COURT OF APPEALS OF WISCONSIN
DISTRICT IV
Appeal No. 2010AP2835

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,
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, Aurelis Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP, 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.

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

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DEPFA BANK PLC'S CONSOLIDATED OPPOSITION TO THE MOTIONS TO DISMISS FILED BY THE OFFICE OF THE INSURANCE COMMISSIONER AND AMBAC ASSURANCE CORPORATION

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I.

INTRODUCTION

Appellant Depfa Bank, Plc ("Depfa" or "Appellant") opposes the motions of the Office of the Insurance Commissioner of the state of Wisconsin (the "OCI") and Ambac Assurance Corporation ("Ambac") to dismiss Depfa's pending appeal of several final Orders[1] of the circuit court entered in the Ambac insolvency proceedings, captioned as *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corporation* (the "Receivership Proceedings"). Depfa is confident of this Court's jurisdiction to hear the appeal because the orders appealed from are final and subject to appeal under Wisconsin law. Notably, in ruling on the OCI's and Ambac's motions to dismiss in earlier appeals taken from substantively identical final orders arising from separate challenges to the creation and rehabilitation of the Segregated Account, the Court of Appeals denied the motions, determining that the circuit court's orders were final and appealable. (*See* June 18, 2010 Ct. of Appeals Order, R. 169, App. 3, at 34-38; July 7, 2010 Ct. of Appeals Order, R. 242, App. 4, at 39-42.) Those earlier appeals were filed by the RMBS Policyholder Group ("RMBS") and the Las Vegas Monorail Bondholders ("LVMB"), two other Ambac policyholders whose

[1] Depfa appealed from an order entered on October 26, 2010, as corrected by order signed by the circuit court on October 29, 2010, and filed November 1, 2010 (as corrected, the "October 26, 2010 Order"), and an order entered October 20, 2010, regarding the scheduling of further hearings on the proposed Segregated Account Rehabilitation Plan notwithstanding the fact that the circuit court had been divested of jurisdiction to proceed with such hearings due to the appeals.

Ambac policies were assigned to the Segregated Account without notice or consent.[2] The failure of earlier motions to dismiss similar appeals has not deterred the OCI and Ambac from seeking to dismiss the Depfa and other appeals. Subsequent events in the circuit court indicate that the OCI and Ambac brought the instant motions to dismiss only after realizing that the multiple appeals filed by RMBS, LVMB, Depfa, and others have divested the circuit court of jurisdiction to proceed with hearings on the OCI's proposed Rehabilitation Plan.

The jurisdictional confusion that now exists in the Receivership Proceedings is a problem created by the OCI. At the inception of the Receivership Proceedings, the OCI requested a bifurcated process pursuant to which policyholders were required to file, no later than June 22, 2010, any and all challenges to the legality of the creation and immediate seizure of the Ambac Segregated A ccount. A number of timely challenges were made and ruled on by the circuit court in orders that, according to this Court, are final and appealable. The policyholders have all taken appeals from those judgments, lest the OCI and Ambac assert that the policyholders have waived their right to appeal. Pursuant to Wisconsin Statutes § 808.075, the circuit court is divested of jurisdiction to rule on any issues that form the subject matter of the appeals. Thus, by its own design and tactics, the OCI is now caught between a rock and a hard place.

[2] The appeals of RMBS and LVMB have been consolidated as Consolidated Appeals 2010-AP-1291, and briefing of these appeals on the merits is either complete or nearly complete.

While the motions to dismiss are without merit, Depfa readily acknowledges that the unusual and unprecedented manner in which the OCI has handled the Ambac matter in the circuit court has created very significant administrative and procedural challenges for the Court of Appeals. The Ambac case has already spawned no less than eight separate appeals and petitions for interlocutory relief, with more to follow if the circuit court ignores the jurisdictional mandate of Section 808.075 and proceeds to rule on the OCI's motion to approve the proposed Rehabilitation Plan for Ambac and its Segregated Account.[3] Although the appeals and petitions arise from slightly different procedural circumstances, all of the appellants want fundamentally the same thing – an opportunity to have the Court of Appeals review, *on the merits*, the legality, propriety, and fairness of the OCI's actions in the Receivership Proceedings, including the legality of the simultaneous creation and seizure of the Segregated Account. So far, the OCI has demonstrated a dogged determination to block the Court of Appeals from undertaking any such review on the merits by liberally asserting waiver, estoppel, preclusion, and mootness arguments at every

[3] The OCI's motion to confirm the Rehabilitation Plan was heard in a week-long evidentiary hearing conducted over appellants' collective jurisdictional objections under Section 808.075, and the matter is now under advisement. At several times during the confirmation hearing, the circuit court essentially ruled from the bench that the Plan would be confirmed, and that the written order submitted by the OCI would be issued within a "few days." (*See* Nov. 19, 2010 Hr'g Tr. at 49-51, App. 14, at 132-35 (Judge Johnston denying RMBS's motion for directed ruling denying confirmation of Plan) and Nov. 30, 2010, Hr'g Tr. at 223:9-15, App. 15, at 154 (Judge Johnston noting that the written order would be issued shortly).)

opportunity. (*See, e.g.*, June 18, 2010 Ct. of Appeals Order, R. 169, at 5, App. 3, at 34-38 (rejecting the OCI's disingenuous mootness argument).)

Depfa has no desire to add to the procedural morass created by the OCI. Rather, Depfa believes that the Court of Appeals will be in the best position to review the disputed rulings of the circuit court by staying *all pending appeals* that relate directly or indirectly to the legality of the Segregated Account and Receivership Proceedings, including Depfa's appeal and the consolidated RMBS and LVMB appeals,[4] until the circuit court enters its written order confirming the OCI's Rehabilitation Plan. At that point, the appellants and other objectors who have contested the Rehabilitation Plan for the disputed Segregated Account can bring all of the issues to the Court of Appeals with the full and extensive record that has been developed in the circuit court, which appeals may then be consolidated with the stayed appeals. This approach would preserve the Appellants' right to appellate review on the merits of all issues and prior orders arising from the Segregated Account and Receivership Proceedings, without risk that the OCI will assert waiver, estoppel, mootness, or similar arguments in an effort to prevent the Court of Appeals from reaching the merits. Indeed, Depfa hereby stipulates to a stay on such terms as will preserve Depfa's right to

[4] To the extent the issues in the RMBS/LVMB Consolidated Appeal (*i.e*, the RMBS objections to the consummation of the so-called "Bank Settlement," and LVMB's objection to its Ambac policy being allocated to the Segregated Account), can be resolved *without reaching the disputes over the legality of the Segregated Account and the Receivership Proceeding*, Depfa has no objection to those issues being resolved.

appellate court review, on the merits, of all issues and challenges that have been raised in the circuit court.

Accordingly, Depfa respectfully requests that the Court of Appeals deny the motions to dismiss, but stay, *sua sponte*, the pending appeals in anticipation that they will be consolidated into the appeals to be taken from the Rehabilitation Plan confirmation order to be entered by the circuit court.[5]

II.

PROCEDURAL HISTORY

A. The Creation Of The Segregated Account And Immediate Rehabilitation Thereof.

On March 21, 2010, at the direction of the OCI, the Board of Directors of Ambac voted to establish a Segregated Account (Verified Pet., R. 1, at ¶¶ 4-5, 7-9), which was approved by the OCI on March 24, 2010. (May 27, 2010 Circuit Ct. Findings of Fact & Conclusions of Law, R. 127, at 11, ¶ 26, App. 2, at 27.) The Segregated Account was created for the purpose of sequestering "troubled" policies and other liabilities of Ambac in order to effectuate the orderly

[5] While this brief was being finalized for filing, Depfa was advised by the OCI's counsel that the OCI had stipulated to a similar disposition of the appeal filed by objector One State Street LLC. While the stipulation appears to provide for dismissal of One State Street's appeal without prejudice, the OCI has agreed to the preservation of all arguments and issues raised in One State Street's appeal, which is precisely the same result that will be achieved by the stay of all appeals recommended by Depfa. Depfa prefers a stay of all appeals in order to avoid the risk that appellate review of issues arising from the later filed appeals will be prejudiced by a ruling, or partial ruling, based on a less developed record, that may be entered in the LVMB/RMBS Consolidated Appeals. Notwithstanding the filing of this opposition to the motions to dismiss, Depfa will continue to discuss a broad stipulation with all relevant parties to determine if agreement can be reached on a broad consensual stay, to further the parties' collective interests in fairness and judicial economy.

run off of these liabilities. (*See* Nov. 15, 2010 Hr'g Tr. at 214, App. 11, at 105-06; Nov. 16, Hr'g Tr. at 55-56, App. 12, at 114-16.) According to Insurance Commissioner Sean Dilweg, the Segregated Account was never intended to operate as a going-concern (Nov. 15, 2010 Hr'g Tr. at 215, App. 11, at 106-07; Nov. 16, 2010 Hr'g Tr. at 55-56, App. 12, at 114-16), and had no assets of its own (Nov. 15, 2010 Hr'g Tr. at 214, App. 11, at 105-06). The OCI further intended the Segregated Account to encourage the settlement and commutation of these "troubled" policies for less than their face value. (Nov. 15, 2010 Hr'g Tr. at 188-89, App. 11, at 102-03.)

On March 24, 2010, just days after its creation and the very same day as the OCI's approval, the OCI filed the verified petition and supporting documents to place the Segregated Account into rehabilitation. (*See* Verified Pet., R. 1.) The circuit court immediately granted this petition, and entered both a rehabilitation order and a temporary injunction prohibiting, among other things, any Segregated Account policyholders from "commencing or prosecuting any actions, claims, lawsuits or other formal legal proceedings" in any forum against the Segregated Account or Ambac with respect to Segregated Account "policies . . . , contracts, or liabilities." (Mar. 24, 2010 Circuit Ct. Order Granting Temporary Inj., R. 9 at ¶ 1, App. 1, at 2.) The sole relief that policyholders were allowed to pursue was to file objections to the circuit court's actions on or before June 22, 2010. (*See id.* R. 9 ¶ 12, App. 1, at 13-14; *see also id.* R. 9 at ¶ 10, App.

1, at 13 (violations could result in forfeiture, criminal sanctions, voiding of claims and policy rights).)

B. The RMBS/LVMB Challenges.

On April 30, 2010, RMBS brought an Emergency Motion for: (1) Immediate relief to preserve the status quo with regard to any settlements or commutations "that may divert assets from the General Account" before the circuit court ruled on arguments challenging such account and its rehabilitation; (2) "Expedited discovery regarding the formation of the Segregated Account and the adequacy of the capitalization of the Segregated Account . . ."; (3) The return of the RMBS policies to the General Account; and (4) "[A]n Order that the establishment of the Segregated Account was invalid due to non-compliance with the Wisconsin Insurance Statutes and its stated purpose and violation of the United States Constitution and Wisconsin Constitution . . . ." RMBS later requested intervention, if necessary, with relation to the Emergency Motion and the underlying proceeding. (May 14, 2010 RMBS Emergency Mot., R. 53. LVMB filed a similar expedited challenge on May 5, 2010. May 5, 2010 LVMB Emergency Mot., R. 41, 42.)

The OCI, in its opposition to these motions, argued, in pertinent part, that the Segregated Account was created in accordance with Wisconsin law, did not implicate the "novation" doctrine, and did not violate the United States or Wisconsin constitutions. (May 20, 2010 OCI Br. in Opp'n, R. 73, at 20-33.)

Ambac's Opposition was strictly limited to the requested relief and standing to request same. (May 20, 2010 Ambac Br. in Opp'n, R. 69.)

The circuit court held a hearing on these motions on May 25, 2010, ultimately denying them in their entirety and entering an almost identical version of the findings of fact and conclusions of law submitted by the OCI. (*See* May 27, 2010 Circuit Ct. Findings of Fact & Conclusions of Law, R. 127, at 2, App. 2, at 18.) In doing so, the circuit court ruled in pertinent part that the "Segregated Account was formed in compliance with Wisconsin law," that the OCI acted within its discretion, that the doctrine of novation did not apply, and that the establishment of the Segregated Account was constitutional. (*Id.* R. 127, at 14-15, App. 2, at 30-31.) The denial of these motions was promptly appealed.[6] The RMBS appeal is presently pending,[7] despite motions by Ambac and the OCI attempting to dismiss it. (*See* June 10, 2010 Ambac Mot. to Dismiss RMBS Investor's Purported Appeal, App. 17, at 210-16; June 11, 2010 OCI Am. Mot. to Dismiss RMBS Note Holders' Purported Appeal, App. 18, at 217-39.)

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[6] Demonstrating the interrelated nature of the various claims and interested parties in this case, Federal Home Loan Mortgage Corporation ("Freddie Mac") filed a notice of appeal of the Findings of Fact and Conclusions of law on June 10, 2010. Freddie Mac had moved to intervene and join RMBS's Emergency Motion the day before hearing on said motion. (*See* June 18, 2010 Ct. of Appeals Order, R. 169, at 2, App. 3, at 35.) This appeal appears to be pending. (*See* July 7, 2010 Ct. of Appeals Order, R. 242, App. 4, at 39-42 (refusing to dismiss said appeal).)

[7] The RMBS appeal is pending as Case No. 2010-AP-1291, and the LVMB appeal was assigned Case No. 2010-AP-2022. The two appeals were later consolidated as Consolidated Appeals 2010-AP-1291.

C. The Wells Fargo Challenge.

On April 5, 2010,[8] Wells Fargo filed its motion to intervene and modify the injunction on four grounds: (1) The transfer of Bondholder policies to the Segregated Account "prior to the Order of Rehabilitation, without notice, without the Bondholders Trustee's consent and without providing the Bondholders with any consideration, was an ineffective novation"; (2) "[T]he transfer violated statutory requirements for the formation of a 'Segregated Account' because the Segregated Account did not have adequate capital and surplus at the time it was formed"; (3) "The Commissioner exceeded the authority given to him by the Wisconsin Legislature in the Wisconsin Insurance Code when he attempted to modify Ambac's obligations before the rehabilitation proceeding and outside the supervision of Court"; and (4) "The Commissioner violated the Constitutions of the United States and Wisconsin when he approved the Segregated Account and the transfer of the Bondholders' Policies to that account, because he did not provide the Bondholders with any just compensation or due process, and because he treated the Bondholders differently from other similarly situated municipal bondholder insureds." (Apr. 5, 2010 Wells Fargo P. & A., R. 16, at 1-2.)

[8] The Wells Fargo challenge appears to have been filed under a normal briefing schedule, although submitted well in advance of the Court's June 22, 2010 deadline. As such, the Wells Fargo motion was decided after the submission of the June 22, 2010 Motions, but before the June 22, 2010 Motions were ultimately decided.

The OCI and Ambac opposed the Wells Fargo motion, arguing that the May 27, 2010 Findings of Fact and Conclusions of Law with regard to the RMBS/LVM motions reached the merits of Wells Fargo's arguments and prevented their consideration. (*See* June 10, 2010 OCI Opp'n , R. 148 at 2-3 (incorporating prior arguments and noting that only Wells Fargo's Equal Protection challenge remains for consideration); June 11, 2010 Ambac Opp'n, R. 157 at 7.) The Wells Fargo motion was ultimately denied on July 16, 2010[9] (July 16, 2010 Circuit Ct. Order, R. 258, App. 5, at 43-51), which Wells Fargo appealed on August 6, 2010.

D. <u>The June 22 Motions.</u>

A number of additional challenges to the Segregated Account and its rehabilitation were filed in accordance with the circuit court's schedule as set out in the March 24, 2010 injunction order by: Depfa, Wells Fargo, Bank of America, PNC Bank, One State Street, Deutsche Bank, U.S. Bank, Lloyds and ALL Student Loan, Bank of New York Mellon, and Knowledgeworks and the State of Ohio, all of which were accompanied by motions for leave to intervene as parties in the Receivership Proceeding (collectively, the "June 22 Motions"). *See* http://ambacpolicyholders.com/court-filings/. While containing some unique

[9] Wells Fargo moved to modify its original motion and join in another motion of LVMB (*see* June 21, 2010 Mot.), the specific details of which are not germane here. The Wells Fargo challenge and appeal, however, further demonstrate the complicated and interrelated nature of all of the proceedings arising in the circuit court with regard to the Segregated Account and rehabilitation thereof.

arguments, the June 22 Motions all contested the propriety and legality of the creation of the Segregated Account. All of the June 22 Motions were set for consolidated briefing and hearing. Two days of hearings were held by the circuit court on September 9 and 13, 2010, and the circuit court denied all of the motions several weeks later. (*See* Oct. 26, 2010 Circuit Ct. Order, R. 397, App. 7, at 56-76.) In denying the June 22 Motions, the circuit court referenced and incorporated its earlier orders denying all of the previous challenges, including the RMBS, LVMB, and Wells Fargo motions. (*Id.* at R. 397, at 2-3, 6-9, App. 7, at 57-58, 61-64 (referencing the May 27, 2010 Findings of Fact & Conclusions of Law and the July 16, 2010 Order in denying the Wells Fargo/LVMB motion).) Depfa, One State Street, LLC, and Lloyds/ALL Student Loans appealed from this order,[10] ultimately resulting in the instant motions to dismiss.

E. The Plan Confirmation Proceedings.

On October 8, 2010, after the hearings on the June 22 Motions but before entry of the circuit court's order denying the motions, the OCI filed its motion to approve a proposed Rehabilitation Plan for the Segregated Account. At the request of the OCI, the circuit court held a scheduling conference on October 14, 2010, wherein it received argument regarding the scheduling of the

[10] Based on the procedural confusion created by the proceedings in the circuit court, including the issue of the circuit court's jurisdiction following the appeals, and in order to avoid the OCI asserting that Depfa is estopped from later seeking appellate review of the denial of all discovery requests and objections to the severely truncated schedule for the Plan confirmation hearings, Depfa also appealed from the October 20, 2010 scheduling order.

Plan confirmation hearings. At this hearing, a group of General and Segregated Account policyholders representing more than $50 billion in outstanding bonds guaranteed by Ambac requested that the court set the Plan confirmation hearing to commence approximately 120 days after the OCI and Ambac made a limited number of documents related to the Plan available to policyholders for review. This policyholder request for limited disclosure was based on the complexity of the Plan and the policyholders' collective desire to achieve a truly durable plan based on a process of collaboration and consensus rather than an expedited "cram down" process that would inevitably leave the rehabilitation process vulnerable and unstable. (*See* Oct. 14, 2010 Hr'g Tr., R. 471, at 48:7-50:16 ("[W]e proposed in this statement that we get together as a group of policyholders, some in the General Account, some in the Segregated Account, because both camps have a very significant interest in the viability and durability of the plan . . . ."); *see also id.* at 50:21-22; 62:8-9; 63:5-7; 65:18-66:3; 66:13-67:3; 67:23-71:20; 71:23-74:15.)

However, those requests were summarily denied. (*See* Oct. 20, 2010 Circuit Ct. Order, R. 387, App. 6, at 52-55.) Instead, the circuit court ordered a truncated schedule wherein the briefing and hearings on the Plan would be completed within six weeks of the filing of the initial Plan. During that time, the OCI continued to materially amend the Plan, including significant amendments filed *after* the deadline for policyholder objections. (*See id.*; Oct. 21,

2010 OCI Amendment to Disclosure Statement, R. 390; Nov. 8, 2010 Order for Temporary Inj. Relief, R. 436 (enjoining the bankruptcy estate of Ambac's parent company and the IRS); Nov. 12, 2010 OCI Amendment 2 to Disclosure Statement, App. 9, at 80-88.[11])

Pursuant to the disputed October 20 Scheduling Order, the circuit court conducted an evidentiary hearing during the week of November 15-19, 2010, to consider the OCI's motion to confirm the Plan, and closing arguments of counsel were held on November 30, 2010. The examination of witnesses at these hearings presented the interested parties with their first and only opportunity for discovery in the Receivership Proceeding and greatly expanded the evidentiary record regarding the legal and factual issues that arise in this and other appeals. At the hearing, the circuit court indicated it would confirm the Plan, and would do so quickly. (*See* Nov. 19, 2010 Hr'g Tr. at 49-51, App. 14, at 132-35; Nov. 30, 2010 Hr'g Tr. at 222:20-25, 223:11-17, App. 15, at 154.)

[11] These late amendments, which, among other things, sought to cram down the Internal Revenue Service into a subordinated position within the Segregated Account, have now resulted in further uncertainty and procedural confusion. On December 8, 2010, the United States filed a Notice of Removal of the Receivership Proceeding to the U.S. District Court for the Western District of Wisconsin. *See* http://ambacpolicyholders.com/storage/courtfilings/12082010/NoticeOfRemoval.PD.

III.

ARGUMENT

A. Denial Of Depfa's Intervention Request Resulted In An Appealable Order.

The OCI and Ambac have not cited a single case for their proposition that the denial of Depfa's request to intervene in the instant action did not result in an appealable order. On the contrary, their authorities aptly demonstrate that Depfa is entitled to appeal its denial of right of intervention. *See Becker v. Becker*, 66 Wis.2d 731, 735, 225 N.W.2d 884, 886 (Wis. 1975) (denial of intervention request derives from "special proceeding" resulting in appealable order); *Nat'l Distilling Co. v. Seidel*, 103 Wis. 489, 90 N.W. 744 (Wis. 1899) (same); *see also Sewerage Comm'n of Milwaukee v. Wisc. Dept. of Natural Res.*, 104 Wis.2d 182, 311 N.W.2d 677 (Wis. 1981) (allowing appeal from denial of intervention request). Moreover, the rule requiring a "final statement" does not alter this analysis because such rule was created to protect, not prohibit, a party's right to appeal. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶¶ 45-46, 299 Wis.2d 723, 728 N.W.2d 670 (Wis. 2007) (recognizing need to "liberally" construe ambiguities in favor of right of appeal).

Depfa's obligation to continue to participate in the circuit court proceedings on the proposed Rehabilitation Plan is irrelevant to its right to appeal the earlier final orders. *See In re Estate of Sanders*, 2008 WI 63, 310 Wis.2d 175, 750 N.W.2d 806 (Wis. 2008) (noting series of special proceedings may result in

series of appealable orders); *see also Fredrick v. City of Janesville*, 92 Wis.2d 685, 285 N.E.2d 655, 657 (Wis. 1979) (rejecting reasoning that subsequent events can determine finality). The circuit court engaged in a special proceeding and denied Depfa's request to intervene; this results in an appealable order. *See Becker*, 66. Wis.2d at 735.

Any argument that Depfa has not been prejudiced by the denial of intervention is similarly without merit. (*See* Nov. 29, 2010 Ambac Mot. to Dismiss, at 6.) For example, as a non-party, Depfa was denied any opportunity to conduct discovery prior to the Plan confirmation hearings. (*See* Oct. 14, 2010 Hr'g Tr., R. 471, at 81:25-83:21; Nov. 30, 2010 Hr'g Tr., at 27:22-24; 194:21-195:20, App. 15, at 146, 149-50.) Moreover, it was denied the opportunity to fully cross-examine witnesses at those hearings after the OCI was permitted to redirect said witnesses. (*See* Nov. 18, 2010 Hr'g Tr. at 127-30, App. 13, at 122-25; Nov. 30, 2010 Hr'g Tr. at 27:22-24, App. 15, at 146.) Finally, the OCI reserved the majority of its closing argument for rebuttal, thereby disallowing Depfa from responding to such arguments. (Nov. 30, 2010 Hr'g Tr. at 9:20-10:4, 11:21-22, 27:22-24, App. 15, at 141-43, 146.) Clearly, limited "permissive" participation, rather than participation as a true "party" by intervention, is materially different. The law is clear that Depfa has an absolute right to appeal the circuit court's denial of leave to intervene. *See Becker*, 66. Wis.2d at 735.

B. Depfa's Appeal Was Necessary To Protect Its Right To Review By The Court Of Appeals On The Merits.

Moreover, Depfa's continued participation in the circuit court proceedings following the denial of its June 22 Motion does not preclude Depfa's appeal. In light of the bifurcated process recommended by the OCI and adopted by the circuit court, Depfa had no choice. The inconsistent positions taken by the OCI and the unorthodox nature of the circuit court proceedings forced Depfa to bring this appeal to protect its right to challenge the creation of the Segregated Account and the propriety of the circuit court's rulings related thereto. In addition, Depfa's continued participation in the rehabilitation proceedings was necessary to safeguard the appellate record regarding those subsequent proceedings, and to avoid waiver arguments by the OCI.

For example, the OCI described the RMBS/LVM Emergency Motions as "special proceedings that are ancillary to the underlying main case" that were discretely different from plan proceedings and did not divest the circuit court of jurisdiction. (Nov. 15, 2010 Hr'g Tr. at 57-58, App. 11, at 97-99.) However, the OCI moved to dismiss those actions arguing that they were from "non-final" orders. (June 1, 2010 OCI Mot. to Dismiss, App. 16, at 156-209.) This incongruity can also be seen in the OCI's argument that RMBS's request for injunctive relief regarding the CDS Settlement was unnecessary because the settlement money was subject to recapture, followed by an argument that the

appeal was moot because the transaction was consummated and the money was gone. (*See* June 18, 2010 Appellate Ct. Order, R. 169, at 5, App. 3 at 38.) With such uncertainty, Depfa can hardly be faulted for acting to protect its interest in appellate review on the merits of the significant legal and factual issues surrounding the Segregated Account by bringing the instant appeal.[12]

C. This Court Retains Jurisdiction To Consider The Remaining Issues Surrounding The October 26, 2010 Order.

Further, the OCI and Ambac have offered no authority to demonstrate that this Court is divested of jurisdiction to consider the other issues surrounding the October 26, 2010 order. Despite suggestions otherwise, the propriety of the Segregated Account is a foundational element of the fairness and legality of the Plan to rehabilitate the Segregated Account and was decided within the same "special proceeding" that denied Depfa's intervention request. Therefore, Depfa's challenge to the Segregated Account is not in contravention of Wis. Stat. § 645.33(5) because if the Segregated Account was improperly formed,

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[12] In Ambac's motion to dismiss, the tone and tenor of which befits a party whose headquarters and attorneys hail from New York City, Ambac asserts that Depfa acted surreptitiously in bringing the instant appeal while continuing to participate in the circuit court. Contrary to this assertion, Depfa fully advised the circuit court of its pending appeal and argued that the appeal had divested the circuit court of jurisdiction. (*See* Depfa's Nov. 8, 2010 Objections to Plan, R. 429, at 9-11.) Depfa further stated it was proceeding out of a desire to avoid any potential preclusion arguments or other attempts by the OCI to avoid meaningful appellate review (*id.* at 11) and reserved its right to amend, add to, or withdraw the arguments contained within the objections, in recognition of the constrained procedure under which it was operating (*id.* at 6). Further, the Court of Appeals was aware of the continued participation of the Appellants as objectors in the Plan confirmation hearing process, as acknowledged by the denial of the request for a stay and interlocutory appeal, entered after Lloyd's and ALL V's petition for interlocutory relief from the October 26, 2010 order. (*See* Nov. 12, 2010 Ct. of Appeals Order, App. 10, at 89-92.) Depfa hid nothing from either the circuit court or the Court of Appeals, and any vitriolic accusation to the contrary is specious.

the circuit court did not have jurisdiction to engage in the rehabilitation proceedings to begin with. Wis. Stat. § 808.075. Likewise, scrutinizing the propriety and constitutionality of the OCI's actions in approving and subjecting the Segregated Account to rehabilitation serve to support, not undermine, judicial economy because if the OCI acted improperly on these accounts, any rehabilitation plan relying on the Segregated Account necessarily will not withstand appellate scrutiny. Therefore, the OCI and Ambac have not shown that this Court is without jurisdiction to consider Depfa's appeal of the October 26, 2010 order.

D. Depfa Supports A Stay Of All Proceedings Pending Consolidation.

Notwithstanding that judicial economy would be served by deciding the foundational questions regarding the propriety and constitutionality of the Segregated Account first, in an effort to assist the Court of Appeals in creating order out of the chaos created by the OCI, Depfa is willing to stipulate to a stay of all appellate proceedings pending the appeal and consolidation of the imminent order approving the Plan. Consolidation of these proceedings would allow for review to be conducted based on a greatly expanded record, which would include the record derived from the confirmation hearings that occurred in the circuit court after Depfa perfected its appeal. This alternative will also safeguard against inconsistent orders and will protect the rights of all interested

parties to be heard on the underlying substantive issues as part of a consolidated appellate review.

The OCI appears to agree with the suitability of this suggestion. (*See* Nov. 24, 2010 OCI Mot. to Dismiss, at 6 (noting that "[i]f the court approves the plan of rehabilitation, then all of the challenges to the Segregated Account . . . can be reviewed on appeal at one time, in the context of the plan of rehabilitation, and with the benefit of the significant additional factual development that has taken place during the five days of public hearings and the rehabilitation court's written findings of fact and conclusions of law based on those hearings. This approach has the benefit of avoiding potentially inconsistent rulings in the Court of Appeal . . . ," and going on to note that "consolidated Case Nos. 2010AP1291 and 2010AP2022 . . . raise challenges to the Segregated Account that significantly overlap with the issues identified by Depfa"); *id.* at 10 (requesting stay and supplementation of record).)

Moreover, there is no reason that the numerous appeals from the Segregated Account's creation and rehabilitation cannot be consolidated to avoid any concerns regarding inconsistent rulings or records. *See* Wis. Stat. § 809.10(2) (multiple parties may choose to prosecute appeals arising from same case together); *see also* Wis. Stat. § 809.10(3) (court may *sua sponte* "consolidate separate appeals in separate actions or proceedings in the trial court").

Therefore, Depfa suggests that the Court of Appeals stay the appeals of Depfa, Lloyd's and ALL Student Loans, One State Street, LVMB, RMBS,[13] Freddie Mac, and Wells Fargo (as well as any other appeals that may be filed arising from the Receivership Proceedings) pending consolidation with the forthcoming appeals arising from the imminent Plan confirmation. This will enable the Court to consider the issues of this appeal with the benefit of a full record and in a manner that will allow the Court to consider the various arguments of all interested parties in an organized and efficient manner.

IV.

CONCLUSION

Accordingly, while Depfa believes it has established this Court's jurisdiction over its appeal, Depfa agrees that entry of an order staying the multiple proceedings presently pending before this Court to allow consolidation of these cases with the forthcoming appeals of the Plan confirmation. An order staying and consolidating these proceedings would further judicial economy, avoid the possibility of inconsistent opinions, and allow all interested parties to be heard on the substantive issues prior to any appellate court rulings on the merits.

[13] It is Depfa's understanding that some briefing has already taken place on this appeal. Unless the Court intends to dispose of this appeal without reaching the merits of the Segregated Account dispute, it should be included in the Court's stay of proceedings in order to avoid a premature determination on an incomplete record.

Dated: December 10, 2010

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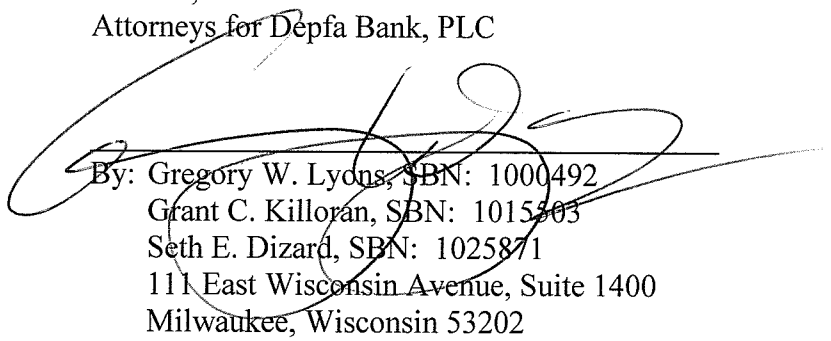

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