

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

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

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

**BRIEF IN SUPPORT OF MOTION TO DISMISS FREDDIE MAC'S
APPEAL OF THE COURT'S DENIAL OF FREDDIE MAC'S
MOTION FOR A TEMPORARY INJUNCTION**

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The Wisconsin Office of the Commissioner of Insurance, as regulator of Ambac Assurance Corporation (“Ambac”), and the Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator (collectively “OCI”), submit the following brief in support of their motion to dismiss the appeal filed by the Federal Home Loan Mortgage Corporation (“Freddie Mac”) dated June 10, 2010, except insofar as that appeal challenges the circuit court’s denial of their motion to intervene. The other decisions of the circuit court that Freddie Mac purports to raise on appeal—namely, the circuit court’s denial of its motion to enjoin a then-unconsummated settlement between Ambac and several policyholders, and the circuit court’s denial of its motion relating to the establishment of the Segregated Account of Ambac (the “Segregated Account”)—are non-final orders, moot, and/or otherwise fail to meet the standards for permissive appeals. For the reasons described below, they are non-appealable orders that are not properly before the Court on this purported appeal.

PROCEDURAL HISTORY

On March 24, 2010, OCI approved Ambac’s establishment of the Segregated Account pursuant to Wis. Stat. § 611.24(2), including the allocation of fewer than 1,000 of the roughly 15,000 Ambac financial guaranty insurance policies to the Segregated Account. (Appendix to OCI’s Preliminary Objection to RMBS Movants’ Motion for Injunction .

Pending Appeal (“OCI App”) at 12-13, ¶¶ 27, 31.) OCI then petitioned the Dane County Circuit Court for rehabilitation of the Segregated Account pursuant to Chapter 645 of the Wisconsin Statutes. (OCI App 13, ¶ 32.) The circuit court granted the petition and appointed the Commissioner of Insurance as rehabilitator of the Segregated Account. (*Id.*)

This appeal stems from “emergency” motions initially filed in the circuit court by several holders of residential mortgage-backed securities (the “RMBS Movants”) to (1) enjoin a proposed multi-billion dollar settlement between Ambac and fourteen bank policyholders of Ambac, and (2) challenge the establishment of the Segregated Account under statutory, constitutional, and common law. (Appendix to RMBS Policyholders’ Renewed Emergency Motion for Injunction Pending Appeal (“A-App”), at 215-18.) On the day before the hearing scheduled on those motions, Freddie Mac moved to intervene and filed a brief in support of its “partial joinder” in the emergency motions with respect to the request for discovery regarding the bank settlement and the capitalization of the Segregated Account. (*See* brief attached to Freddie Mac’s Petition for Leave to Appeal, at 3-4.)

In an order dated May 27, 2010, the circuit court denied the motions seeking to enjoin the bank settlement and to challenge the establishment of the Segregated Account. (OCI App 1-17.) The circuit

court also denied Freddie Mac's motion to formally intervene in the proceedings. (OCI App 17, ¶ 9.)

Freddie Mac thereafter attempted to appeal from the circuit court's May 27 rulings. They filed a Notice of Appeal on June 10, 2010, which purported to raise five issues on appeal as of right: three issues relating to the circuit court's denial of the motion to enjoin the settlement, one relating to the denial of discovery regarding the formation of the Segregated Account, and one relating to the circuit court's denial of its motion to intervene in the proceedings. (Appellants' Docketing Statement at 2.) On the same date, Freddie Mac also filed a Petition for Leave to Appeal on June 10, 2010 raising the same discovery and evidentiary issues and challenging the circuit court's approval of the settlement. (Freddie Mac's Petition for Leave to Appeal at 5.)

In sum, Freddie Mac seeks review of issues relating to the circuit court's denial of three distinct motions: (1) the motion to enjoin the bank settlement (both by permission and as a matter of right), (2) the motion challenging the establishment of the Segregated Account (both by permission and as a matter of right), and (3) Freddie Mac's motion for intervention (as a matter of right). This brief will address each category of purported issues for appeal in turn.

ARGUMENT

I. The Denial of the Motion to Temporarily Enjoin the Bank Settlement is Not Appealable.

The circuit court's denial of the motion to temporarily enjoin the bank settlement is not appealable, and purported appellate issues pertaining to that decision of the circuit court should be dismissed for two independent reasons.

A. Freddie Mac's Purported Appeal of the Denial of Injunctive Relief is Moot.

Because the bank settlement has now been consummated, any issues relating to Freddie Mac's effort to enjoin that transaction are moot. As set forth in the attached Rehabilitator's Report Regarding Closing of the Bank Group Settlement, which was recently filed with the Dane County Circuit Court along with the accompanying Affidavit of Roger A. Peterson ("Peterson Aff."), the settlement was fully closed and consummated on June 7, 2010. As noted in paragraph 5 of the Peterson Affidavit:

The motions by the LVM Bondholder Group and the RMBS Note Holders to temporarily enjoin the Bank Group Settlement are moot because that Settlement has been fully closed and consummated. There is nothing left to enjoin with respect to the Bank Group Settlement transaction.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Assocs. LLC v. Dep't of Admin.*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. To

determine whether the resolution sought can have any practical effect on the existing controversy, the reviewing court does not address the factual and legal issues underlying the controversy; instead, it considers whether any of the relief sought can now be granted. *Id.* ¶¶ 30-31.

PRN Associates addressed a situation similar to the case at hand. PRN (referred to as “Prism” in the opinion) was an unsuccessful bidder for a State of Wisconsin building contract. While administrative review proceedings addressing PRN’s challenge to the rejection of its bid were pending, the State signed a building contract with another contractor, who ultimately performed the job that PRN had bid. *Id.* ¶ 18. The circuit court dismissed a petition for judicial review challenging the Department of Administration’s action as moot, concluding, *inter alia*, that injunctive relief was unavailable because the contract had already been let to another bidder and performed. *Id.* ¶ 22. The Court of Appeals affirmed, stating that it “cannot unravel a contract when it has already been fully performed,” *id.* ¶ 40, and to permit further litigation that could not result in the relief sought “would amount to an exercise in futility,” *id.* ¶ 48 n.19.

The transaction that Freddie Mac sought to temporarily enjoin in the circuit court was fully closed and consummated on June 7, 2010. (Peterson Aff. ¶¶ 4-5.) Like the contract in *PRN Associates*, there is nothing left to enjoin with respect to that transaction. (*Id.* ¶ 5.) Because the

injunctive relief sought by Freddie Mac is no longer available, its claim is, by definition, moot.

Questions regarding whether the settling banks would have been entitled to policyholder status and claims priority had the settlement not been consummated are also moot, because the settling banks commuted (*i.e.*, cancelled) their policies and released their claims as part of the settlement.¹ As the circuit court noted, the settlement was “a compromise of many potential litigation considerations and other factors.” (OCI App. 8, ¶ 17.) The settlement was entered to avoid the delays and risks involved in such litigation over priority status and other uncertain legal issues (*id.*), and the consummation of the settlement makes it unnecessary to undertake the moot exercise of engaging in the very litigation that was avoided through settlement. *See Look v. Zignego Contractors, Inc.*, 47 Wis. 2d 197, 199, 177 N.W.2d 127, 128 (1970) (dismissing an appeal as moot when a decision would “have no practical effect upon the controversy” and noting that “no good purpose would be served by ruling on an appeal that has become so clearly and completely without consequence”).

¹ As described in the SEC filing referenced in paragraph 4 of the Peterson Affidavit, “[e]ach of the Counterparties, on the one hand, and [Ambac], on the other hand, have released the other party from any claims relating to any credit default swaps or financial guaranty insurance policies commuted pursuant to the Commutation Agreements.” June 8, 2010 Form 8-K Report of Ambac Financial Group, Inc. to the Securities and Exchange Commission, at 1, *available at* www.sec.gov/Archives/edgar/data/874501/000119312510134440/d8k.htm.

B. The Circuit Court’s Denial of Injunctive Relief is a Non-Final Order and Fails to Satisfy the Standards for Appeals by Permission.

Even if challenges to the settlement were not moot, they do not meet the requirements for appeals as a matter of right or permissive appeals under Wisconsin law.

First, the circuit court’s denial of the motion to enjoin the settlement is not appealable as a matter of right because it is not a final order under Wis. Stat. § 809.10. Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin* § 4.9, at 7-8 (4th ed. 2010) (“[A]s a general rule, a judgment or order that denies a motion is not final.”); 3 Cynthia L. Buchko et al., *Wisconsin Civil Procedure Before Trial* § 7.28, at 18-19 (3d ed. 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).”).

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. Freddie Mac’s joinder in the injunction motion and its subsequent appeal are premised on the contention that the settlement may impair Freddie Mac’s continuing interests in the ongoing rehabilitation and might (according to Freddie Mac) lessen the amount it will receive pursuant to the plan of rehabilitation OCI is developing as the

case proceeds. The trial court's denial of injunctive relief regarding a settlement between Ambac and a group of policyholders with policies that were not allocated to the Segregated Account does not dispose of the entire rehabilitation as to Freddie Mac. Freddie Mac remains the holder of policies allocated to the Segregated Account and will be subject to the rehabilitation plan upon its approval by the circuit court, including receipt of claims payments in accordance with that plan. As evidenced by the dozens of circuit court docket entries since the May 27 order denying temporary injunctive relief and the several pending motions in that court, the denial of that injunction hardly disposed of the rehabilitation proceedings.

Second, Freddie Mac's request for discretionary interlocutory review of this now-mooted settlement fails to meet the requirements for permissive appeals. An advisory opinion regarding the merits of this complex, multi-party settlement involving a group of policies that were *not* in the Segregated Account could not materially advance the Segregated Account rehabilitation proceedings, clarify the issues, or protect Appellants from irreparable harm, as required for permissive appeals.² Wis. Stat. § 808.03(2). Indeed, it would have the opposite effect. As the circuit court

² OCI will more fully discuss these and other factors for permissive appeals in its forthcoming response to the Petition for Leave to Appeal.

found, further litigation on the issue would disrupt the rehabilitation and create uncertainty with regard to the financial condition of Ambac (OCI App 13-14, ¶ 34), and a necessarily advisory opinion regarding the denial of a motion within the circuit court's discretion would only further transform a proceeding that is supposed to be "regarded as a management rather than as a legal task," Wis. Stat. Ann. § 645.32 cmt., into a protracted legal battle.

In addition, Freddie Mac should not be entitled to pursue an appeal of the interlocutory, non-final order of the circuit court because it has yet to establish standing as a party. The trial court found that it was not a party and denied its motion to intervene. (OCI App 16-17, ¶¶ 8-9.) As noted in Part III below, nonparties are not permitted to appeal unless and until they first establish standing as parties. Here, that will await the outcome of Freddie Mac's appeal of the denial of its motion to intervene.

II. The Circuit Court's Rejection of Discovery Challenges Relating to the Establishment of the Segregated Account is Not a Final Appealable Order, and it is Not Appropriate for Permissive Review.

Freddie Mac also lacks any right to appeal the circuit court's denial of its motion for discovery regarding the initial capitalization of the Segregated Account.

First, for largely the same reasons that the circuit court's denial of the motions to enjoin the bank settlement were not final, the

denial of motions relating to the establishment of the Segregated Account are *not* final and therefore not appealable as a matter of right under Wis. Stat. § 809.10. *See* Heffernan, *supra*, § 4.9 (“As a general rule, a judgment or order that denies a motion is not final.”).

Second, Freddie Mac’s partial joinder of the motion challenging the Segregated Account was limited to “the requests that the Court permit expedited discovery regarding the formation of the Segregated Account and the adequacy of the capitalization of the Segregated Account.” (Freddie Mac’s Brief in Support of Partial Joinder, at 4 (attached to Petition for Leave to Appeal).) The mere denial of discovery relating to challenges raised by other movants does not dispose of the entire matter in litigation as to Freddie Mac or conclude the rehabilitation proceeding (which includes treatment of the Freddie Mac policies), as required for appeals as a matter of right. Wis. Stat. § 808.03(1).

This interlocutory ruling also fails to meet the requirements for permissive appeals. For reasons that will be more fully explicated in OCI’s upcoming response to the Petitions for Leave to Appeal filed by Freddie Mac and others, a permissive appeal of the circuit court’s rejection of challenges to the formation of the Segregated Account would needlessly protract a rehabilitation that requires expediency for the benefit of policyholders as a whole. Further, and particularly with regard to Freddie Mac’s limited challenge relating to discovery concerning the formation of

the Segregated Account, it would promote piecemeal appeals of discretionary rulings in a proceeding that already threatens to unravel into a series of contentious legal battles, given the number of policyholders affected.

Finally, as noted above, Freddie Mac should not be entitled to pursue an appeal of this interlocutory order because it has not yet established that it is a party with standing to appeal.

III. This Court's Jurisdiction to Review the Denial of Freddie Mac's Motion to Intervene Does Not Encompass Other Non-Final Orders.

OCI does not object to Freddie Mac's pursuit of that portion of the trial court's decision denying its motion to intervene as an appeal of right under Wis. Stat. § 809.10, because "[w]hen a trial court denies the motion of a nonparty to intervene and be made a party to the action, that order is appealable for the reason that such a person cannot appeal from the final judgment." *Fahrenkrug v. D.M. Builders, Inc.*, 41 Wis. 2d 416, 418, 164 N.W.2d 281, 282 (1969). Even if Freddie Mac overturns the denial of its motion to intervene and establishes standing as a party, however, that ruling would not give it license to also appeal all non-final, unrelated rulings in this ongoing proceeding; it only establishes its right as a party to appeal from subsequent, otherwise appealable orders that affect it. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987); *see also Becker v. Becker*, 66 Wis. 2d 731, 735, 225 N.W.2d 884,

886 (1975) (“A person not a party who petitions to intervene is entitled to appeal *from the order denying his application*, because the application initiates a special proceeding which is terminated by the order.”) (emphasis added); *Brody v. Long*, 13 Wis. 2d 288, 292, 108 N.W.2d 662, 664 (1961) (dismissing appeal of parties who sought to intervene in summary judgment proceeding between other parties “because a party to the action, who is aggrieved by such an order, can secure a review thereof by appealing from the final judgment”).

In sum, success on Freddie Mac’s appeal of the denial of its motion to intervene would merely give it standing to appeal only those substantive orders that *are* final or otherwise appealable. Were it otherwise, any individual or entity could obtain interlocutory review of right as to any aspect of any proceeding merely by asserting—and being denied—the right to intervene. Such a rule would foster chaotic proceedings with a plethora of intermittent appeals, each one potentially challenging the same prior non-final orders time and again, while the original parties to the proceeding must await final judgment to challenge those same orders. Such a doctrine would undermine the two primary purposes of the final order rule: to “protect trial proceedings by avoiding unnecessary interruptions and delays caused by multiple appeals,” and to “reduce[] the burden on the court of appeals by limiting the number of appeals to one appeal per case and allowing piecemeal appeals only under

the special circumstances set forth in § 808.03(2).” *K.W. v. Banas*, 191 Wis. 2d 354, 357, 529 N.W.2d 253, 254 (Ct. App. 1995) (per curiam) (quotation and alterations omitted).

CONCLUSION

For the foregoing reasons, OCI respectfully requests that this Court dismiss those all portions of Freddie Mac’s appeal except its appeal of the circuit court’s denial of its motion to intervene.

Dated this 18th day of June, 2010.

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In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

**REHABILITATOR'S REPORT REGARDING
CLOSING OF THE BANK GROUP SETTLEMENT**

TO: Honorable William D. Johnston, Presiding by Judicial Assignment
Lafayette County Circuit Court
Lafayette County Courthouse
626 Main Street
Post Office Box 40
Darlington, Wisconsin 53530-0040

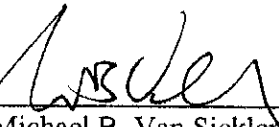
PLEASE TAKE NOTICE that the Bank Group Settlement which was the subject of motions heard by this Court on May 25, 2010 (decided by written decision with Findings of Fact and Conclusions of Law on May 27, 2010) has been fully closed and consummated.

At the status conference before this Court on Friday, June 4, 2010, the undersigned reported that OCI was guardedly optimistic that the Bank Group Settlement would close and be consummated the following Monday, June 7, 2010. The undersigned is pleased to be able to report that the Settlement did, in fact, get closed and consummated on Monday, June 7, 2010. See the attached Second Affidavit of OCI's Roger Peterson.

Dated this 10th day of June, 2010.

FOLEY & LARDNER LLP

By:


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In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of Ambac Assurance Corporation

SECOND AFFIDAVIT OF ROGER A. PETERSON
Director of the Bureau of Financial Analysis and Examinations
For the Wisconsin Office of the Commissioner of Insurance

STATE OF WISCONSIN)
) ss.
 DANE COUNTY)

Roger A. Peterson, being first duly sworn on oath deposes and states as follows:

1. I am the Director of the Bureau of Financial Analysis and Examinations for the Wisconsin Office of the Commissioner of Insurance ("OCI"), where I have worked for more than 20 years. During that time, I have had extensive, increasing regulatory responsibilities in regard to Ambac Assurance Corporation ("Ambac"). In carrying out my duties, I have had direct access to confidential financial records and other information regarding Ambac.

2. I previously executed an affidavit dated May 19, 2010 which was submitted in this Court by counsel for OCI, as the Regulator of Ambac and the Wisconsin Commissioner of Insurance, as the Court-appointed Rehabilitator in this proceeding. That affidavit was offered in support of the positions of OCI and the Rehabilitator in regard to several issues raised by certain moving parties, including objections by a group of institutions holding bond interests with respect to the Las Vegas Monorail (the "LVM Bondholder Group") and a group of several institutions holding notes pertaining to real estate mortgage-back securities (the "RMBS Note Holders").

3. My prior affidavit focused on the proposed settlement between Ambac's general account and a group of 14 financial institutions with respect to a particularly troubled segment of Ambac's policy portfolio known as the ABS CDO exposures (referred to in my prior affidavit and here as the "Bank Group Settlement"). The Bank Group Settlement was detailed in my prior affidavit at paragraphs 16-37.

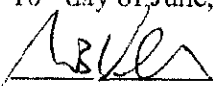
4. On Monday, June 7, 2010, the Bank Group Settlement was fully closed and consummated. Details about the closing of the Bank Group Settlement were reported by Ambac's parent company, Ambac Financial Group, Inc., in a Form 8-K Report to the Securities and Exchange Commission on June 8, 2010. That Report is publicly available through the Securities and Exchange Commission.

5. The motions by the LVM Bondholder Group and the RMBS Note Holders to temporarily enjoin the Bank Group Settlement are moot because that Settlement has been fully closed and consummated. There is nothing left to enjoin with respect to the Bank Group Settlement transaction.

Dated this 10th day of June, 2010.


Roger A. Peterson

Subscribed and sworn to before me this
10th day of June, 2010.


Notary Public, State of Wisconsin
My commission is permanent.