions of law contained in the May 27 Order. (App. 8; R. 258, July 16 Order at 8.) The July 16 Order provides no explanation of how those findings and conclusions could possibly have disposed of the issues presented by the LVM Bondholders' June 9 motion, when those issues were not before the court on the earlier motions.

IV. Proceedings in This Court

On August 2, 2010, the LVM Bondholders filed a Notice of Appeal from the July 16 Order. On August 6, 2010, Wells Fargo filed a similar Notice of Appeal. On September 20, 2010, OCI filed a motion to consolidate this appeal with appeal number 2010-AP-1291. On October 1, 2010, the LVM Bondholders filed a response and cross-motion, with the consent of their co-appellants in appeal number 2010-AP-1291, in which they joined in the motion to consolidate the appeals, requested that the Court approve a consolidated briefing schedule agreed to by all parties, and asked that the Court bifurcate oral argument (if any) to permit the distinct issues in the two appeals to be argued separately. On October 8, 2010, the Court issued an Order consolidating the two appeals, and deferred ruling on the bifurcation of oral argument until the Court decides whether it will hear argument on either or both of the consolidated appeals.

STANDARD OF REVIEW

The LVM Bondholders' motion involves questions of statutory interpretation and constitutional issues, which are reviewed *de novo*. *State v. McClaren*, 2009 WI 69, ¶ 14, 318 Wis. 2d 739, 748, 767 N.W.2d 550, 554. The application of a statute to a given set of facts is a question of law, which is also reviewed *de novo*. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 18, 235 Wis. 2d 610, 623, 612 N.W.2d 59, 67.

ARGUMENT

I. The Circuit Court Erred in Concluding that the Allocation of the LVM Bond Policy to the Segregated Account was Lawful and Did Not Violate Wisconsin's Segregated Account Statute

A. Wisconsin's Segregated Account Statute Permits Ambac to Segregate Policies Only by Type of Insurance and Not Based on Claim Status

Section 611.24 of the Wisconsin Statutes permits, and in some instances requires, the creation of segregated accounts for certain types of insurance. Thus, Section 611.24(1), entitled "Mandatory segregated accounts," requires the establishment of segregated accounts for three specified "classes of insurance business": mortgage guaranty insurance, financial guaranty insurance (in certain circumstances), and life insurance. Section 611.24(2), entitled "Optional segregated accounts," permits an insurer, with the Commissioner's approval, to create a segregated account "for any part of its business":

> With the approval of the commissioner, a corporation may establish a segregated account for any part of its business. The commissioner shall approve unless he or she finds that the segregated account would be contrary to law or to the interests of any class of insureds.

Wis. Stat. § 611.24(2) (2006).

On their face, these provisions of Wisconsin's segregated account statute make clear that such accounts must be created by type of insurance. This is the clear import both of the statute's mandatory provision, which requires the creation of a segregated account for specified "*classes* of insurance business," and of its permissive provision – which allows the creation of a segregated account "for any *part* of [the] business," absent a finding that the account "would be contrary . . . to the interests of any *class* of insureds." (Emphasis added.)

The Official Commentary to Section 611.24 confirms that the Wisconsin Legislature's intent in enacting these provisions was to permit (and in some instances to require) segregation by type of insurance, so that "the fortunes of policyholders in hazardous and secure types of insurance should be separated":

> *Some branches of the insurance business are much riskier than others.* Traditionally, it has been considered desirable for certain kinds of business to be transacted by separate companies, so that adverse experience or failure in the more hazardous venture would not endanger the policyholders in the more stable types of business . . . . [I]nsurers have, for a variety of reasons, often found it desirable to establish separate corporations for certain divisions of their business, even within a single line. High risk automobile business is an

> illustration. . . . [I]t is not yet possible to abandon completely the notion that *the fortunes of policyholders in hazardous and secure types of insurance should be separated*.

Wis. Stat. § 611.24, Comments at L. 1971, C 260 § 72 (2006) (emphasis added).

Ambac's allocation of the LVM Bond Policy to the Segregated Account violates these clear principles. As discussed above, Ambac has left the vast majority of its municipal bond policies in its General Account. At the same time, Ambac has allocated the LVM Bond Policy to the Segregated Account. Its basis for doing so is not, and could not be, that the LVM Bond Policy differs in type from the other municipal bond policies remaining in the General Account: the LVM Bond Policy is a standard municipal bond policy substantially similar to many others that Ambac insured and that remain in the General Account. As Ambac and the Commissioner have acknowledged, their sole basis for allocating the LVM Bond Policy to the Segregated Account is that it is in default and has "material projected impairments." (R. 2, Rehab. Br. at 3.)

Allocating policies to a segregated account based on claim status rather than policy type is unauthorized, unprecedented, and contravenes both the terms and the express purpose of Wis. Stat. § 611.24. It also undermines the very purpose of buying insurance. The LVM Bondholders, like all municipal bond policyholders, bought insurance so that they would be paid on their policy if the issuer defaulted. And yet, precisely *because*

the issuer has defaulted, the LVM Bond Policy has been pooled with other defaulted or soon-to-be-defaulted policies and given payment rights subordinate to those of Ambac's other municipal bond policyholders. As a result, the LVM Policy now faces a substantial risk of non-payment.

Such treatment is contrary to the most basic of insurance law principles. Wis. Stat. § 601.01(2) provides that the central purpose of insurance statutes is "[t]o ensure that policyholders, claimants and insurers are treated *fairly and equitably*." (Emphasis added.) Wis. Stat. § 645.01(4)(d) further provides that the purpose of the rehabilitation statute is "protection of the interests of insureds, creditors, and the public generally . . . , through . . . *[e]quitable apportionment of any unavoidable loss*." (Emphasis added.) Basic fairness, and the essential concept of shared risk underlying insurance, requires that any differential treatment in rehabilitation be predicated on the risks associated with a type of policy *when issued*. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) ("The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. 'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that *such losses are spread over all the risks . . . .*'") (quoting 1 G. Couch, *Cyclopedia of Insurance Law* § 1:3 (2d ed. 1959) (emphasis added)).

To penalize holders of the same type of insurance based on the fact that they turned out to *need* the insurance they purchased violates these principles, as further demonstrated by the Equal Protection cases discussed below in Point II. To approve such *post hoc* reallocation of risk would be tantamount to creating a subordinated segregated account only for those life insurance policies where the insured had developed a fatal disease – a grotesque and unlawful result.

Ambac argued below that the LVM Bondholders' interpretation of section 611.24(2) would prevent Ambac from creating any segregated account at all, since all of Ambac's policies, including its municipal bond policies, fall within the single "class" of financial guaranty insurance. (R. 223, June 30, 2010 Ambac Br. at 8-9.) But the LVM Bondholders have not suggested that policies may be allocated *only* according to their formal "class" of insurance under state insurance law – merely that allocations must be based on policy *type*, rather than *claim status*. This provides OCI with ample flexibility to make distinctions *within* the broad class of financial guaranty insurance – so long as groups of policies are allocated to a segregated account based on their relative risk *at the time the policies were issued*. *See* Wis. Stat. § 611.24, Comments at L. 1971, C 260 § 72 ("[I]nsurers have, for a variety of reasons, often found it desirable to establish separate corporations for certain divisions of their business, even within a single line. High risk automobile business is an illustration.").

Thus, as noted above, Ambac's allocation of such high-risk exposures as RMBS and CDS to the Segregated Account was entirely consistent with the requirements of the statute, while its allocation of the LVM Bond Policy was not. (*See* R. 2, Rehab. Br. at 1 (contrasting Ambac's "traditional" business of insuring "low-risk, low-margin public finance bonds" with its more recent forays into "riskier, higher-margin private 'structured-finance' investments, including [RMBS] and [CDOs].").)

B. The Circuit Court Misinterpreted the Segregated Account Statute and Legislative Commentary

In denying the LVM Bondholders' motion below, the Circuit Court quoted a portion of the Official Commentary to section 611.24 (which OCI and Ambac had quoted in their briefs), which states that subsection (2) of the statute "provides for optional segregated accounts *under any circumstances the corporation wishes*, if the separation meets the commissioner's approval." (App. 5; R. 258, July 16 Order at 5) (emphasis added).) However, the Circuit Court's reliance on this single sentence of commentary in rejecting the LVM Bondholders' arguments was misplaced. When read as a whole, the commentary actually *supports* the conclusion that policies may be segregated only according to policy type.

The *entire* paragraph of the Official Commentary that was excerpted by the Circuit Court reads as follows:

> Sub. (2) provides for optional segregated accounts under any circumstances the corporation wishes, if the separation meets the commissioner's approval. *This i[n]*

> *effect extends to all insurance the liberality of former s. 206.385(1)*, but protects insureds by requiring the commissioner's approval. S. 206.385(1) is continued expressly (with minor changes) for life insurers in s. 611.25(2).

Wis. Stat. § 611.24, Comments at L. 1971, C 260 § 72 (2006) (emphasis added). The former provision cited in this paragraph, Wis. Stat. § 206.385(1), applied only to life insurers. It permitted such insurers, which generally are subject to very strict limitations on the investment of their assets, to create a separate account (*i.e.*, a segregated account) for their annuity business, exempt from those stringent investment limitations – so that, for their annuity business, life insurers could make investments commensurate with the higher degree of risk appropriate for that business, while limiting the risks to which their life insurance business was exposed.[7]

Thus, the Official Commentary to section 611.24(2) – which explains that the optional segregated account provision "*i[n] effect extends to all insurance the liberality of former s. 206.385(1)*" – makes clear that the Legislature's intent in enacting section 611.24(2) was to permit the creation of segregated accounts for *types* of insurance business other than

[7] Subsections (1) and (2) of former section 206.385 ("Separate accounts") provided, in relevant part: "(1) Any domestic life insurance company may establish one or more separate accounts, and allocate to such separate accounts any amounts paid or remitted to or held by the company which are to be applied to provide benefits payable in fixed and guaranteed or variable dollar amounts, or both, and other incidental benefits. (2) The amounts allocated to each such account and accumulations thereon may be invested and reinvested without regard to any requirements or limitations prescribed by s. 206.34 . . . ."

annuities, thereby extending the prior law that permitted such segregation in that one particular area. This comports with the express language of the statute, which permits the insurer to establish a segregated account "for any *part* of its business." Under this framework, if the insurer wishes, it may create a segregated account for high-risk structured finance policies such as RMBS and CDS (*i.e.*, by policy type), but if the insurer does so, it cannot also allocate to that account one of many lower-risk and more secure municipal bond policies simply because the policyholder has a mature and substantial claim (*i.e.*, by claim status, as was done here). That is an unauthorized use of the segregated account statute and should not be permitted to stand.

Finally, as discussed in Point II below, not only does Ambac's allocation of the LVM Bond Policy to the Segregated Account contravene the terms and express purpose of the segregated account statute; it also constitutes illegal discrimination among policyholders of the same class of insureds in violation of the Equal Protection Clauses of the U.S. and Wisconsin Constitutions. Under well-established rules of statutory construction, if the Circuit Court believed that the language of section 611.14(2) was reasonably susceptible of more than one construction, it was obliged to select the meaning that would avoid an unconstitutional result. *See Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 41, 319 Wis. 2d 439, 469, 768 N.W.2d 700, 715 (Wisconsin courts interpret

statutes "in a manner that will not create constitutional conflicts"); *Kenosha County Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶ 50, 293 Wis. 2d 530, 560, 716 N.W.2d 845, 860 (Wisconsin courts "interpret statutes to be constitutional if possible").

II. The Circuit Court Erred in Concluding That the Allocation of the LVM Bond Policy to the Segregated Account Did Not Violate the Equal Protection Clause of the U.S. and Wisconsin Constitutions

It is a fundamental tenet of insurance law that the power of the state to modify a policyholder's contractual rights in connection with the rehabilitation or liquidation of an insurer is not unlimited. To the contrary, that power is constrained by the Equal Protection Clause of the United States Constitution – and of the constitutions of many states, including Wisconsin – which, among other things, requires that "insureds of substantially the same class [be] treated similarly." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3D, § 5.24 (1997).[8]

This constitutional prohibition against discrimination among insureds of the same class, or type, has been recognized at least since the seminal case of *Carpenter v. Pacific Mutual Life Ins. Co. of Cal.*, 10 Cal.

[8] The Wisconsin Supreme Court "applies the same interpretation to the state Equal Protection Clause found in Wis. Const. art. I § 1, as that given to the federal provision, U.S. Const. amend. XIV § 1." *State v. Post*, 197 Wis. 2d 279, 318 n.21, 541 N.W.2d 115, 128 n.21 (1995). Thus, to the extent the Commissioner's allocation of policies violates the Equal Protection Clause of the U.S. Constitution, it also violates the parallel provision of the Wisconsin Constitution.

2d 307 (1937), *aff'd sub nom Neblett v. Carpenter*, 305 U.S. 297 (1938). In that case, the California Supreme Court – in a decision affirmed by the U.S. Supreme Court – ruled that, while the "contract of the policyholder is subject to the reasonable exercise of the state's police power," the state's action "shall not be arbitrary or *improperly discriminatory.*" *Id.* at 329 (rehabilitation plan that treated life insurance policies more liberally than non-cancellable accident and health policies, but that gave equal and non-discriminatory treatment to all claims within each class, did not violate equal protection); *see generally Couch on Insurance* 3D, § 5.24 ("[d]ifferential treatment of classes of insureds does not violate equal protection as long as insureds of substantially the same class are treated similarly").[9]

[9] *Carpenter* provides the seminal example both of the sort of discrimination that is permissible (discrimination between classes) and of the sort that is forbidden (discrimination within a class). The rehabilitation plan in *Carpenter* gave more favorable treatment to the class of life insurance policies than to the class of non-cancellable health and accident policies (which the court labeled "non-can"policies), while providing the same treatment to all policies within each class. The court held that it was proper to favor the life policies over the "non-can" policies because "the life policyholders . . . were paying adequate premiums for their insurance and these phases of the old company's business were highly profitable. The non-can policyholders were not paying adequate premiums, and this fact was the primary cause of the difficulty of the old company. The non-can policies were draining the old company to disaster." 10 Cal. 2d at 336. Thus, *Carpenter* makes clear that it is acceptable to provide different treatment in rehabilitation for a *category* of policies that were under-priced in relation to the risks involved, and as a result caused the insurer's financial distress.

Here, just like the non-can health and accident policies in *Carpenter* – and *unlike* Ambac's municipal bond policies – Ambac's RMBS and CDS policies were grossly underpriced in light of the risks associated with those particular types of exposures. (*See* R. 2, OCI Rehab. Br. at 15, explaining that "[i]nsuring [RMBS and CDS] carried greater risk for Ambac, in that the amount of risk was more difficult to calculate and price

Courts considering the actions of state insurance agencies in insurance rehabilitations have not hesitated to enforce this settled principle when the agency's action would discriminate among insureds of substantially the same class. For example, in *Commercial Nat'l Bank v. Superior Court of Los Angeles County*, 14 Cal. App. 4th 393 (Ct. App. 1993), the court rejected a proposed rehabilitation plan that utilized a "dual valuation" system in which municipal guaranteed investment contracts ("Muni-GIC's") were valued at different rates. *Id.* at 414. Observing that all of the Muni-GIC's were structured as single premium annuities, with a stream of periodic payments generated by an internal rate of interest, the court held that the plan "improperly discriminate[d] between substantially identical policies in the same class," because it "ignore[d] the substantively similar benefits promised in all of the annuities and focuse[d] instead upon the relatively insignificant formal difference that one group of contracts

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through premiums"; *see also* R. 2, Rehab. Br. at 1, contrasting Ambac's "traditional" business of insuring "low-risk, low-margin public finance bonds" with its more recent forays into "riskier, higher-margin private 'structured-finance' investments, including [RMBS] and [CDOs]"; R. 70, May 20, 2010 Matanle Aff. ¶ 8; R. 74, May 20, 2010 Peterson Aff.. ¶ 3.) Consequently, Ambac's subordination of this class of policies – which were under-priced *when issued* – was entirely proper. This appropriate class treatment stands in sharp contrast to Ambac's singling out of the LVM Bond Policy for treatment inferior to that given to the holders of other municipal bond policies, simply because the LVM Bond Policy is already in default.

specifie[d] a guaranteed interest rate and initial accumulation values while the other [did] not." *Id.* at 398, 414.[10]

Here, like the dual-valuation approach in *Commercial National Bank*, the Commissioner's allocation of the LVM Bond Policy to the Segregated Account is improperly discriminatory and violates the Equal Protection Clause. The Commissioner does not dispute that, as in *Commercial National Bank*, his disparate treatment of the LVM Bond Policy is *not* due to the bargained-for "substantive benefits" of the policy being materially different from Ambac's other municipal bond policies. *Commercial Nat'l Bank*, 14 Cal. App. 4th at 414. To the contrary, the risks insured under the AAA-rated LVM Bond Policy were of the same low level as those under Ambac's other municipal bond policies. And yet "virtually the entire municipal bond portfolio" of Ambac was kept in the General Account (Press Release dated Mar. 25, 2010, available at http://www.ambac.com/Press/032510.html; R. 147, June 9 LVM Br. at 8), while the LVM Bond Policy was allocated to the Segregated Account,

[10] *See also In re Conservation of Alpine Ins. Co.*, 741 N.E.2d 663, 668 (Ill. Ct. App. 2000), in which the Illinois Court of Appeals rejected as "impermissibly discriminatory and therefore illegal" a rehabilitation plan that distinguished between policyholders insured solely by the insurer undergoing rehabilitation and those also having additional insurance through other carriers. The court explained that the state insurance code "does not provide for the punishment of multiple policy claimants insureds based on the fortuitous circumstance of their seeking out additional coverage." *Id.*

where it will receive subordinated and considerably less favorable treatment solely because of its claim status.

The Commissioner attempted to justify this discrimination by explaining that policies were assigned to the Segregated Account based on similar impaired status and projected losses associated with each policy. But current claim status does not make a municipal bond policy substantially similar to the categories of high-risk insurance otherwise populating the Segregated Account. It is simply not permissible for the Commissioner, in deciding which of Ambac's policies to place into rehabilitation, to cherry-pick from among all of the municipal bond policies of Ambac and relegate to a Segregated Account for rehabilitation purposes only those that happen to be in default – any more than it would be acceptable to subordinate the claims of those life insurance policyholders who had recently died or become seriously ill. Such disparate treatment of substantially similar policies in the same class is "impermissibly discriminatory and therefore illegal." *In re Conservation of Alpine Ins. Co.*, 741 N.E.2d at 668; *see also Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶ 177, 284 Wis. 2d 573, 672, 701 N.W.2d 440, 489 (statutory cap on recovery in medical malpractice actions violated equal protection by discriminating against those who actually suffered damages in excess of the cap); *GTE Sprint Comm'ns. Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 187, 454 N.W.2d 797, 798 (1990) (tax on

certain telecommunications carriers and not others denied the taxed carriers "the constitutional guarantee of equal protection of the laws").

Accordingly, the Circuit Court's ruling that the allocation of the LVM Bond Policy to the Segregated Account did not violate the Equal Protection Clause was in error and should be reversed.[11]

III. The Circuit Court Erred in Relying on Prior Findings of Fact and Conclusions of Law That Had No Bearing on the LVM Bondholders' Motion

In the July 16 Order, the Circuit Court stated that its May 27, 2010 ruling on the RMBS Policyholders' motion had "specifically addressed the establishment of the Segregated Account" and went on, as requested by OCI, to "reaffirm[]" the findings of fact and conclusions of law contained in its May 27 Order, "particularly Findings 19-31 and 36 and Conclusions 2-5 and 8-9." (App. 5, 8; R. 258, July 16 Order at 5, 8; *see also* R. 222, June 30, 2010 OCI Br., Prop. Ord. ¶ 1.) If the Circuit Court meant to hold that these findings and conclusions precluded the LVM Bondholders' statutory and constitutional challenges to the LMV Bond Policy's allocation to the Segregated Account, its ruling was clearly mistaken.[12]

[11] The Court need not reach this question if it reverses on the grounds described in Point I above.

[12] The Circuit Court's statement that it was reaffirming "particularly . . . Conclusions 2-5 and 8-9" of its prior Order is difficult to understand. Of these six prior conclusions of law, only conclusions 2 and 5 – which ruled that the Segregated Account "was formed in compliance with Wisconsin law" (conclusion 2) and that "[t]he establishment of the Segregated Account was constitutional" (conclusion 5) (R. 127, May 27 Order at 14-15) – could even arguably have any application to the issues raised by the LVM

The Circuit Court's findings and conclusions in the May 27 Order could not possibly have disposed of the particular statutory or constitutional arguments raised by the LVM Bondholders in the June 9 motion, because *those arguments had not yet been raised* in any of the motions that were before the Circuit Court as of May 27:

- While the RMBS Policyholders' motion challenged the lawfulness of the Segregated Account under the Wisconsin statute, that challenge was based principally on an argument that the account was not adequately capitalized as required by Wis. Stat. § 611.24(3)(a) (2006); it had nothing to do with the criteria that were used to allocate policies to the Segregated Account. (R. 38, Apr. 30, 2010 RMBS Br. at 24-25.) Similarly, the RMBS Policyholders' motion argued that the transfer of their policy to Segregated Account was a constitutionally impermissible taking, and also that it violated their due process rights, but it did *not* argue that the transfer of their policy violated either Wisconsin's segregated account

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Bondholders' motion below. Conclusion 3, which stated that "OCI acted well within its discretion in approving the establishment of the Segregated Account," does not bear upon the LVM Bondholders' motion because the motion does not challenge the "establishment" of the Segregated Account, and because OCI's exercise of "discretion" in approving the creation of the account could not possibly excuse the statutory and constitutional violations that occurred as a result of the allocation of the LVM Bond Policy to it. (R. 127, May 27 Order at 15.) Conclusion 4 stated that the allocation of policies to the Segregated Account "did not effect an improper novation of contract" (as argued by the RMBS Policyholders), which has no relation to the issues raised by the LVM Bondholders. Conclusions 8 and 9 denied the movants' requests for discovery and intervention.

statute or the Equal Protection Clause –arguments that would not have applied to the RMBS Policyholders since *all* of Ambac's RMBS policies were allocated to the Segregated Account. (R. 38, April 30, 2010 RMBS Br. at 26-27.)

- As noted above, Wells Fargo, as the Bondholders' Trustee, had earlier filed a motion challenging the allocation of the LVM Bond Policy to the Segregated Account on a variety of grounds (*see* n. 2, above), including Equal Protection. However, that motion, by Order of the Circuit Court dated April 16, 2010, was set for hearing on July 9, 2010, when the LVM Bondholders' motion was ultimately heard as well. (R. 22, Apr. 16, 2010 Order.) Indeed, Ambac and OCI both acknowledged in the court below that the May 27 Order did *not* address or dispose of the Equal Protection issue. (R. 148, June 10, 2010 OCI Br. at 2; R. 157, June 11, 2010 Ambac Br. at 7.)

For these reasons, the findings and conclusions contained in the May 27 Order had no bearing on either the statutory or the constitutional issues presented by the LVM Bondholders' June 9 motion, and the Circuit Court's reliance on any of those findings or conclusions was in error.

CONCLUSION

For the reasons set forth above, the LVM Bondholders and Wells Fargo respectfully request that the Court reverse the Circuit Court's July 16 Order and issue an order declaring that the allocation of the LVM Bond Policy to the Segregated Account was unlawful.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font. The length of this brief is 7,473 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of s 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 the brief and appendix filed with the court and served on all opposing parties.

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CERTIFICATION OF APPENDIX

I hereby certify that filed in connection with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) any portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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