COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal No. 2010-AP-2835

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, 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 MASTER FUND, LTD., KING STREET CAPITAL, L.P., MONARCH ALTERNATIVE CAPITAL L.P., STONEHILL CAPITAL MANAGEMENT LLC, EATON VANCE MANAGEMENT, NUVEEN ASSET MANAGEMENT, RESTORATION CAPITAL MANAGEMENT LLC AND STONE LION CAPITAL PARTNERS LP,

Defendants,

DEPFA BANK, PLC,

Proposed-Intervenor-Appellant,

ONE STATE STREET LLC, ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION AND LLOYDS TSB BANK PLC,

Proposed-Intervenors-Co-Appellants.

BRIEF OF ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION AND LLOYDS TSB BANK PLC IN OPPOSITION TO MOTION TO DISMISS APPEAL

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On October 25, 2010, the Dane County Circuit Court, the Honorable William D. Johnston presiding, issued an order denying the motion of Access to Loans for Learning Student Loan Corporation and Lloyds TSB Bank plc (together "ALL/Lloyds") to intervene in the plan of rehabilitation proceedings of the Segregated Account of AAC and to modify the circuit court's order for temporary injunctive relief entered on March 24, 2010. ALL/Lloyds moved for permissive review of the order, as amended (the "November 1 Order"),[1] which this Court denied on November 12, 2010. ALL/Lloyds has now moved to appeal the November 1 Order as a matter of right under Wis. Stat. § 808.03(1). The Wisconsin Commissioner of Insurance ("OCI") and Ambac Assurance Corporation ("AAC") has each moved to dismiss the appeal on the ground that the November 1 Order is not a final, appealable order. This brief responds to those motions.

In arguing that the November 1 Order is non-final, OCI ignores a June 18, 2010 order (the "June 18 Order") by this Court, holding in part that the denial of motions to intervene in this rehabilitation proceeding was a final order appealable as of right. (Order

[1] The circuit court amended the October 25, 2010 order on November 1, 2010. (*See* attachments to Docketing Statement of Depfa Bank, plc).

2010AP1291 at 4.) Unlike OCI, AAC acknowledges that the ALL/Lloyds appeal is from a final order as construed by this Court, but it seeks reconsideration because the June 18 Order "in hindsight has [been] proven wrong." (AAC Motion to Dismiss at 21.) ALL/Lloyds asserts that, while this Court has already declined to reconsider the June 18 Order (*see* Order, 2010AP1291, at 3 (July 7, 2010)), and has the discretion to reconsider it again, nothing has changed which should alter the Court's previous decision and therefore it should deny OCI and AAC's motions to dismiss. Indeed, the week-long, November 15-19, 2010 hearing on the OCI's motion for confirmation of a rehabilitation plan pertaining to the Segregated Account clearly showed the significant rights that were *not* afforded ALL/Lloyds and others as mere "interested parties" as opposed to the rights that would be afforded to a party that had been permitted to formally intervene.

ALL/Lloyds agrees with OCI that briefing of this appeal should be stayed pending the circuit court's ruling on OCI's motion for confirmation of a rehabilitation plan, which ruling is expected very soon. This Court could then on the basis of a complete record determine whether the circuit court's denial of intervention and attendant discovery to numerous parties in the entire process was

prejudicial. It would also permit a decision by this Court on the fundamental issue of the lawfulness of the Segregated Account of AAC to be properly decided on a fully developed record. Indeed, ALL/Lloyds contends that this fundamental issue should not be ruled on in any of the appeals currently before this Court until the appellate record in this matter is fully developed and all affected parties may be heard.

ARGUMENT

ALL/Lloyds' goal in moving for review of the November 1, 2010 Order, now under Wis. Stat. § 803.03(1) and, previously, under Wis. Stat. § 803.03(2), has been to obtain appellate review on the merits of the lawfulness and fairness of the creation of the Segregated Account and the improper allocation of the ALL/Lloyds policy in the Segregated Account, with as complete a circuit court record as possible, while preserving its rights to fully participate in the case at the circuit court and appellate court levels. In the November 1, 2010 Order, the circuit court denied ALL/Lloyds' request to intervene, it denied ALL/Lloyds the right to any information or discovery unless agreed to by OCI, and it held that the creation of the Segregated Account was lawful. (*See, generally,* Decision on Motions, Appendix to OCI Motion to Dismiss ("OCI App.") at 1-21.) Based on this Court's June 18 Order finding the

same rulings with respect to other parties were final orders for purposes of appeal, ALL/Lloyds' appeal is from a final order.

In orders dated May 27, 2010 and July 16, 2010, both of which the circuit court incorporated in the November 1, 2010 Order, the circuit court denied the intervention and discovery requests of other parties and held that the Segregated Account was lawfully created. (OCI App. at 6-7; OCI Appendix to OCI Response Brief, 2010AP2721-LV ("OCI App-LV"), at 59 and 89). Those two orders have been appealed to this Court and consolidated and are currently pending. (2010AP1291 and 2022.)

In its November 12 Order denying ALL/Lloyds' request for permissive review, this Court noted that "[t]he issues will be fully preserved, and their factual context better developed, following the [rehabilitation plan confirmation] hearing." (Order, 2010AP2721-LV, at 4.) Now that the plan confirmation hearing has been held and the circuit court has indicated it will decide the issue soon, it makes sense, as suggested in the alternative by OCI, to stay this appeal so as to permit the appeal record to be supplemented to include the plan confirmation hearing proceedings. By doing so, this Court will be able to decide the merits of the Segregated Account's creation as well as the

intervention and discovery issues on a complete record as it indicated in its November 12, 2010 Order would be the best course of action.

I. THE APPEAL OF ALL/LLOYDS IS OF RIGHT UNDER THE JUNE 18, 2010 AND JULY 7, 2010 ORDERS.

In a May 27, 2010 Order, the circuit court issued Findings of Fact and Conclusions of Law that denied motions by three groups of parties,[2] among other things, to intervene in the rehabilitation proceeding of the AAC Segregated Account and to enjoin the consummation of a settlement agreement between AAC and a group of banks. In particular, the circuit court concluded that motions to intervene should be denied because the movants did not meet standards for intervention; discovery should be denied in part because policyholders did not have standing as parties to seek discovery in the rehabilitation proceeding; the Segregated Account was established in compliance with Wisconsin law and was constitutionally created; and the settlement with the bank group should not be enjoined. ("OCI App-LV" at 72-73 (conclusions of law 2-9)). The RMBS Policyholders, the LVM Bondholders, and Freddie Mac appealed in the alternative under subsections (1) and (2) of Wis. Stat. § 808.03.

[2] The "RMBS Policyholders," the "LVM Bondholders," and "Freddie Mac." (*See* June 18 Order at 1.)

In the June 18 Order, this Court concluded that the May 27, 2010 order was final as to the three groups of appellants because it disposed of the entire matter in litigation as to the parties. (June 18 Order at 4.) This Court noted that OCI and AAC agreed that the portion of the May 27, 2010 Order denying intervention was final, but asserted that other portions of the order were not final. (*Id.* at 3.) This Court disagreed, concluding that with the denial of the motion to intervene and the denial of the motion to enjoin the settlement there was "no reason to parse the order." (*Id.* at 4.) This Court reaffirmed its conclusion in its July 7, 2010 Order, in which it construed an OCI motion to dismiss the LVM Bondholders and Freddie Mac appeals as motions for reconsideration.[3] (Order, 2010AP1291 at 3.)

OCI and AAC suggest that the participation of ALL/Lloyds in the rehabilitation proceedings after the November 1 Order was entered shows that the appeal was not from a final order. But they ignore the fact that they unsuccessfully made a similar argument to this Court in seeking the dismissal of the RMBS Policyholders, LVM Bondholders, and Freddie Mac appeals. In seeking the dismissal of Freddie Mac's

[3] The Court also denied in the July 7, 2010 Order OCI's motion to remove all party names and descriptions from the caption.

appeal of the denial of its motion to enjoin the bank settlement, for example, OCI noted that Freddie Mac continued as a policyholder of policies allocated to the Segregated Account and would be subject to an approved rehabilitation plan. (OCI Brief in Support of Motion to Dismiss Freddie Mac's Appeal, 2010AP1291 (June 18, 2010) at 8.) Citing to "the dozens of circuit court docket entries" since the May 27 order and the several pending motions in the circuit court, OCI argued to this Court that the denial of the injunction "hardly disposed of the rehabilitation proceedings." (*Id.*) This argument was rejected by this Court then and it should be rejected by it now.

Despite its previous failures to convince this Court of the principle that participation in the rehabilitation proceeding after entry of the order appealed from establishes the lack of finality, OCI lists the appearances ALL/Lloyds and other appellants have made and the witnesses they have cross-examined during the plan confirmation hearing, apparently to support its contention that the November 1 Order is not final. In a footnote to its brief in this case, however, OCI acknowledges that a single rehabilitation proceeding can "constitute a series of special proceedings," one or more of which may involve appealable final orders. (OCI Motion to Dismiss at 4 n.3.)

By way of comparison, in a mortgage foreclosure proceeding, court approval of a judgment of foreclosure and sale represents a separately appealable order from an order confirming the sale. *Shuput v. Lauer*, 109 Wis. 2d 164, 165, 325 N.W.2d 321 (1982). In *Shuput*, the appellant waited until the circuit court confirmed the sale before appealing the merits of the foreclosure. As a result, it lost its chance to challenge the foreclosure because it did not file a timely appeal of the earlier foreclosure judgment. Here, ALL/Lloyds has wisely proceeded in the alternative by seeking a permissive appeal and an appeal as of right.

In addition to ignoring this Court's conclusions that similar orders in this overall proceeding were final, OCI and AAC fail to consider the significance for purposes of finality of the nature of the issues in the pending consolidated appeal. OCI does note, however, that the pending consolidated appeal "raises[s] challenges to the Segregated Account that significantly overlap with the issues identified by" ALL/Lloyds and the other appellants from the November 1, 2010 Order. (OCI Motion to Dismiss at 6.) Indeed, the merits of the lawfulness of the Segregated Account are explicitly addressed – and vigorously contested – in the briefs of the RMBS Policyholders, Freddie

Mac, OCI, and AAC.[4] It is a common theme running through all of the "interested parties" positions and papers in this case.

Pursuant to this Court's June 18, 2010 and July 7, 2010 orders, the circuit court's conclusions of law in its May 27 and July 16 orders that the Segregated Account was lawfully and constitutionally established were determined to be final and appealable. While failing to explain why the Court should again reconsider its decision, OCI makes policy arguments in support of a comprehensive review – rather than a review one appeal at a time – by this Court of the pending challenges to the Segregated Account. (OCI Motion to Dismiss at 6.) Those policy arguments are reasonable and support a stay of appellate proceedings pending supplementation of the appeal record to include the plan confirmation hearing proceedings. By applying its June 18 Order and staying briefing pending receipt of a full record, including that portion arising from the plan confirmation hearing and the November 1, 2010 Order, this Court can satisfy the legitimate goal of resolving the challenges to the Segregated Account on the merits based on a complete record.

[4] As argued by the RMBS Policyholders to the circuit court, there is serious doubt whether the circuit court has jurisdiction to confirm the proposed rehabilitation, since the plan depends on the validity of the Segregated Account, an issue currently pending in this Court. (*See* RMBS Objections to Plan of Rehabilitation on Ambac Policyholder Website (Nov. 8, 2010), at 12-13)

II. THE DENIAL OF ALL/LLOYDS' REQUESTS TO INTERVENE AND FOR DISCOVERY IS FINAL AND APPEALABLE.

In its June 1, 2010 Motion to Dismiss the RMBS Policyholders appeal of the May 27, 2010 Order, OCI said that it did "not object to Movants' pursuing that portion of the trial court's decision denying their motion to intervene as an appeal of right under § 809.10 because it is generally recognized that 'an order denying a petition to intervene is final.'" (OCI Motion to Dismiss at 4, quoting Michael S. Heffernan, Appellate Practice & Procedure in Wisconsin § 4.10 at 8.) This Court agreed in the June 18 Order. Ignoring its previous argument and the Court's acceptance of the argument, OCI now argues that denial of intervention is not final in an insurance rehabilitation context. (OCI Motion to Dismiss at 8.) AAC, in contrast, acknowledges the June 18 Order, but contends it was "predicated on a misunderstanding." (AAC Motion to Dismiss at 5.)

Both OCI and AAC assert, in effect, that intervention is immaterial because ALL/Lloyds has participated in the case. (OCI Motion to Dismiss at 8; AAC Motion to Dismiss at 6.) OCI argues that "the rehabilitation court here has repeatedly acknowledged that any interested person can continue to participate and be heard in the

proceeding." AAC says that "[n]o rights or arguments have been lost, simply by reason of the fact that formal intervention has been denied."

OCI and AAC are wrong. ALL/Lloyds has been harmed by the denial of intervention. Intervention gives parties rights that they can rely on and exercise as parties in litigation. Those rights include, for example, the rights to discovery, to due process, and to appeal from both final and nonfinal orders. Not only has ALL/Lloyds been denied the right to discovery, it has been denied *any* information that OCI elects not to provide. As a result, it was forced to participate in the confirmation hearing with its hands tied. In any event, neither OCI nor AAC has provided any basis for altering the longstanding principle that denial of intervention is appealable as of right.

CONCLUSION

ALL/Lloyds respectfully submits that the method that best accomplishes both judicial economy and efficiency in this complex proceeding is to stay any ruling of the lawfulness of the Segregated Account in this appeal and in the two other pending appeals which present this same issue until the full record is developed from the plan confirmation hearing as well as the record from the present appeal of

the November 1, 2010 Order.[5] Whether or not a segregated account can be created under Wisconsin law for the sole purpose of being placed in rehabilitation is fundamental to virtually all issues in this rehabilitation proceeding and should be decided by this Court *on the merits* and on a complete record.

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By /s/
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[5] The issue in those appeals concerning the propriety of the Bank Settlement possibly can be decided irrespective of the lawfulness of the Segregated Account.