

COURT OF APPEALS OF WISCONSIN  
DISTRICT IV  
Appeal No. 2010-AP-1291-LV

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

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

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**MOTION TO DISMISS RMBS MOVANTS' PURPORTED APPEAL  
OF RIGHT OF TRIAL COURT'S NON-FINAL DENIAL OF  
TEMPORARY INJUNCTIVE RELIEF**

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The Wisconsin Office of the Commissioner of Insurance, as the regulator of Ambac Assurance Corporation (“Ambac”), and the Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator (collectively “OCI”) move the Court to dismiss that portion of the direct appeal filed by the RMBS note holders (hereinafter “Movants”) dated May 28, 2010 that relates to the trial court’s non-final denial of Movants’ motion for temporary injunctive relief. The grounds for OCI’s motion to dismiss are as follows:

**I. PROCEDURAL HISTORY**

1. On April 30, 2010, Movants filed with the trial court a motion for temporary injunctive relief aimed at blocking a multi-billion dollar settlement between Ambac and fourteen bank policyholders of Ambac. (Movants’ motion is in their supplemental appeal appendix at A-App. 215-80.) As detailed in the trial court’s Findings of Fact and Conclusions of Law (attached to OCI’s accompanying “Preliminary Objection” at ¶¶ 25-36; OCI-App. 10-14), Ambac is not in the above-captioned Segregated Account rehabilitation proceeding and the policies held by the settling bank group are held by Ambac, not the Segregated Account, and therefore are not involved in the Segregated Account rehabilitation proceeding.

2. On May 14, 2010, Movants filed a separate motion in the trial court for permission “to intervene,” arguing that they should be

accorded the status of “parties” because they claimed to have an ongoing “interest relating to the property and transactions that are the subject of this [rehabilitation case] and the disposition of the issues involved in this matter [the rehabilitation case] may impair or impede the RMBS Policyholders’ ability to protect that interest.” (A-App 305.)

3. Following extensive briefing and submissions of voluminous affidavits and a three-hour hearing on Tuesday, May 25, 2010, the trial court indicated that it would be denying Movants’ motions for the reasons argued by OCI and Ambac and would, “in the next several days” be issuing its written decision in the form of Findings of Fact and Conclusions of Law. (A-App. 578-80.)

4. The very next day, without waiting for the trial court to issue his written decision, Movants attempted to initiate an interlocutory appeal to this Court in a form of a “Petition for Leave to Appeal.” Movants sought relief in this Court as a permissive appeal under Wis. Stat. § 808.03, arguing that this Court could “review the circuit court’s denial of the RMBS Policyholders’ motion to modify the injunction order, **even though it is a non-final order.**” Movants went on to address the requisite three-part test for permissive review under § 808.03(2) (emphasis added).

5. The next day, Thursday, May 27, 2010, this Court issued a *sua sponte* order holding that Movants’ permissive appeal petition was “premature, as is the request for relief pending appeal” because the trial

court had not yet entered its written decision. (A-App. 584, 587.) In the concluding paragraph of that order, this Court stated that:

Once the circuit court enters an order or judgment in this case, the RMBS policyholders may file a petition for leave to appeal, a notice of appeal, or both, if they are uncertain whether the order or judgment is final. At that point, they may renew their request for relief pending appeal.

*Id.*

6. The trial court entered its written decision, Findings of Fact and Conclusions of Law on May 27, 2010 (*see* attachment to OCI's accompanying Preliminary Objection at OCI-App. 1-17; and at A-App. 589).

7. On Friday, May 28, 2010, Movants filed a new set of appeal papers, this time purportedly appealing the trial court's written decision as a final order pursuant to Wis. Stat. § 809.10(1)(a) as to both the trial court's denial of Movants' motion for a temporary injunction and its denial of Movants' separate motion to intervene.

## **II. ARGUMENT**

8. In Conclusion of Law 9, the trial court held that "because Movants have not satisfied the requirements for intervention under Wisconsin law, their motion to intervene in this proceeding is denied." (OCI App. 17; A-App. 606.) OCI does 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.” *See* Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin* § 4.10, at 8 (updated Feb. 24, 2010); *Sewerage Commission of Milwaukee v. DNR*, 104 Wis. 2d 182, 311 N.W.2d 677 (Ct. App. 1981).

9. It is equally well-settled, however, that a trial court denial of a motion for a temporary injunction is not final, and hence, not appealable as a matter of right under Wis. Stat. § 809.10. Heffernan, *supra*, at § 4.9, pp. 7-8 (“[A]s a general rule, a judgment or order that denies a motion is not final.”). The same general rule is recognized in 3 *Wisconsin Civil Procedure Before Trial* § 7.28, at 18-19 (State Bar of Wisconsin 2009): “[T]he circuit court’s decision to grant or deny a motion for temporary injunction is ordinarily considered a nonfinal order for purposes of appeal. Accordingly, appeals of such orders are by permission rather than by right and are guided by § 808.03(2).”

10. The trial court’s denial of Movants’ motion for a temporary injunction does not meet the test for finality set forth in § 808.03(1). Section 808.03(1) provides that an order is final only if it “disposes of the entire matter in litigation as to one or more of the parties.” Here, that clearly is not the case. Movants’ injunction motion is premised on the contention that allowing Ambac to consummate its proposed settlement with the bank group may impair Movants’ continuing interests in the ongoing rehabilitation and might (according to Movants) lessen the

amount Movants will receive pursuant to the plan of rehabilitation OCI is developing as the case proceeds. The policies in which the Movants claim an interest were allocated to the Segregated Account pursuant to the process detailed in the trial court's Findings of Fact ¶¶ 19-31 and Conclusions of Law 1-8 (OCI-App. 8-17). Denying a settlement between Ambac and a group of banks with policies in Ambac, not the Segregated Account, does not dispose of the entire Segregated Account rehabilitation as to Movants. If Movants succeed in overturning the trial court's determination that they are not parties and not entitled to intervene, there may well be other issues in the future which Movants seek to litigate in the ongoing Segregated Account rehabilitation proceeding.

11. Movants did not follow the procedural path outlined by this Court in its order dated May 27, where it indicated that Movants should "file a petition for leave to appeal, a notice of appeal, or both, if they are uncertain whether the order or judgment is final" (A-App. 587). This Court did not indicate that they could file a new appeal as a matter of right as to the non-final decision regarding the temporary injunction motion.

12. Movants also should not be entitled to pursue an appeal of the interlocutory non-final denial of their motion for a temporary injunction because they have yet to establish standing as parties. The trial court found that they were not parties and denied their motion to intervene. (Conclusions of Law 8 and 9; OCI App. 16-17; A-App. 605-06.)

Nonparties should not be permitted to pursue an interlocutory permissive appeal unless and until they first are able to establish standing as parties. Here, that will await the outcome of this Court dealing with Movants' appeal of the denial of their motion for intervention.

WHEREFORE, OCI respectfully requests that the Court deny that portion of Movants' direct appeal pertaining to seeking review of the trial court denial of their motion for a temporary injunction.

Dated this 1st day of June, 2010.

FOLEY & LARDNER LLP



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Dane County Circuit Court Case No. 2010-CV-1576  
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**MOTION TO DISMISS THE RMBS NOTE HOLDERS' IMPROPER  
MOTION FOR AN INJUNCTION PENDING APPEAL**

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The Wisconsin Office of the Commissioner of Insurance, as the regulator Ambac Assurance Corporation (“Ambac”), and the Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator (collectively “OCI”) move this Court to dismiss the improper “Motion for Injunction Pending Appeal” filed by the RMBS note holders (“Movants”) on May 28, 2010. The grounds for OCI’s motion to dismiss are as follows:

1. In direct violation of Wis. Stat. § 809.12, Movants are asking this Court for the extraordinary relief of imposing a multi-billion dollar injunction pending appeal even though they did not first seek that relief from the circuit court. Section 809.12 provides:

A person seeking relief under s. 808.07 **shall file** a motion in the trial court unless it is impractical to seek relief in the trial court. A motion [in the court of appeals] must show why it was impractical to seek relief in the trial court or, if the motion had been filed in the trial court, the reasons given by the trial court for its action.

(Emphasis added.)

2. Movants’ motion and supporting memorandum to this Court are silent about the clear requirements of § 809.12. Without ever mentioning the rule, Movants claim in passing that:

At the conclusion of the hearing, the RMBS Policyholders orally moved to **enjoin** the CDS settlement pending appeal of the circuit court’s order. Alternatively, the RMBS Policyholders requested that the circuit court **enjoin** the CDS settlement until this Court could rule on a motion

for an injunction. The circuit court denied both requests and declined to permit any relief.

(Movants' Memorandum at p. 11; emphasis added.)

3. There are multiple problems with Movants' position:

A. Movants Mischaracterize the Record:

The above-quoted statement in Movants' Memorandum materially mischaracterizes what was actually said, as reflected in the transcript. In fact, Movants never asked the trial court at the conclusion of the hearing to "enjoin the CDS Settlement" pending appeal. Rather, Movants only asked the court to "stay its order pending review by the appellate court" (*see* Tr. at 129, 130; A-App. 580, 581). At the time Movants asked the trial court to "stay his decision," there was no injunction in place and the trial court had not yet issued its written decision. Requesting a "stay" is a far cry from asking the court to issue an injunction pending appeal which would block a multi-billion dollar settlement agreement between Ambac and third-party policyholders.

B. Movants Never Filed a Motion For

Relief: Section 809.12 explicitly says that an appellant "**shall file** a motion in the trial court" (emphasis added). The "shall

file” requirement requires a written submission to the trial court, not an oral question at the end of a long hearing.

C. Movants’ Oral “Motion” Was Premature:

Much like an appeal is improperly premature if it is initiated prior to the trial court issuing its final written decision, a party should not be found to have satisfied the requirements of § 809.12 where, as here, the oral request for “a stay” came two days prior to the trial court issuing its written decision. For the process of seeking relief first in the trial court (where the judge is far more familiar with the record and issues than a later appellate court) to be meaningful, the parties seeking such relief must know what the final decision provides, and the trial court must have the opportunity to review the written request for relief in light of its final written decision. It would be an understatement to characterize the path followed here by Movants as “putting the cart before the horse.”

4. Here, there is nothing for this Court to review.

Movants’ pre-decision oral request for “a stay” (not an injunction) consisted of a single sentence, without any supporting reasons or legal authority. The trial court declined to stay the issuance of his decision and told Movants it would be issued “in several days.” There was no discussion in that brief exchange between Movants and the trial judge about an

injunction pending appeal. It would make a mockery of § 809.12 if such an exchange were deemed to satisfy the requirements of “a filed” post-decision motion.

5. Contrary to § 809.12, Movants’ appeal submissions make no effort to show why it was impractical for them to seek relief in the trial court before seeking relief in this Court. The trial court is far more familiar with the issues and factual record than this Court. Moreover, by circumventing the statutory requirement of seeking relief first in the trial court, Movants prevented this Court from having the benefit of being able to review the basis for the trial court’s exercise of discretion on the issue. *See State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995).

6. The trial court’s verbal denial of the pre-decision oral request for a “stay” does not mean that relief in the form of an injunction may now be sought in the Court of Appeals because it was “impractical” to seek relief in the trial court pursuant to Rule 809.12. *See Gaugert v. Duve*, 2000 WI App 34, ¶¶ 4-5, 17-19, 233 Wis. 2d 190, 607 N.W.2d 310 (reciting prior history of case and declining hear a motion for relief pending appeal because it was not impractical to first seek relief in the trial court, even though the trial court had said it would not entertain such a motion and had suggested the parties seek relief in the Court of Appeals).

7. Movants' motion for relief pending appeal should also be summarily dismissed because they are not parties and have no standing. *See* Trial Court Conclusions of Law 8 and 9 (OCI-App. 16-17); *see* also OCI's accompanying Preliminary Objection.<sup>1</sup> A nonparty with no standing should not be heard to seek the extraordinary remedy of injunctive relief pending appeal. Movants should not be able to seek such relief unless and until they are first successful in demonstrating on appeal that the trial court erred in denying their motion to intervene.

8. Additional reasons supporting this motion are set forth in OCI's accompanying Preliminary Objection.

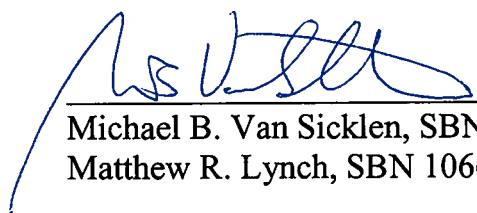
WHEREFORE, OCI respectfully requests that this Court summarily dismiss Movants' improper motion for relief pending appeal.

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<sup>1</sup> The trial court's written decision, Findings of Fact and Conclusions of Law are attached to OCI's accompanying "Preliminary Objection" as OCI's Appendix, cited "OCI-App. \_\_\_\_").

Dated this 1st day of June, 2010.

FOLEY & LARDNER LLP

A handwritten signature in blue ink, appearing to read "Michael B. Van Sicklen", is written over a horizontal line.

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**PRELIMINARY OBJECTION (WITH APPENDIX) OF OFFICE OF  
THE COMMISSIONER OF INSURANCE AND THE  
COMMISSIONER OF THE STATE OF WISCONSIN TO RMBS  
MOVANTS' MOTION FOR INJUNCTION PENDING APPEAL**

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## INTRODUCTION

The Wisconsin Office of the Commissioner of Insurance (“OCI”), as the regulator of Ambac Assurance Corporation (“Ambac” or the “General Account”), and the Commissioner of Insurance of the State of Wisconsin, as the court-appointed rehabilitator (the “Rehabilitator”) (collectively “OCI”) of the Segregated Account of Ambac (the “Segregated Account”) strongly object to the “Motion for an Injunction Pending Appeal” filed on May 28, 2010 by five note holders that have misleadingly referred to themselves in this proceeding as “RMBS Policyholders” (hereinafter “Movants”).<sup>1</sup>

This Preliminary Objection is filed for the precautionary purpose of alerting the Court to OCI’s opposition and to ensure that the Court does not take any precipitous action before OCI has its full opportunity to respond. Pursuant to Wis. Stat. § 809.14(1), OCI has 11 days to file its full response to the Motion for Injunction Pending Appeal. Although Movants characterize their Motion for Injunction Pending Appeal as an “emergency motion,” they did not affirmatively seek *ex parte* relief,

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<sup>1</sup> Movants are five hedge funds and securities broker-dealers that purchased securitized notes pertaining to residential mortgage-backed securities (“RMBS”) issued by trusts. The institutional trustees for those trusts, not the individual note holders, are the policyholders. Movants are not policyholders of either the Segregated Account involved in the subject rehabilitation proceeding or the General Account of Ambac, which is not part of the rehabilitation proceeding.

expedited disposition or take other action to otherwise shorten the normal 11-day response period.

This is Movants' second attempt to perfect this appeal. Movants' first effort was summarily dismissed by this Court on May 27th, the day after it was filed, because Movants had improperly filed it before the trial court had rendered its written decision. (Appellants' Appendix ("A-App") 584-88.)

Subsequently, Circuit Court Judge Johnston did exactly as he indicated he would at the end of the hearing on Tuesday, May 25th—namely, on Thursday, May 27, he rendered his final decision in the form of detailed written Findings of Fact and Conclusions of Law. (See OCI's attached Appendix 1-17 (hereinafter "Findings" and "Conclusions").) In those Findings and Conclusions, he—among other things—

1. described Ambac's business and the events leading up to the establishment and rehabilitation of the Segregated Account (Findings ¶¶ 1-5, 19-31);
2. outlined the context and terms of Ambac's proposed settlement with fourteen banks (including OCI's extensive oversight and involvement in negotiations), the independent appraisal by highly respected third-party BlackRock Solutions ("BlackRock"), and the policies at issue (*id.* ¶¶ 6-18);
3. found that "the proposed Bank Group Settlement is a fair and reasonable compromise that will benefit policyholders of both the General and Segregated Accounts" (*id.* ¶ 34);

4. detailed the massive risk of financial and other harm to all policyholders of Ambac and its Segregated Account if the settlement does not close (*id.* ¶¶ 12-15, 18, 34-35; Conclusions ¶ 6(c), (d)); and
5. explained why Movants failed to meet their burden for a preliminary injunction with regard to each of the relevant factors (Conclusions ¶ 6(a) & Findings ¶¶ 5, 7-14; Conclusions ¶ 6(b) & Findings ¶¶ 7, 35; Conclusions ¶ 6(c) & Findings ¶¶ 4, 14, 17-18, 26-27, 34-36; Conclusions ¶ 6(d), (e) & Findings ¶¶ 17-18, 23, 33-36).

Movants make no focused attempt to explain to this Court the basis on which they claim those Findings are clearly erroneous or the Conclusions legally incorrect. Instead, they repeatedly mischaracterize or ignore the Findings, to the detriment of this Court’s review. As one particularly important example, Movants assert without explanation that the “relief [they] request—to enjoin the consummation of the CDS Settlement and the distribution of funds to the holders of the CDS contracts until the Court has resolved [Movants’] appeal—will not harm any of the involved parties.” (Movants’ Br. at 6.) Movants blatantly ignore the trial court’s express Finding to the contrary:

If the bank group settlement is temporarily enjoined, that injunction will likely cause the settlement to fall apart and never close. If the Movants later failed on the merits to obtain a permanent injunction, or were to reconsider their position and cease their pursuit of permanent injunctive relief, the General Account would incur present value Bank Group claims of \$7.7 to \$12.9 billion, according to

BlackRock's appraisal—losses far in excess of the \$4.6 billion capped settlement.

(Findings ¶ 35.) As the trial court properly noted, *any* form of injunctive relief—be it a preliminary injunction at the trial court level or an “Emergency Motion for Injunction Pending Appeal” by this Court—would likely have the same practical effect as a permanent injunction, and thereby subject “Ambac, the Segregated Account, and policyholders [to] a significant risk of harm,” potentially in the billions of dollars. (*Id.* ¶ 6(d).)

In making these and other Findings and Conclusions, the trial court had before it literally hundreds of pages of supporting affidavits and exhibits, not to mention the benefit of a three-hour hearing at which all in attendance were afforded the opportunity to be heard.<sup>2</sup> As described further below, Judge Johnston also had the benefit of roughly two decades of judicial experience with complex insurance matters as the regularly assigned judge for all delinquency proceedings brought under Chapter 645

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<sup>2</sup> Rather than arguing against the Findings and Conclusions below, Movants assert that Judge Johnston's written order is something less than “the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination,” and can therefore be ignored. (Movants' Br. at 20.) This is a desperate and invalid argument. Movants do not, and cannot, claim that any of the Findings and Conclusions are irrational or lacked evidentiary support, and the sheer size of the appendices in this matter shows that the record is “thorough enough to allow [this Court] to analyze” the issues. *In the Interest of Joy P.*, 200 Wis. 2d 227, 241, 546 N.W.2d 494 (Ct. App. 1996).

of the Wisconsin Statutes. This Court should not accept Movants' "emergency" invitation to casually disregard the well-founded Findings and Conclusions of Judge Johnston and imperil a settlement that "will benefit policyholders of both the General and Segregated Accounts by capping potentially massive future losses [at] a substantial discount." (Findings ¶ 34.)

## DISCUSSION

### I. THERE ARE MAJOR PROCEDURAL FLAWS WITH MOVANTS' APPEAL AND INJUNCTION MOTION

#### A. **Movants' Motion for an Injunction Pending Appeal is Premature and Should be Summarily Denied Because They Did Not Properly Seek Injunctive Relief Pending Appeal.**

As detailed more fully in OCI's accompanying Motion to Dismiss Movants' request for relief pending appeal, Wis. Stat. § 809.12 "requires a person seeking relief **to file** the motion in the circuit court first unless it is impractical to seek relief in the trial court" (emphasis added). While there was a brief exchange at the conclusion of the May 25th hearing between Movants' counsel and Judge Johnston about whether Judge Johnston would grant a "stay" pending appeal (A-App. 580-82), that was done prior to Judge Johnston rendering his decision in final written form two days later. Movants never asked the trial court to consider their present request for an injunction pending appeal, and never "filed" any post-decision motion for such relief with Judge Johnston.

Movants' pre-decision, one-sentence oral request for a "stay" was made without a written motion by Movants and without any opportunity for OCI or Ambac to respond. More importantly, Movants did not ask the trial court to consider issuing an affirmative injunction against Ambac and OCI while Movants appeal. Consequently, the trial court has not yet been afforded an opportunity to address the issue or articulate the reasons underlying a discretionary decision by him about such relief, hence depriving this Court of the normal procedure under which it would have the benefit of being able to evaluate the trial court's reasoning and exercise of discretion.

The trial court's verbal denial of the oral request for a "stay" in this case does not mean that it would be "impractical" to first properly seek an injunction pending appeal in the trial court. *See Gaugert v. Duve*, 2000 WI App 34, ¶¶ 4-5, 17-19, 233 Wis. 2d 190, 607 N.W.2d 310 (reciting prior history of case and declining hear a motion for relief pending appeal because it was not impractical to first seek relief in the trial court, even though the trial court had said it would not entertain such a motion and had suggested the parties seek relief in the Court of Appeals). Given the complexity of this case and the multi-billion dollar stakes involved, it would be imprudent for this Court to allow the issue to be addressed on some abbreviated, improper procedural path.

**B. It is Premature to Even Consider Relief Pending Appeal Until After Movants First Properly Perfect a Permissive Appeal of the Trial Court's Non-Final Order Denying Movants' Motion for a Temporary Injunction.**

In its other accompanying motion to dismiss,<sup>3</sup> OCI has set forth the reasons why this Court should dismiss Movants' improper attempt to appeal of right the trial court's non-final denial of Movants' motion below for a temporary injunction. As this Court held in its May 27<sup>th</sup> dismissal of Movants' first defective attempt to appeal, a request for relief pending appeal should not be considered until after the appellants have properly perfected their appeal.

**C. Movants Are Seeking Relief in the Segregated Account Rehabilitation Case to Enjoin a Settlement By and Between Parties Outside the Segregated Account.**

Movants are seeking to use the jurisdiction of the Segregated Account rehabilitation court to enjoin consummation of a settlement between the General Account of Ambac, which is not in rehabilitation, and 14 banks with respect to policies which are in the General Account, not the Segregated Account. It is well-settled that a segregated account in rehabilitation is itself an "insurer." *See* Wis. Stat. § 611.24(3)(e). Ambac remains a separate insurer outside of the Wisconsin rehabilitation proceeding. The trial judge properly found that there was no basis for

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<sup>3</sup> Contemporaneously with filing this Preliminary Objection, OCI filed two separate motions: (1) one to dismiss Movants' improper appeal; and (2) the other to dismiss Movants' premature request to this Court for relief pending appeal.

Movants' request that he extend his jurisdiction in the Segregated Account rehabilitation proceeding to cover challenges to OCI's discretionary decision to approve the settlement *as the regulator* of an insurer that is not in rehabilitation. (Conclusions ¶ 6(a), (c).)

**D. Movants Are Not “Parties” and Do Not Have “Standing”**

Further, as the trial court held, Movants are not parties with the rights accorded litigants in adversarial proceedings. (Conclusions ¶ 8.) Indeed, Movants' appellate submissions create an entirely new and unwarranted caption for the case in which they style OCI as a “Plaintiff/Respondent”; Ambac as an “Other Interested Party/Respondent”; themselves as “Defendants/Appellants”; and certain other non-parties as “Defendants.” In fact, the proper caption of the Segregated Account Rehabilitation proceeding has no such designations.

Even if Movants were “policyholders,” which they are not,<sup>4</sup> policyholders are not parties with a right to judicial review in insurance rehabilitation proceedings. As the trial court held at Conclusion of Law No. 8, Chapter 645 of the Wisconsin Statutes—which governs insurance delinquency proceedings in this state—grants no right of standing to third parties (such as policyholders or creditors) to intervene and pursue discovery or obtain judicial review of decisions of the Commissioner in

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<sup>4</sup> See footnote 1, *supra*.

administering the rehabilitation of the insurer. The absence of such a right in the language of the rehabilitation statutes is particularly important because Chapter 645 *does* expressly allow judicial review for “any person whose interests are substantially affected” in other types of proceedings, such as summary orders made without hearings. Wis. Stat. § 645.21(4). Movants do not mention, let alone justify, their attempt to contravene the well-established axiom of statutory construction that “where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.” 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 46:5 (7<sup>th</sup> ed. 2007).

The Wisconsin Legislature’s decision to limit the right to judicial review in Chapter 645 proceedings reflects the overarching remedial public purposes of the proceedings available under that chapter: “the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors[.]” Wis. Stat. § 645.01(4). It is not an adversarial proceeding to adjudicate the diverse and divergent interests of each policyholder, but rather a formal remedial measure to “rehabilitate the business of a domestic insurer.” Wis. Stat. § 645.32(1). Accordingly, rehabilitation is “a very flexible procedure” that is “regarded as a management rather than a legal task. . . . [The rehabilitator] must act under the supervision of the court, of course, but the court’s control should be liberal, not strict, and should be

provided without cumbersome procedures.” Wis. Stat. Ann. § 645.32 cmt. Giving each and every one of the policyholders in the Segregated Account the full-fledged rights of a party—such as rights to discovery, to formally second-guess or attempt to dictate each decision that the Rehabilitator makes, and then to formally second-guess the trial court’s approval or disapproval of those decisions—would stifle efforts to “reform and revitalize the insurer,” Wis. Stat. § 645.33(2), by transforming orderly rehabilitation proceedings into an endless series of protracted legal battles.

In sum, the Wisconsin legislature has granted OCI “considerable discretion” to take the actions it deems necessary to protect policyholders and the public when confronted with a distressed insurer. Wis. Stat. Ch. 645, Subch. III, introductory cmt. The Legislature also has granted broad discretion to the trial court to authorize such actions by OCI, and it has limited the ability of outside parties to challenge those discretionary determinations.

**E. The Trial Court Did Not Abuse its Discretion in Denying Movants’ Motion to Intervene.**

At Conclusion of Law No. 9, the trial court held that because Movants did not satisfy the requirements for intervention under Wisconsin law, their motion to intervene in this proceeding was denied. It would be premature for this Court to even consider the merits of Movants’ motion for the extraordinary relief of an injunction pending appeal without first

determining whether Movants' request to intervene was properly denied, whether Movants have standing, and whether there is a meritorious basis on which to grant them the right to pursue a permissive appeal regarding the trial court's denial of their motion for a temporary injunction.

While not directly related to their present motion for injunctive relief, which is not properly before the Court, it is nevertheless worth noting that the trial court's denial of Movants' motion to intervene was proper. Movants claim that they were entitled to intervene as of right pursuant to Wis. Stat. § 803.09(1) (Movants' Br. at 22-24),<sup>5</sup> but, as noted above, no such right exists in rehabilitation proceedings under Chapter 645. Section 803.09 does not apply to this type of special proceeding under Wisconsin law.

Further, even if intervention of right could be obtained in rehabilitation proceedings, the trial court's denial was proper. To meet the standard for intervention of right, Movants must prove that "the existing parties do not adequately represent [their] interests." *Helgeland v. Wis. Municipalities*, 2008 WI 9 § 38, 307 Wis. 2d 1, 745 N.W.2d 1. It is OCI's duty to protect the interests of policyholders and creditors of distressed insurers. Wis. Stat. § 645.01(4). As the trial court reiterated several times,

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<sup>5</sup> Movants raised this argument for the first time in reply briefing on their motion at the trial court. *Compare* A-App 303-08 (Motion to Intervene) *with* A-App 447-50 (Movants' arguments in reply regarding intervention).

OCI is adequately doing so by acting for the benefit of all policyholders, including Movants, including authorizing the actions Movants now challenge. (Findings ¶¶ 17-18, 26, 34-36.)

As the Wisconsin Supreme Court recently noted, “absent some showing to the contrary, we presume that [state officials] will fulfill their duties under the law,” thus rendering intervention unnecessary. *Helgeland*, 2008 WI 9, ¶ 108. Movants have not attempted to make such a showing here, instead making the assertion that because OCI did not agree with their position regarding the settlement, OCI is *per se* failing to adequately protect their interests. (Movants’ Br. at 23.) Movants’ argument has been flatly rejected by the Wisconsin Supreme Court, which held that mere disagreements regarding the means to accomplish the same goal do not give rise to a “per se” right to intervene. *Helgeland*, 2008 WI 9, ¶¶ 110-14. *See also Sewerage Comm’n of Milwaukee v. Wis. Dep’t of Natural Resources*, 104 Wis. 2d 182, 189, 311 N.W.2d 677 (Ct. App. 1981).

Therefore, to the extent relevant to the present motion (bearing on the likelihood-of-success criteria), the trial court did not abuse its discretion in holding that Movants failed to meet the requirements for intervention of right.

**II. THERE IS NO MERIT TO MOVANTS' ARGUMENTS REGARDING THE BANK SETTLEMENT OR INJUNCTIVE RELIEF.**

Movants have no reasonable basis in fact or law for pursuing this appeal, much less seeking the extraordinary relief of an injunction from this Court that could cause direct monetary damages to the Segregated Account and Ambac of up to \$9.3 billion. (Findings ¶¶ 21, 35.) Movants' request is particularly outrageous because they are openly refusing to bond any portion of those damages.

**A. The Trial Court Correctly Found That The Ambac Settlements Did Not Require Court Approval.**

Movants argue that, under Wis. Stat. § 645.33(2), court approval is required before Ambac and the Bank Group may consummate their settlement. Movants are mistaken. Section 645.33(2) provides, in relevant part: "Subject to court approval, the rehabilitator may take the action that he or she deems necessary or expedient to reform and revitalize the insurer." *Id.* (emphasis added).

Because the Segregated Account is a separate "insurer" under Wisconsin law, *see* Wis. Stat. §§ 611.24(e), 645.03(1)(f), the "insurer" referenced in section 645.33(2) is the Segregated Account. Moreover, the "rehabilitator" in that section refers to OCI, acting in its role as rehabilitator of the Segregated Account—the only "insurer" subject to this rehabilitation proceeding. Thus, the court approval requirement relates to actions taken

by OCI, in its role as rehabilitator, to reform and revitalize the Segregated Account.

Here, the Movants are seeking to enjoin OCI, acting *in its role as regulator of Ambac*, from approving the bank group settlement, which relates to policies that are in Ambac's General Account, *not* in the Segregated Account. Thus, on its face, section 645.33(2) does not apply to the transaction the Movants seek to enjoin.

Moreover, even if there were a basis to require court approval, the trial court considered in detail the submissions of the parties, including the Affidavit of OCI's Roger Peterson, which discussed in detail the complex and competing considerations that OCI weighed in deciding to give its regulatory support to the settlement. In denying the Movants' emergency motions, the trial court referenced the deference to be accorded to OCI and declined to second-guess OCI's regulatory decision-making. (Conclusions ¶ 6(c).) Thus, even if court approval of the Bank Group Settlement were required, the trial court's refusal to enjoin that settlement constitutes such approval.

**B. Even If Court Approval Were Required, The Trial Court Correctly Found That OCI's Approval Of The Settlement Was Proper.**

In determining whether Movants satisfy all of the criteria for the extraordinary relief of obtaining an injunction, particularly one issued in connection with an improperly perfected appeal, OCI urges this Court to

carefully review the evidentiary record and legal submissions before the trial court by OCI and Ambac. It is respectfully submitted that those submissions demonstrate the overwhelming weight of facts and law against Movants on each of the applicable criteria for obtaining an injunction in either the trial court or this Court (preserving the status quo, likelihood of success, balance of harms, irreparable injury and the public interest). OCI will not restate those arguments at length here because they are thoroughly explicated in the materials submitted and argued before the trial court which are now before this Court in the appendices. OCI will however, briefly outline a number of substantive flaws with Movants' positions that render their request for injunctive relief pending appeal inappropriate.

**1. Movants fail to recognize the deference owed to decisions of OCI and the trial court.**

Although Movants' position is expressly premised on second-guessing the judgment of OCI, as Ambac's regulator, and the Commissioner, as Rehabilitator of the Segregated Account, they have made no effort in either their trial court submissions or their appellate submissions to acknowledge the well-settled Wisconsin law regarding the strong deference owed to decisions by OCI and the Commissioner. *See Nat'l Motorists Ass'n v. Office of Comm'r of Ins.*, 2002 WI App 308, ¶ 25, 259 Wis. 2d 240, 655 N.W.2d 179 (“[W]e may reverse OCI’s discretionary decision . . . only if it is arbitrary and capricious. An agency decision is

arbitrary and capricious if it lacks a rational basis.”) (internal citation omitted). *See also* Wis. Stat. § 227.57(8), (10). OCI is also afforded particular deference in the course of insurance delinquency proceedings. *See, e.g., Matter of Mills v. Fla. Asset Fin. Corp.*, 818 N.Y.S. 2d 333, 334 (N.Y. App. Div. 2006); *LaVecchia v. HIP of N.J., Inc.*, 734 A.2d 361, 364 (N.J. Super. Ct. Ch. Div. 1999); *Minor v. Stephens*, 898 S.W.2d 71, 76 (Ky. 1995); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1092 (Pa. 1992); 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 5:22 (3d ed. 2008) (noting the “broad discretion” of the rehabilitator).

Nowhere in either the trial court proceedings nor in the recent appellate submissions do Movants argue, much less demonstrate, that OCI’s approval of the transaction which Movants seek to enjoin was “arbitrary and capricious.” An accurate factual and procedural view of the underlying Segregated Account rehabilitation proceeding and OCI’s regulatory oversight of Ambac is set forth in the trial court’s Findings and Conclusions, which are well grounded in the evidentiary submissions before it from OCI and Ambac.

Perhaps for this reason, Movants do not challenge OCI’s decisions as arbitrary, but rather attempt to assume OCI’s role for themselves. Movants grandly purport to represent not only their own hedge funds, but also “other Ambac policyholders” (Movants’ Br. at 6), “the interest of all policyholders” (Movants’ Br. at 27), the Circuit Court in

providing it “sufficient information to review and determine whether to approve the actions of OCI” (Movants’ Br. at 21), the State of Wisconsin (Movants’ Br. at 26), and “the general public” (Movants’ Br. at 6). Movants even claim that their motion is an attempt “to assist OCI’s efforts to rehabilitate” the insurer. (Movants’ Br. at 27.)

Movants all but ignore the fact that it is *the Commissioner* that the Wisconsin legislature tasked with protecting the interests of policyholders, creditors, and the public, Wis. Stat. § 645.01(4), not a self-anointed group of hedge funds. It is *the Commissioner* who is responsible for seeking the trial court’s approval of certain actions related to the rehabilitation and providing information to the court, and, if the court finds it insufficient or incomplete, for following the court’s instructions regarding that deficiency. Wis. Stat. § 645.33. It is *the Commissioner* who is an officer of the State of Wisconsin, bound to act in accordance with its laws and interests.

No matter how often they attempt to blur these distinctions, both their original trial court submissions and now their appellate submissions make clear that Movants seek to advance only their own narrow financial interests. As demonstrated in the evidentiary record developed by OCI and Ambac below, the self-serving leverage that Movants seek to obtain through their “Emergency Injunction” efforts would, if granted, cause potentially catastrophic damages of up to \$9.3

billion to Ambac and the Segregated Account. (Findings ¶¶ 21, 35.) Those damages would directly harm the thousands of true policyholders of the Segregated Account and Ambac, as well as creditors and the public.

Movants also ignore the considerable discretion owed to the trial court. “It is a basic rule that the granting or refusal of a temporary injunction is a matter lying within the discretion of the trial court and its determination will not be upset unless an abuse of discretion is shown.” *Join Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass’n*, 70 Wis. 2d 292, 308, 234 N.W.2d 289, 299 (1975). Similarly, the “scope of review in rehabilitation proceedings is specific and limited to the question of whether the [trial] court abused its discretion.” *Foster v. Mut. Fire, Marine & Inland Ins.*, 676 A.2d 652, 657 (Pa. 1996); *see also Minor*, 898 S.W.2d at 75 (“[R]ehabilitation and liquidation of an insolvent insurance company is a special statutory proceeding and . . . the application and utilization of special statutory rules may be left largely to the supervision of the trial judge in the exercise of sound judicial discretion.”).

Finally, it bears noting that the trial court judge whose interlocutory decision Movants fault has specialized knowledge in the field of insurance law. By statute, all Wisconsin delinquency proceedings involving insurance companies (summary orders, rehabilitation and liquidation) must be commenced in the Dane County Circuit Court or the circuit court for the county where the insurer is located. *See Wis. Stat.*

§ 645.31. Because of the extraordinarily specialized and time-consuming nature of such proceedings—much like major federal Chapter 11 bankruptcy reorganization cases—the Chief Judge for the 5th Judicial Administrative District began assigning all such cases to Judge Johnston (who normally sits as the sole Circuit Court Judge of the Circuit Court of Lafayette County) dating back almost 20 years ago. Approximately a decade ago that informal tradition was reduced to a standing order. (Segregated Account Docket 7, at Tab A.) Consequently, for two decades, Judge Johnston has been handling all of these demanding insurance proceedings and has developed substantial, recognized expertise as a judicial expert in the field. While this Court must always give substantial deference to the trial court as to the types of discretionary decisions about injunctive relief that Movants raise here, such deference is especially appropriate here in light of Judge Johnston’s special expertise.

**2. Movants do not show a likelihood of success on the merits.**

Movants boldly assert that “it is likely [they] will prevail on appeal,” but they never really explain how, at least not on an issue that would entitle them to the relief they currently seek. They do not contest any of the court’s findings of fact leading to its conclusions that the bank group settlement serves the best interests of policyholders and that Movants failed to meet the requirements for injunctive relief. They do not contend

that OCI acted arbitrarily and capriciously in its approval of Ambac's settlement with the Bank Group.

Movants *do* argue that the settlement requires court approval, evidence, and an opportunity to be heard (Movants' Br. at 16-24), but they fail to argue that any of these purported requirements were not met here. Nor could they. As reflected in the appendices, the trial court received multiple affidavits, exhibits, and briefs regarding the bank group settlement, held a lengthy open hearing at which some 22 attorneys entered notices of appearance and were afforded an opportunity to be heard, and ultimately agreed with OCI that the settlement was in the best interest of policyholders and the public. (A-App 215-583; R-App 1-124; Findings ¶¶ 34-35 & Conclusions ¶ 6(c).)

Moreover, the three alleged "requirements" that Movants cling to as the basis for optimism on appeal are not requirements at all under the circumstances at issue here. First, as noted above, court approval of a transaction between an insurer that is not in rehabilitation and the holders of policies that are not subject to a rehabilitation proceeding is not required. *See supra* Part II.A. Second, even if such approval were required, intervention and an opportunity for discovery are not.

Movants' challenges on these points are virtually indistinguishable from those at issue in another rehabilitation case arising in a state with virtually identical rehabilitation statutes to those of Wisconsin.

In *O'Neal v. Oxendine*, 514 S.E.2d 908 (Ga. App. 1999), the rehabilitator for an insurer reached an agreement that would eliminate the rehabilitating insurer's policy obligations through reinsurance. *Id.* at 909. The rehabilitator sought court approval of the transaction.<sup>6</sup> *Id.* Prior to the hearing on the rehabilitator's motion for approval, O'Neal—a creditor of the insurer—moved to intervene, moved for discovery relating to the transaction “to enable him to determine whether approval of the reinsurance agreement was fair and in his best interest,” and appeared at the hearing to argue that approval should be delayed to allow discovery into the fairness of the transaction. *Id.* at 909-10.

The rehabilitation court refused to permit discovery, denied the motion to intervene, agreed with the rehabilitator that the transaction was “fair and equitable to all parties in interest and calculated to maximize the value accorded to creditors.” *Id.* at 910 (internal quotation omitted). The Georgia Court of Appeals affirmed the rehabilitation court's decision to approve the transaction and deny O'Neal's motions for intervention and discovery, on grounds that are equally relevant to Movants' appeal:

[T]he trial court was faced with several considerations. First, and perhaps most important, [the reinsurer] was entitled to

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<sup>6</sup> Unlike here, the agreement in *Oxendine* was between the insurer in rehabilitation and a reinsurer. *Id.* Therefore, court approval was required. Ga. Code § 33-17-13.

terminate the reinsurance agreement if it was not consummated by March 1, 1998, and any delay in approval of the agreement could have jeopardized the ability of the Commissioner to close the transaction in a timely manner. Moreover, requiring [the reinsurer] to submit to depositions and produce all documents relating to the proposed agreement, as requested by O'Neal, could have affected [the reinsurer's] willingness to consummate the transaction. In denying O'Neal's motion, the trial court indicated it was "hesitant" to do anything to jeopardize the transaction.

In addition, O'Neal failed to provide the trial court with any concrete basis to expect that allowing discovery was likely to lead to evidence that would affect the trial court's decision as to whether to approve the reinsurance agreement. Indeed, O'Neal's attorney admitted that the reinsurance agreement proposal might be in the best interest of the parties, and that he simply wanted to conduct discovery to be able to make an informed decision about whether to support the agreement. Combined with the fact that O'Neal did not seek an expedited hearing so that the discovery motion could be considered well in advance of the approval hearing, this clearly authorized the trial court to conclude that the possible benefits of allowing discovery were outweighed by the danger of delay, particularly in light of the Commissioner's evidence regarding the deteriorating financial condition of the company and the adverse consequences of rejecting the reinsurance agreement. . . .

Although the court technically "denied" the motion to intervene, it allowed O'Neal to participate fully in the approval hearing and to raise objections to the reinsurance agreement. Although O'Neal elected to present no testimony in opposition to the approval motion,

he was not prevented from doing so by the trial court. Accordingly, he has not shown how he has been harmed by the denial of his motion to intervene.

*Id.* at 911-12.

Movants here made virtually the same requests as O’Neal. Judge Johnston afforded Movants the same opportunities to be heard as O’Neal, and the same “danger of delay” exists here as it did in the Georgia rehabilitation proceeding. Movants can hardly proclaim a likelihood of success on appeal when the most analogous decision on the books squarely rejects the very challenges they raise, especially when the one distinguishing fact in that case—that the transaction at issue there was between an insurer *in rehabilitation* and another party, and therefore required court approval—only buttresses the conclusion that Judge Johnston and OCI gave Movants even more process than was required under the circumstances.

**3. Other factors support the denial of injunctive relief.**

In addition, all of the other factors relevant to the grant or denial of injunctive relief weigh against Movants. First, as noted in Judge Johnston’s Findings, the Bank Group Settlement is a continuation of Ambac’s business practice of negotiating commutations when warranted, subject to OCI’s regulatory approval. (Findings ¶¶ 5-7.) Enjoining that

practice and plunging into protracted litigation with the bank group members would alter the *status quo*, not preserve it. (Conclusions ¶ 6(a).)

Second, the “irreparable harm” alleged by Movants is neither irreparable nor harmful. The claims are not irreparable in that they are clearly measurable in money damages (the money paid out in accordance with the settlement, which would be returned to the General Account), and “the Bank Group members clearly are collectible as to the amounts at issue.” (Conclusions ¶ 6(b).) Further, Movants’ claim of harm to them is purely speculative, as they concede: “The loss of some or all of the \$2.6 billion in cash and \$2 billion in notes *could* irreparably harm” them by putting the claims-paying resources of the Segregated Account “at risk.” (Movants’ Br. at 15.) But the trial court found that a failure to consummate the settlement put those resources at much greater risk (Findings ¶¶ 34-35), and Movants do not refute that risk in their briefing regarding the injunction bond issue (Movants’ Br. at 26-28).

Third, an injunction would harm the public interest, not help it. In approving the Bank Group Settlement and taking other actions related to Ambac and the Segregated Account, OCI evaluated a number of options, retained a number of professional consultants and advisors, met with business and economic leaders, and took numerous precautions to protect the public from needless collateral damage on account of Ambac’s financial condition. (Findings ¶¶ 17-36.) Movants, on the other hand, point to no

support for their bald assertion that failing to grant an injunction would “jeopardize Wisconsin’s policy of promoting business growth.” (Movants Br. at 26.) OCI is responsible for protecting the public interest in this and other insurance-related matters, and it has diligently done so here.

### **III. MOVANTS HAVE NO RIGHT TO AN INJUNCTION WHILE REFUSING TO POST A BOND.**

Movants urge this Court to dispense with the statutory mandate that injunctions “shall be” conditioned on posting an appropriate bond by making four disingenuous arguments: (1) having *Ambac* post a \$2.6 billion bond, rather than Movants, is somehow appropriate and would “fully protect the parties if the [Movants’] appeal is unsuccessful” (Movants’ Br. at 27); (2) OCI’s application for and the trial court’s grant of first-day injunctive relief in furtherance of the rehabilitation, as authorized by Chapter 645 on the Commissioner’s official bond, Wis. Stat. §§ 645.05, 645.08, somehow gives Movants the right to obtain injunctions without bond in order to “assist OCI’s efforts to rehabilitate [*Ambac*]” (Movants’ Br. at 27; (3) their motion for an injunction pending appeal is subject to the \$100 million cap on an undertaking for a “stay [of] execution of the judgment during appellate review,” Wis. Stat. § 808.07(2m)(a) (Movants’ Br. at 28); and (4) that because the bond would be substantial, the Court is authorized to relieve them of their bond obligations (*id.*).

Movants are incorrect on all four points. First, as the trial court noted, even a temporary injunction would likely “cause the settlement to fall apart and never close,” resulting in costly, slow-moving litigation with the bank group, uncertainty and instability for the General and Segregated Accounts, detrimental delays for all policyholders, and up to \$12.9 billion in additional claims against Ambac and/or the Segregated Account. (Findings ¶¶ 17-18, 34-35.) Ambac, the Segregated Account, their policyholders, and the public would suffer the devastating consequences of a wrongly issued injunction. Having Ambac put \$2.6 billion in escrow as a bond against harm to itself makes no sense and does not protect holders of the other 15,000 policies if the injunction causes the transaction to fall apart and causes up to \$12.9 billion in additional claims.

Second, while Chapter 645 authorizes the Rehabilitator to obtain injunctions in furtherance of the rehabilitation on his official bond, nothing in that chapter permits Movants to dispense with statutory bond requirements regardless of whether they believe an injunction *against* an OCI-approved transaction would somehow “assist OCI’s efforts” in the rehabilitation. (Movants’ Br. at 27.)

Third, Movants are seeking the grant of an injunction, not a stay of execution of a judgment pending appeal, despite their argument to the contrary at the trial court (*see* accompanying Motion to Dismiss) and despite framing their motion in terms of the requirements for a stay pending

appeal rather than an injunction (Movants' Br. at 13 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995), a stay-pending-appeal case). Therefore, by its terms, the \$100 million cap in Wis. Stat. § 808.07(2m)(a) for undertakings "in order to stay the execution of the judgment during appellate review" does not apply.

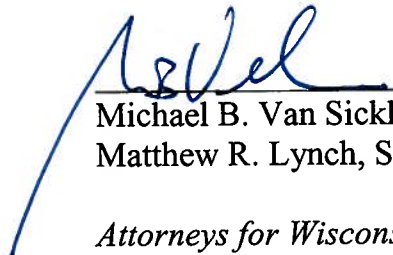
Finally, Movants argue that they should not have to post a bond to protect the interests of the many thousands of actual policyholders because, requiring a bond would unfairly "stifle" Movants' ability to appeal, citing *City of Williamsport v. United States*, 273 F. Supp. 899, 904 (N.D. Pa. 1967). *Williamsport* offers no support for Movants' novel argument. The narrow holding in that case is that a federal railroad may seek review of an adverse decision by the Interstate Commerce Commission without posting a bond because of a special federal statutory provision which permits that procedure. *Id.* Movants cite no similar Wisconsin provision that relieves them of the duty to provide a bond here.

## CONCLUSION

For the foregoing reasons, OCI respectfully requests that this Court deny Movants' Motion for Injunction Pending Appeal. OCI reserves the right to present a fuller response within the time permitted by Wis. Stat. § 809.14(1).

Dated this 1st day of June, 2010.

FOLEY & LARDNER LLP



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## **APPENDIX TABLE OF CONTENTS**

Findings of Fact and Conclusions of Law Regarding Motions of Certain RMBS Policyholders and Certain LVM Bondholders (dated May 27, 2010)	OCI App. 0001
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10 MAY 27 PM 1:14

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

CIRCUIT COURT  
DANE COUNTY, WI

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
REGARDING MOTIONS OF CERTAIN RMBS POLICYHOLDERS AND  
CERTAIN LVM BONDHOLDERS**

Before the Court are two motions, entitled "Emergency Motion to Modify Order for Temporary Injunctive Relief Filed by Certain RMBS Policyholders and Motion Seeking Expedited Relief," filed on April 30, 2010 by a group of owners or managers of funds that own residential mortgage-backed securities ("RMBS") consisting of Aurelius Capital Management, LP, Fir Tree, Inc., King Street Capital Master Fund, Ltd., Monarch Alternative Capital LP, and Stonehill Capital Management LLC (collectively, the "RMBS Movants"); and "Emergency Motion to Enjoin Consummation of the Proposed Settlement Between Ambac and Certain CDS Counterparties," filed on May 5, 2010 by a group of owners or managers of funds and accounts that hold Las Vegas Monorail Project Revenue Bonds (the "LVM Bonds") consisting of Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners L.P. (collectively, the "LVM Movants").

These motions were heard by this Court May 25, 2010. Many submissions have been filed with this Court supporting or opposing these motions. These submissions have been reviewed by the Court. At the May 25, 2010 hearing, all parties were presented the opportunity to be heard on the motions. Upon this record, this Court determines that the submissions of fact and law presented by the Wisconsin Office of the Commissioner of Insurance and Sean Dilweg,

Commissioner of Insurance of the State of Wisconsin as Rehabilitator of the Segregated Account of Ambac Assurance Corporation; by the Bank Insureds of financial guaranty insurance policies issued by the Ambac Assurance Corporation; and Ambac Assurance Corporation, all are adopted and made those of this Court.

For the reasons described herein, both motions are DENIED in their entirety.

### **FINDINGS OF FACT**

#### **BACKGROUND**

1. Ambac Assurance Corporation ("Ambac") is a Wisconsin-domiciled insurer authorized to transact surety and financial guaranty insurance. Through 2008, Ambac offered financial guaranty insurance on investment-grade municipal finance and private structured debt obligations, such as municipal bonds and RMBS.

2. Ambac also guaranteed some structured finance debt obligations indirectly, whereby a non-insurance, wholly owned Ambac subsidiary would enter into a credit-default swap ("CDS") with a counterparty that protected the counterparty from defaults of the underlying security issuer, and Ambac would, in turn, guarantee the financial obligations of its subsidiary. Some of the CDS transactions Ambac guaranteed included collateralized debt obligations of asset-backed securities ("ABS CDOs"), which are pools of securities backed by bundles of receivables such as mortgages.

3. Starting in late 2007, Ambac's financial stability began to deteriorate as RMBS and other financial instruments it insured or invested in suffered significant actual and expected future losses. Ambac's actual and expected losses continued to grow in 2008 and 2009, and downgrades in Ambac's credit ratings caused it to cease writing new policies and begin a

functional run-off of its business. In 2009 alone, Ambac made approximately \$1.6 billion in gross claims payments, with the vast majority related to RMBS obligations.

4. Throughout the past two-plus years, oversight of Ambac by the Wisconsin Office of the Commissioner of Insurance ("OCI") has been increasingly extensive. As Ambac's condition began to deteriorate in late 2007, OCI increased its regulatory oversight of Ambac's capital position, financial health, and business activities, and that oversight continued to increase as Ambac's financial situation worsened in 2008 and 2009. OCI retained financial advisors and legal counsel with expertise pertaining to the specialized types of policies written by Ambac, the financial guaranty insurance business, restructuring, and Wisconsin insurance law. By 2009, OCI and its advisors were working on Ambac-related matters on essentially a daily basis. Its determinations are grounded in the literally thousands of hours of professional time that its senior staff and outside legal and financial advisors have spent in regard to the complex regulatory and restructuring challenges posed by OCI's statutory mandate to protect policyholders, creditors, and the public in light of Ambac's financial condition.

#### **COMMUTATIONS, ABS CDO EXPOSURES, AND THE BANK SETTLEMENT**

5. In 2008 and 2009, Ambac engaged in discussions with various policyholders regarding bilateral restructurings and commutations, several of which resulted in successful commutations that removed troubled policies from Ambac's books for a percentage of their projected ultimate expected losses. Ambac made approximately \$1.8 billion in commutation payments in 2008 and another \$1.4 billion in commutation payments in 2009, which were vetted and "non-disapproved" by OCI under Wisconsin insurance law. While these "one-off" commutations were alone insufficient to resolve the challenges facing Ambac, they did improve its financial condition.

6. Engaging in such negotiations with all Ambac policyholders and beneficiaries was impractical for a number of reasons. Ambac has almost 15,000 policies across approximately 20 distinct exposure categories. There is no practical way to identify the holders of some types of policies, such as those insuring non-publicly traded securities or those held by intermediate trustees. Further, any non-confidential discussions with policyholders would have greatly enhanced the risk that parties would have exercised certain triggers in their contracts with Ambac, which would have had a disastrous effect on Ambac's financial condition. Therefore, such discussions were generally limited to policyholders or groups of policyholders that were readily identifiable by Ambac, well-organized, and which agreed to conduct all negotiations pursuant to written confidentiality agreements.

7. In the fall of 2009, Ambac became aware that several large financial institutions that are parties to CDS in respect of ABS CDOs were forming a group (the "Bank Group") to negotiate with Ambac regarding a global commutation of those exposures. The Bank Group eventually consisted of 14 financial institutions that, together with their direct affiliates, are among the largest financial institutions in the world. Ambac had previously engaged in negotiations for bilateral "one-off" commutations with some of those institutions, and it renewed those talks with an eye toward global settlement. As the negotiations continued into late 2009 and early 2010, OCI took an active role in overseeing, evaluating, and facilitating discussions between Ambac and the Bank Group.

8. A compromise between Ambac and the Bank Group was and remains important to the financial condition of Ambac and the interests of policyholders. Absent a global commutation with the Bank Group, OCI projects that ABS CDO exposures are likely to experience the greatest losses of all Ambac exposures—materially greater than even the troubled

RMBS book. Various loss exposure estimates available to OCI during the negotiations with the Bank Group all showed dramatic increases in the estimated amounts of economic loss projections. Of further concern, the ABS CDO structures are particularly sensitive to increases in interest rates, such that even a one percent increase in such rates could significantly add to such losses. The existence of contractual triggers allowing policy beneficiaries to terminate the CDS contracts and seek "mark-to-market" damages upon certain Ambac-related conditions or events added uncertainty to the size and timing of such losses.

9. A threshold challenge in negotiations was the uncertainty and disagreement between Ambac and its advisors, on the one hand, and the Bank Group and its advisors, on the other hand, as to the range of projected economic and market value losses for the ABS CDO policies. To resolve that problem, Ambac and the Bank Group sought to identify a highly qualified, independent professional organization with recognized expertise concerning complex ABS CDO transactions to perform a neutral appraisal of Ambac's ABS CDO book of business on a deal-by-deal basis.

10. After vetting the alternatives, Ambac and the Bank Group selected BlackRock Solutions ("BlackRock"). BlackRock was selected because of its expertise in valuing the securities comprising ABS CDOs and its previous experience in performing neutral appraisals in situations where other monoline financial guarantors like Ambac sought to commute their troubled ABS CDO policies. OCI was comfortable with the choice of BlackRock as an independent appraiser.

11. BlackRock finished its appraisal in early 2010. The appraisal analyzed each of the transactions in detail, on a deal-by-deal basis, and made its valuations of the Bank Group's claims under three different scenarios: "base case," "stress case," and "mark-to-market" or

“market value” case. The “base case” valuation relies on certain economic assumptions based on statistics that were prevailing at the time the analysis was performed. The “stress case” valuation is based on the assumption that actual economic conditions would be worse than the industry statistics used in the base case. The “mark-to-market case” determines the value of the Ambac policy based on an estimate of the value of the ABS CDO being analyzed, using a mid-market fair value. A mark-to-market payment would arise if the Bank Group successfully exercised termination rights and received market-value based termination payments. BlackRock discounted the base and stress case scenarios to present value using a discount rate equivalent to the interest rate on the related debt obligation issued by the ABS CDO and specified in the relevant CDS contract.

12. BlackRock’s aggregate valuations of the loss estimates for the 17 deals at issue were as follows: base case – \$8.668 billion; stress case – \$10.361 billion; and market value case – \$12.863 billion. Applying a 5.1% discount rate consistent with Ambac’s statutory accounting requirements to the base and stress case valuations (rather than the obligation-specific discount rates employed by BlackRock), the base case valuation is \$7.684 billion and the stress case valuation is \$9.186 billion.

13. Based on their extensive evaluation of CDO ABS exposures over time, OCI and its financial advisors believe that the BlackRock appraisals are fair and reasonable estimates for the purpose of making informed regulatory decisions. These independent BlackRock appraisals were not out of line with the loss expectations OCI developed based upon its own concurrent and ongoing assessment of Ambac’s ABS CDO book, though OCI and its financial advisors predict that actual losses are more likely than not to develop above the levels projected by BlackRock

due to the potential for greater than anticipated collateral deterioration and increases in interest rates, among other factors.

14. On March 24, 2010, after months of protracted, arm's-length negotiations between Ambac and the Bank Group (with OCI playing an increasingly active role), Ambac and the Bank Group entered a non-binding statement of intent to commute all Ambac's outstanding CDS in respect of ABS CDOs (the "Bank Group Settlement"). In exchange for commuting \$16.5 billion in net par exposure, with an appraised present value of \$8.7 to \$12.9 billion (\$7.7 to \$12.9 billion using a 5.1% discount rate), Ambac would transfer to the Bank Group in the aggregate \$2.6 billion in cash and \$2 billion of newly issued surplus notes of Ambac.

15. Averaging the BlackRock valuations under its base, stress, and mark-to-market case scenarios, the Bank Group Settlement would pay the Bank Group 43.3% of expected losses, with 24.5% in cash and 18.8% in notes (46.4% of expected losses, with 26.2% in cash and 20.2% in notes, using a 5.1% discount rate). Even when removing the mark-to-market valuation from the equation, and averaging only the base and stress case scenarios, the Bank Group Settlement would only pay Bank Group members approximately 50% of their anticipated losses, with 27% to 31% in cash.

16. OCI, Ambac, and all members of the Bank Group also entered into an extensive, heavily negotiated 60-day forbearance agreement to preserve the delicate status quo between completion of the non-binding statement of intent and the projected closing of the Bank Group Settlement. After further negotiations, the parties agreed to a short extension of the agreement to allow the present motions to be heard prior to its lapse. OCI believes that further extensions would be difficult to obtain without protracted negotiations and concessions to the Bank Group, and even then might not be possible.

17. In approving the terms of the proposed Bank Group Settlement, OCI considered such variables as whether the Bank Group would succeed in asserting mark-to-market damages, whether the ABS CDO policies could be viewed as subordinate to other policies under Wisconsin law, and the potential delays and risks in litigation involving those issues. These variables were factored into OCI's assessment that the Bank Group Settlement, which is a compromise of many potential litigation considerations and other factors, is fair and equitable to all policyholders.

18. The proposed Bank Group Settlement benefits all policyholders of Ambac's General Account and the Segregated Account. Settling the growing, volatile ABS CDO exposures at a major discount inures to the benefit of all other policyholders by capping those exposures, eliminating the possibility of costly, slow-moving mark-to-market litigation that would reduce recoveries to policyholders in the Segregated Account, impair Ambac's ability to provide continuing coverage to policyholders in the General Account, and delay the ultimate resolution of Ambac's financial situation.

#### ESTABLISHMENT OF THE SEGREGATED ACCOUNT

19. While commutations improved Ambac's financial condition, they alone were insufficient to resolve the mounting financial challenges facing the company. As Ambac's claims payments and projected loss impairments mounted and its liquid claims paying resources were eroded, it became increasingly clear to OCI that some type of affirmative regulatory action under Chapter 645 of the Wisconsin Statutes would be necessary to slow the outflow of claims-paying resources and prevent the exercise of insolvency and *ipso facto* "triggers" by certain categories of policyholders. Absent regulatory action, there was a growing risk that Ambac would become insolvent before its in-force policy obligations were satisfied.

20. Ambac's condition earlier this year left OCI with two realistic regulatory choices: (1) place all of Ambac into a Chapter 645 rehabilitation proceeding, or (2) allow Ambac to establish the Segregated Account, allocate certain troubled policies or policies with triggers to the Segregated Account while leaving most policies in Ambac's General Account, and commence rehabilitation of the Segregated Account.

21. The first option—placing all of Ambac into a Chapter 645 rehabilitation proceeding—carried significant and unnecessary risks of harm to policyholders, which OCI and its advisors referred to as “collateral damage.” The vast majority of Ambac’s policies (more than 14,000 out of nearly 15,000 Ambac policies in force) insured problem-free transactions that were performing, with little or no projected claim impairments. These included the policies insuring notes issued by sizable corporations such as Dunkin’ Brands, Inc. (the franchisor of the Dunkin’ Donuts and Baskin Robbins chains), Sonic Corporation (the franchisor of Sonic drive-in restaurants), and the Hertz Corporation (the owner of the Hertz rental car and equipment rental businesses), who collectively provide employment for more than 380,000 people worldwide. For these and other commercial asset-backed securities transactions (“Commercial ABS”), the filing of a rehabilitation in respect of Ambac could have given these corporate issuers’ lenders the right to withhold financing for the payment on the notes and counterparties the right to accelerate and declare defaults upon certain triggering events could arise due to Ambac’s rehabilitation. Any shortfall in the affected corporate issuers’ ability to make those accelerated damages payments would fall on Ambac, thus harming policyholders as a whole. Ambac alone could experience an excess of \$1 billion as a result of such collateral damage.

22. Other segments of Ambac’s business would be similarly affected, including acceleration of the obligations of Ambac affiliates issuing Ambac-guaranteed interest rate and

currency swaps and investment agreements. For example, a general rehabilitation of Ambac would cause the automatic termination of Ambac-insured interest rate swaps issued by an Ambac affiliate to municipalities. Because the swaps were generally entered some years ago when interest rates were higher, many of those municipalities would owe large, lump-sum payments to Ambac's affiliate upon termination, and that affiliate would in turn owe large lump-sum payments to the financial institutions through which it hedged its obligations. A municipality's inability to pay would cause a mismatch with the amount for Ambac's affiliate with the amount paid to the financial institutions with which it hedged these exposures, resulting in additional claims against Ambac and severe financial hardship for the affected municipality.

23. OCI also received comments from certain economic leaders expressing concern of a systemic risk that placing all of Ambac's policies in rehabilitation could result in market disruption such that trading and refinancing of those obligations could be significantly impaired, with unpredictable risks to the broader economy.

24. Finally, a full rehabilitation would have impaired the ability of Ambac subsidiary Everspan Financial Guarantee Corporation ("Everspan"), a Wisconsin-domiciled insurer, to attain credit ratings sufficient to potentially write new, safe public-finance policies, which have historically represented the core of Ambac's insurance business. Due to the vertical relationship between Everspan and Ambac, the benefits of any future business of Everspan would inure to Ambac policyholders as a whole.

25. The second option—establishing and rehabilitating the Segregated Account, while leaving Ambac's General Account outside the rehabilitation proceeding and subject to continued regulatory oversight—addressed Ambac's clear need for rehabilitation of certain troubled segments of its business while eliminating most of the drawbacks of a full rehabilitation.

26. On March 24, 2010, OCI granted its approval to formally establish the Segregated Account, supported by a \$2 billion secured note and an excess of loss reinsurance agreement from the General Account. In doing so, it made the following findings:

- The Allocation is fairly balanced by AAC's issuance of the Secured Note and Excess of Loss Reinsurance Agreement to the Segregated Account. By the terms of the Secured Note, the Segregated Account may make demands upon AAC under the note as needed to meet its expenses, including the payment of claims due in respect of policy liabilities and other liabilities allocated to the Segregated Account. Should the Segregated Account exhaust resources available under the terms of the Secured Note, the Excess of Loss Reinsurance agreement will attach to cover the Segregated Account's liability under policyholder claims. AAC is obligated to make all payments under the Secured Note and Excess of Loss Reinsurance Agreement unless such payment would cause AAC's surplus to fall below \$100 million, or such higher amount as determined by OCI pursuant to a prescribed statutory accounting practice.
- OCI finds that the creation of the Segregated Account and the Allocation create a fair and appropriate balance between (i) those assets and liabilities allocated to the Segregated Account and (ii) those assets and liabilities remaining within AAC's general account, both at present and according to future projections.
- OCI finds that the creation of the Segregated Account and the Allocation serve the interests of the public and policyholders.
- OCI finds that the creation of the Segregated Account and the Allocation was not done with the intent to hinder, delay, or defraud present or future creditors of AAC, but rather to preserve claims-paying resources for the benefit of all policyholders.
- OCI finds that the creation of the Segregated Account and the Allocation do not constitute fraudulent conveyances within the meaning of Wis. Stat. § 645.52 or the Uniform Fraudulent Transfer Act and its predecessor act, the Uniform Fraudulent Conveyance Act.

OCI's above-quoted findings have strong factual support and are not clearly erroneous or contrary to the weight of the evidence.

27. For several weeks prior to granting its formal approval, OCI worked closed with outside advisors and Ambac to identify those policies with projected impairments and/or triggers that best met OCI's criteria for allocation to the Segregated Account. Ultimately, fewer than 1,000 policies (representing approximately \$67 billion in net par outstanding, including more than \$20 billion in "assumed" or reinsurance exposures) were allocated to the Segregated Account. The RMBS and LVM Movants, whose policies were among those allocated to the Segregated Account, collectively comprise approximately 2% of the net par outstanding of all policies in the Segregated Account.

28. Policies on RMBS were allocated to the Segregated Account because the actual and projected impairments are substantial and short-term. From 2008 through March 24, 2010, Ambac paid over \$2 billion in RMBS policy claims. These substantial claims payments were effectively reducing the cumulative sum of Ambac's claims-paying resources in favor of certain RMBS policyholders with mature claims while leaving insufficient resources to pay in full the many policyholders with longer-tail claims. Absent the claims payment moratorium presently in place with regard to Segregated Account policies, Ambac estimates that it would have paid another \$300 million between March 25, 2010 and April 30, 2010.

29. Policies on the bonds relating to the LVM also fit OCI's criteria for allocation to the Segregated Account. LVM is in serious financial distress and filed for Chapter 11 bankruptcy in Nevada in January 2010. The present value of losses associated with LVM exposure could exceed \$350 million—one of the highest projected individual deal losses in the Segregated Account.

30. Besides the LVM policies, other policies with public-finance components, such as swap sureties and leveraged lease transactions, were allocated to the Segregated Account. They

include forty-two public-finance policies (with an aggregate net par outstanding of more than \$1.1 billion as of December 2009) and more than 150 swap surety policies (with initial notional amounts of more than \$10 billion).

31. More than 14,000 policies remain in Ambac's General Account. Those policies were not allocated because (a) they lacked material projected impairments, (b) the collateral damage of a rehabilitation proceeding as to those policies could outweigh the benefits of allocation, and/or (c) the policyholders (namely the Bank Group) were subject to a forbearance agreement. Since the filing of the Verified Petition, Ambac has paid less than \$10 million in claims with respect to policies in the General Account.

**REHABILITATION PROCEEDINGS AND THE INTERESTS OF POLICYHOLDERS  
AND THE PUBLIC REGARDING THE BANK GROUP SETTLEMENT AND THE  
SEGREGATED ACCOUNT**

32. On March 24, 2010, after the Segregated Account was established and the statement of intent between Ambac and the Bank Group was reached, OCI petitioned this Court for Rehabilitation of the Segregated Account, which this Court granted. The Court appointed Commissioner of Insurance Sean Dilweg as Rehabilitator of the Segregated Account, with all the powers authorized by Chapter 645 of the Wisconsin Statutes.

33. The proposed Bank Group Settlement has been negotiated and reached by the Bank Group and Ambac, with OCI's oversight and involvement in its capacity as Ambac's insurance regulator. The Bank Group Settlement continues Ambac's business practice over the past two years of commuting troubled policies at steep discounts from exposure estimates, with OCI's regulatory involvement and approval, outside of rehabilitation.

34. In light of independent third-party appraisals and OCI's own assessments, the proposed Bank Group Settlement is a fair and reasonable compromise that will benefit policyholders of both the General and Segregated Accounts by capping potentially massive

future losses for a mix of cash and notes representing a substantial discount under all financial scenarios. The Bank Group Settlement also avoids costly litigation and brings greater certainty and stability to the financial condition of the General and Segregated Accounts.

35. If the Bank Group Settlement is temporarily enjoined, that injunction will likely cause the settlement to fall apart and never close. If the Movants later failed on the merits to obtain a permanent injunction, or were to reconsider their position and cease their pursuit of permanent injunctive relief, the General and Segregated Accounts would incur present value Bank Group claims of \$7.7 to \$12.9 billion, according to BlackRock's appraisal—losses far in excess of the \$4.6 billion capped settlement.

36. The formation of the Segregated Account, the allocation of less than 1,000 of Ambac's almost 15,000 policies thereto, and the commencement of this rehabilitation of the Segregated Account was a fair and reasonable response to Ambac's financial condition. It addresses the serious financial hazards the allocated policies presented to Ambac and all of its policyholders (including those allocated to the Segregated Account), maximizes claims-paying resources, and avoids the unpredictable and potentially substantial collateral damage to Ambac, its policyholders, and the public that would accompany a full rehabilitation of Ambac.

#### CONCLUSIONS OF LAW

1. This proceeding pertains to the rehabilitation of the Segregated Account of Ambac Assurance Corporation under Wis. Stat. Ch. 645.
2. The Segregated Account was formed in compliance with Wisconsin law. Wis. Stat. § 611.24(2).

3. For the reasons stated in the Affidavit of Roger A. Peterson and in the above findings of fact, OCI acted well within its discretion in approving the establishment of the Segregated Account.

4. The standards for novation, as recognized by the common law of contracts, are inapplicable to the allocation of certain policies to the Segregated Account, which was statutorily authorized under Wisconsin law. The allocation of policies to the Segregated Account was proper and did not effect an improper novation of contract.

5. The establishment of the Segregated Account was constitutional. For the reasons stated in the Findings of Fact and OCI's opposition brief, the allocation of Movants' policies to the Segregated Account did not effectuate a taking of Movants' property. Movants also had no due process right to notice and a hearing prior to OCI's approval of the Segregated Account.

6. The motions of the RMBS Movants and LVM Movants to enjoin the consummation of the settlement between Ambac and the Bank Group are denied.

(a) Preservation of the status quo allows Ambac to continue to operate the General Account business on a day-to-day basis, including the commutation of policies where warranted, subject to OCI's approval.

(b) Movants have failed to satisfy their burden of demonstrating irreparable harm. Their arguments regarding potential adverse consequences of the Bank Group Settlement on them are too speculative to be accorded weight. Moreover, their claims about the Settlement are measurable in money damages and the Bank Group members clearly are collectible as to the amounts at issue.

(c) Movants also have failed to show a likelihood of success on the merits. OCI has broad discretion to approve or disapprove the Bank Group Settlement under its

general regulatory authority over insurers. *See* Wis. Stat. §§ 601.42, 601.43, and 611.01 through 611.78. This Court is required to give deference to OCI's policy choices and regulatory decisions, as long as it acts within its statutory authority. The Peterson Affidavit shows that deference to OCI is warranted here. Movants have identified no facts to suggest that Ambac or OCI should be enjoined from executing, consummating or approving the Bank Group Settlement, in light of OCI's considered judgment that the Bank Group Settlement is in the best interest of all policyholders, including those whose policies have been allocated to the Segregated Account, and OCI's view that the consideration to be paid to the Bank Group, as a percentage of their projected claims, is substantially less generous than the consideration to be paid to policyholders in the Segregated Account under the expected plan of rehabilitation.

(d) Finally, Ambac, the Segregated Account, and policyholders, would be subject to a significant risk of harm if the Bank Group Settlement did not close, and the Bank Group members exercised their contractual *ipso facto* and insolvency triggers. Movants do not address the issue of the bond needed to support an injunction, but OCI believes that a reasonable bond would be in the billions of dollars. This Court need not determine the appropriate amount of a bond here because the other requirements for injunctive relief are not met.

(e) The relief sought by Movants would disserve the public interest.

7. Accordingly, Movants' motions to enjoin the Bank Group Settlement (or OCI's approval of that Settlement) are denied.

8. Movants' request for discovery also is denied. As policyholders, Movants do not have standing as parties to seek discovery in this rehabilitation proceeding. Moreover, even if

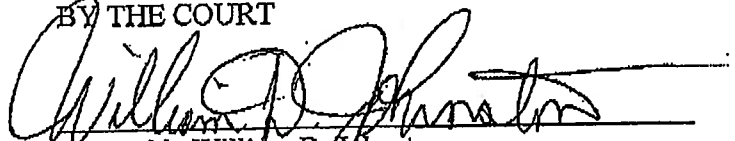
Movants were parties and there were a basis for them to seek discovery in this proceeding, documents relating to OCI's regulatory decision-making are statutory privileged under Wisconsin law. See Wis. Stat. §§ 601.465(1m)(a), (2m)(a). Finally, the discovery Movants seek would be futile because the scope of the Court's review of agency decision-making is very narrow and OCI, in the Peterson Affidavit, has demonstrated a reasoned basis for its actions to address the grave risks posed by Ambac's declining financial situation. As a matter of law, policyholders such as Movants cannot challenge the wisdom of OCI's decision-making, so long as OCI had a rational basis for its regulatory choices.

9. Because Movants have not satisfied the requirements for intervention under Wisconsin law, their motion to intervene in this proceeding is denied.

**WHEREFORE, IT IS HEREBY ORDERED** that RMBS Policyholders' and LVM Bondholders' Emergency Motions for Injunctive and other relief are denied.

Dated this 27<sup>th</sup> day of May, 2010.

BY THE COURT

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

CC: Atty S. Morgan  
 Atty S. Whitmer  
 Atty K. Wisniewski  
 Atty J. Schlicht  
 Atty M. Lynch  
 Atty M. Van Sicken  
 Atty L. Callan  
 Atty RT Muth  
 Atty B. Nowicki  
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Atty N. Pawett  
 Atty D. Greenwald  
 Atty J. Simon  
 Atty P. Trostle  
 Atty D. Cisar  
 Atty S. Lovern  
 Atty C. Struebel  
 Atty D. Walsh

Atty P. Ivanick  
 Atty W. Primps  
 Atty L. Roberts  
 Atty E. Saffitz  
 Atty D. Stolper  
 Atty A. Weiss

done 5/27/10

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