

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 LVM
BONDHOLDERS' APPEAL OF THE COURT'S DENIAL OF THE
LVM BONDHOLDERS' 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 certain beneficial holders of Las Vegas Monorail bonds (hereinafter “Appellants”) dated June 1, 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 Appellants purport to raise on appeal—namely, the circuit court’s denial of their motion to enjoin a then-unconsummated settlement between Ambac and several policyholders, and the circuit court’s denial of the motions of *other* movants challenging the establishment of the Segregated Account of Ambac (the “Segregated Account”)—are non-final orders, moot, waived, 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.) Appellants moved to intervene and filed their own brief in support of the emergency motions with respect to the request to enjoin the bank settlement. (A-App 281-300.) They expressly declined to take any position on the motion insofar as it challenged the formation of the Segregated Account. (A-App 282 n.2.)

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 Appellants’ motion to formally intervene in the proceedings. (OCI App 17, ¶ 9.)

Appellants immediately attempted to appeal from the circuit court's May 27 rulings. They filed a Notice of Appeal on June 1, 2010, which purported to raise four issues on appeal as of right: two issues relating to the circuit court's denial of their motion to enjoin the settlement, one relating to the formation of the Segregated Account, and one relating to the circuit court's denial of their motion to intervene in the proceedings. (Appellants' Docketing Statement at 2.) Appellants thereafter filed a Petition for Leave to Appeal on June 10, 2010. The only issues Appellants raise in their Petition for Leave to Appeal under Wis. Stat. § 808.03(2) relate to the bank settlement, which Appellants unsuccessfully sought to block in the circuit court by a motion for injunctive relief. (Appellants' Petition for Leave to Appeal at 4.)

In sum, Appellants seek review of issues relating to the circuit court's denial of three distinct motions: (1) their motion to enjoin the bank settlement (both by permission and as a matter of right), (2) the RMBS Movants' motion raising challenges to the establishment of the Segregated Account (as a matter of right), and (3) Appellants' 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 Appellants' 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. Appellants' Purported Appeal of the Denial of Injunctive Relief is Moot.

Because the bank settlement has now been consummated, any issues relating to Appellants' 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 Appellants 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 Appellants is no longer available to them, their 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 Appellants’ 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. Appellants’ injunction motion and appeal are premised on the contention that the settlement may impair Appellants’ continuing interests in the ongoing rehabilitation and might (according to Appellants) lessen the amount Appellants 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 Appellants. Appellants remain the holders 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—including one filed by Appellants, which is wholly unrelated to the settlement—the denial of that injunction hardly disposed of the rehabilitation proceedings.

Second, Appellants' 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 and as OCI will more fully discuss in its response to the Petition for Leave to Appeal. Wis. Stat. § 808.03(2). Indeed, it would have the opposite effect. As the circuit court 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, Appellants should not be entitled to pursue an appeal of the interlocutory, non-final order of the circuit court because they have yet to establish standing as parties. The trial court found that they were not parties and denied their 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 Appellants' appeal of the denial of their motion to intervene.

II. Appellants Waived Any Challenges Relating to the Establishment of the Segregated Account, and the Circuit Court's Rejection of Those Challenges is Not a Final Appealable Order.

For several reasons, Appellants also lack any right to appeal the circuit court's denial of the motion of some interested entities (though not Appellants) to invalidate the Segregated Account based on a purported failure to comply with state and federal law.

First, they waived any challenges to the Segregated Account addressed by the circuit court's order. Appellants did not raise any such

challenges before the circuit court, and they expressly declined to take any position on motions filed by other policyholders or beneficiaries challenging the formation of the Segregated Account. (See A-App 282 n.2.) Therefore, Appellants have waived any objections pertaining to the circuit court's rejection of such challenges. See *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 594, 218 N.W.2d 129, 133 (1974) (failure to voice specific, timely objections to trial court resulted in waiver on appeal); *Leon's Frozen Custard, Inc. v. Leon Corp.*, 182 Wis. 2d 236, 246 n.2, 513 N.W.2d 636, 641 n.2 (Ct. App. 1994).

Further, Appellants cannot raise general challenges to the establishment of the Segregated Account because, by their own admission, the establishment of the Segregated Account was not adverse to them. Appellants' brief in support of their motion challenging the allocation of policies related to the Las Vegas Monorail bonds to the Segregated Account, filed in the circuit court on June 9, 2010 ("June 9 Brief," attached) asserts that they "do not object to the principal actions taken by Ambac and the Commissioner at the commencement of this Rehabilitation: the creation of a Segregated Account, and the allocation to that account of the particular types of high-risk structured-finance obligations that were responsible for Ambac's demise[,]” both of which serve “the preservation of Ambac's claims-paying resources and the prevention of preferential payments to near-term claimants at the expense of long-tail claimants.”

(June 9 Brief at 2.) Having thus conceded that they were not aggrieved by the May 27 order insofar as it held that the establishment of the Segregated Account was lawful and appropriate, Appellants lack standing to appeal such issues. *Edlin v. Soderstrom*, 83 Wis. 2d 58, 64, 264 N.W.2d 275, 278 (1978).

Finally, 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 challenging the establishment of the Segregated Account are *not* final and therefore not appealable as a matter of right under Wis. Stat. § 809.10. Indeed, Appellants' own circuit court filings after the May 27, 2010 order support this conclusion. In the June 9 Brief, Appellants moved the circuit court for an order declaring that the allocation of their particular policies to the Segregated Account was unlawful, and the trial court has set a briefing schedule and a hearing date for that motion. (*See* June 9 Brief at 2.) Thus, the May 27 order did not "dispose[] of the entire matter in litigation" as to Appellants, as required for an appeal as a matter of right. Wis. Stat. § 808.03(1).

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

OCI does not object to Appellants' pursuit of that portion of the trial court's decision denying their 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 Appellants overturn the denial of their motion to intervene and establish standing as parties, however, that ruling would not give them license to also appeal all non-final, unrelated rulings in this ongoing proceeding; it only establishes their right as parties to appeal from subsequent, otherwise appealable orders that affect them. *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 Appellants’ appeal of the denial of their motion to intervene would merely give them 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 portions of Appellants’ appeal relating to the denial of their Motion for Injunctive Relief and to the establishment of the Segregated Account.

Dated this 18th day of June, 2010.

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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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

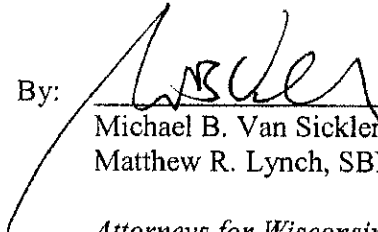
PLEASE TAKE NOTICE that the Bank Group Settlement which was the subject of motions heard by this Court on May 25, 2010 (decided by written decision with Findings of Fact and Conclusions of Law on May 27, 2010) has been fully closed and consummated.

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.

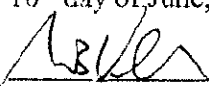
4. On Monday, June 7, 2010, the Bank Group Settlement was fully closed and consummated. Details about the closing of the Bank Group Settlement were reported by Ambac's parent company, Ambac Financial Group, Inc., in a Form 8-K Report to the Securities and Exchange Commission on June 8, 2010. That Report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

COPY
DANE COUNTY

STATE OF WISCONSIN : CIRCUIT COURT :

In the Matter of the Rehabilitation of:

Case No. 10-CV-1576

Segregated Account of Ambac Assurance Corporation

**BRIEF IN SUPPORT OF LVM BONDHOLDERS' MOTION CHALLENGING
ALLOCATION OF LVM BOND POLICY TO SEGREGATED ACCOUNT**

Certain beneficial holders (the "LVM Bondholders")¹ of a majority of the outstanding Las Vegas Monorail Project Revenue Bonds (the "LVM Bonds"), municipal bonds supported by an insurance policy (the "LVM Bond Policy") issued by Ambac Assurance Corporation ("Ambac"), submit this memorandum of law in support of their motion for an order (i) declaring that Ambac's allocation of the LVM Bond Policy to its Segregated Account, with the approval of the Office of the Commissioner of Insurance for the State of Wisconsin (the "Commissioner" or "OCI"), was unlawful, and (ii) granting the LVM Bondholders permission to intervene, to the extent the Court deems intervention necessary, and to take discovery in connection with this motion.²

¹ These holders are certain funds and accounts managed or owned by Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners LP.

² On April 5, 2010, Wells Fargo Bank, N.A., as indenture trustee (the "Trustee") of the LVM Bonds, filed a motion challenging the lawfulness of the Segregated Account's creation on a number of grounds, including that the allocation of the LVM Bond Policy to the Segregated Account violated the Equal Protection Clause of the United States and Wisconsin Constitutions. The Trustee's motion is currently scheduled to be heard by this Court on July 9, 2010. We join in the Trustee's motion to the extent it challenges the lawfulness of the allocation of the LVM Bond Policy to the Segregated Account, but not to the extent it contends that the creation of the Segregated Account was otherwise unlawful.

We note that the Findings of Fact and Conclusions of Law entered by the Court on May 27, 2010, in connection with the emergency motions filed by the RMBS Policyholders and the LVM Bondholders (the "May 27 Decision"), addressed and rejected certain legal challenges to the Segregated Account's creation advanced by the RMBS Policyholders. The RMBS Policyholders did not challenge the lawfulness of the

Preliminary Statement

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

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

In other words, Ambac and the Commissioner allocated the LVM Bond Policy to the Segregated Account on the basis of that policy's claim status (as a defaulted policy with large claims), rather than its insurance type (as a municipal bond policy). In so doing, Ambac and the Commissioner violated a fundamental principle, embodied in Wisconsin's segregated account statute, Wis. Stat. § 611.24, and protected by the Equal Protection Clauses of the Wisconsin and

LVM Bond Policy's allocation to the Segregated Account, and as a result, the May 27 Decision did not address that issue – *i.e.*, the issue raised by the present motion.

U.S. Constitutions: An insurer and its regulator must provide similar treatment to all policies of the same type, including those that are in default or expected to default. It may not segregate its policies based on their claim status, nor may it provide subordinated treatment to claims asserted under defaulted policies. Indeed, permitting an insurer to do so would defeat the very purpose of insurance, by depriving policyholders of the right to payment simply because they have asserted claims.

The allocation of the LVM Bond Policy to the Segregated Account violated these settled rules of law. This action was unlawful and should not be permitted to stand.

Statement of Facts

Ambac

Ambac is a Wisconsin-domiciled financial guaranty company, whose traditional business was to insure municipal bonds. Historically, Ambac had AAA financial strength ratings. (Ambac Financial Group, Inc. Form 10-K for the year ended December 31, 2009, filed Apr. 9, 2010, at 3, annexed as Exhibit A to the Affidavit of Bryan K. Nowicki in Support of Motion to Modify Order for Temporary Injunctive Relief Filed by Certain RMBS Policyholders (“Nowicki Aff.”), dated April 30, 2010.) More recently, however, Ambac began to guaranty “riskier” and “more speculative” structured finance obligations, including residential mortgage-backed securities, collateralized debt obligations of asset backed securities, and credit default swaps. (Commissioner’s Brief in Support of Entry of Order for Rehabilitation (“Rehabilitation Brief”), dated Mar. 24, 2010, at 3, 15, 17.) These riskier products proved lethal to Ambac, just as they did to other major financial institutions. In 2007 and 2008, as the structured finance investments that it insured began to implode, Ambac’s projected future liabilities grew, resulting in a dangerous reduction in capital. This peril was a principal reason for the commencement of the rehabilitation proceedings. (*Id.* at 2.)

The LVM Bonds and the LVM Bond Policy

The LVM Bonds are municipal bonds that were issued in 2000 by the Director of the State of Nevada Department of Business and Trust to finance the construction of a four-mile monorail system in downtown Las Vegas. The LVM Bond Policy issued by Ambac insures the payment of all principal and interest due and owing on the LVM Bonds. At the time of their issuance, Standard & Poors, Moody's and Fitch IBCA assigned triple-A ratings to the LVM Bonds.

Most of the LVM Bonds were purchased and are held by retail investors or mutual funds. Due to their triple-A rating, the LVM Bonds were believed to be a conservative municipal bond investment appropriate for college or retirement savings accounts and were widely held for those purposes, either directly or through mutual fund accounts. (See Declaration of Gavin Wilkinson in Support of Motion of Wells Fargo Bank, National Association, to Modify Temporary Injunction and to Intervene, dated Apr. 5, 2010, ¶ 7.)

Las Vegas Monorail Corporation ("LVMC"), which owns and operates the monorail, filed a voluntary petition for bankruptcy on January 13, 2010. The LVM Bonds are currently in payment default. The main source of repayment for these bonds is expected to be Ambac, through its obligations under the LVM Bond Policy.

Ambac has insured more than \$500 million³ worth of currently outstanding LVM Bonds. Ambac estimates that its total exposure for future payments of principal and interest under the LVM Bond Policy is approximately \$1.163 billion, minus any payments of principal and interest made by LVMC. (See Declaration of Scott Zuchorski in Support of Motion of

³ The value of the LVM Bonds outstanding continues to increase because approximately \$99 million of the original issuance are "capital appreciation" bonds. That is, holders of these bonds do not receive any cash interest over the life of the bonds, but rather interest continues to accrue in kind until maturity.

[Ambac] for Dismissal of Chapter 11 Proceeding, dated January 13, 2010, ¶ 13, annexed to the Affidavit of Noreen J. Parrett dated May 5, 2010 (the "Parrett Aff.") as Exhibit A.)

The Creation of the Segregated Account, and the Commencement of These Rehabilitation Proceedings

On March 24, 2010, the Commissioner announced that Ambac, with the Commissioner's approval, had that day created the Segregated Account, pursuant to Wis. Stat. § 611.24, and had allocated to that account an assortment of policies and other liabilities, including residential mortgage-backed securities ("RMBS"), credit default swaps written on collateralized debt obligations, and certain student loan policies. (Verified Petition for Order of Rehabilitation (the "Petition"), at 5-6 & Tab 1 at 1-3.)

The same day, the Commissioner commenced rehabilitation proceedings with regard to the Segregated Account by filing the March 24, 2010 Petition with this Court. In the Petition, the Commissioner explained that his "restructuring and rehabilitation plan" had "three main components": (1) the creation of the Segregated Account, (2) the proposed CDS settlement, and (3) an "orderly run-off of the Segregated Account" policies under the supervision of the Commissioner. (Petition ¶ 8(a)-(c).) The Plan of Operation for the Segregated Account stated that that account was established "for the purpose of segregating certain segments of [Ambac's] liabilities, and consenting to the subsequent rehabilitation of the Segregated Account under Chapter 645 of the Wisconsin Statutes." (Petition, Tab 1, § II.)

The Segregated Account's Subordination to the General Account

According to the Commissioner's public filings, the Segregated Account has only two assets: (i) a \$2 billion Secured Note issued by Ambac, and (ii) an aggregate excess-of-loss reinsurance policy issued by Ambac to reinsure the Segregated Account's liabilities. (Petition, Tab 1, § V.)

Crucially, Ambac's obligations to the Segregated Account under *both* the Secured Note and the reinsurance policy are effectively subordinated to all of Ambac's other obligations. Ambac is obliged to make payments under the Secured Note only so long as the General Account continues to have a surplus equal to at least \$100 million, or such *higher* amount as OCI may set. (Petition, Tab 1, Ex. G, ¶ 1(c).) Ambac's payment obligations under the reinsurance policy – the Segregated Account's only other asset – are limited in the same manner. (Petition, Tab 1, Ex. H, § 1.04.) As a result, Ambac will have *no payment obligations whatsoever* to the Segregated Account in the event its surplus falls below \$100 million. Ambac's payment obligations to the Segregated Account – and, as a result, that account's ability to make payments to its policyholders – will cease before policyholders in Ambac's General Account face any prospect of non-payment.

Policies allocated to the Segregated Account face a substantial risk of non-payment by virtue of that account's subordinated status. The obligations allocated to the Segregated Account are enormous: approximately \$68 billion of net par exposure, according to Ambac. (Nowicki Aff., Ex. A at 4.) These obligations include, among others, the claims of RMBS policyholders, which OCI projects will demand payments in excess of \$2 billion in 2010 alone. (See Affidavit of Roger A. Peterson, dated May 19, 2010 (“Peterson Aff.”) at ¶ 6.) In contrast to these “short-tail” RMBS obligations, claims under the LVM Bond Policy are long-term; most do not come due until 2030, making them particularly vulnerable to a risk of non-payment.

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

uncertainty, the Commissioner informed the press on March 25, 2010 that policies in the Segregated Account are expected to be paid only 25% in cash, with the remainder to be paid in “surplus notes” subordinated to Ambac’s other obligations. *See Andrew Frye & Jody Shenn, Ambac Clients May Receive 25 Cents on Dollar in Cash,* <http://www.businessweek.com/news/2010-03-25/ambac-clients-may-receive-25-cents-on-dollar-in-cash-update1-.html> (quoting a Mar. 25, 2010 telephone interview with the Commissioner). In the same vein, the Commissioner stated in his March 24, 2010 Petition that the Segregated Account is in financially “hazardous” condition. (Petition at 8.)

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

The Commissioner has explained that he determined which policies to allocate to the Segregated Account by identifying those policies of Ambac that were considered to have “material projected impairments.” (Rehabilitation Brief at 3-4.) Approximately 1,000 policies were transferred to the Segregated Account on the basis of such “projected losses and/or triggers.” (Peterson Aff. ¶ 10; May 27 Decision at 12, ¶ 27.) Conversely, more than 14,000 policies were left in the General Account because (i) they “lacked material projected impairments,” (ii) OCI concluded that the “the collateral damage of a rehabilitation proceeding as to those policies could outweigh the benefits of allocation,” and/or (iii) the policyholders – namely the CDS Banks – signed a forbearance agreement with Ambac. (May 27 Decision at 13, ¶ 31.)

The LVM Bond Policy was among the policies allocated to the Segregated Account. According to the Commissioner, the LVM Bond Policy fit OCI’s criteria for allocation to the Segregated Account because “LVM is in serious financial distress and filed for Chapter 11

bankruptcy in Nevada . . . in January 2010.” (Peterson Aff. ¶ 13; May 27 Decision at 12, ¶ 29.) Ambac has acknowledged that “*virtually the entire insured municipal portfolio remains outside the rehabilitation proceedings.*” (Ambac Press Release dated Mar. 25, 2010 (emphasis added), available at <http://www.ambac.com/Press/032510.html>; see also Peterson Aff. ¶ 15 (stating that “the far greater number” of public-finance transactions “that were not bankrupt like the LVM . . . were left in the General Account”).⁴

ARGUMENT

I. The Allocation of the LVM Bond Policy to the Segregated Account Was Unlawful

The allocation of the LVM Bond Policy to the Segregated Account violates both state and federal law. *First*, the allocation violates the terms and the express purpose of Wisconsin’s segregated account statute, Wis. Stat. § 611.24, which permits an insurer to segregate its business by *type of insurance*, so as to separate the fortunes of the holders of hazardous types of insurance (e.g., mortgage guaranty) from those of the holders of more secure types of insurance (e.g., life). That statute does not permit an insurer to divide policies of the

⁴ The LVM Bondholders have previously asserted in this proceeding that the LVM Bond Policy appears to be the *only* municipal bond policy allocated to the Segregated Account. (LVM Bondholders’ Brief in Support of Emergency Motion to Enjoin Consummation of the Proposed Settlement Between Ambac and Certain CDS Counterparties dated May 5, 2010, at 6.) The Commissioner has taken issue with that assertion, insisting that other “policies with public-finance components, such as swap sureties and leveraged lease transactions,” were also allocated to the Segregated Account. (Peterson Aff. ¶ 14; Findings of Fact and Conclusions of Law at 12, ¶ 30.) These supposedly include more than 42 “direct public-finance policies” and more than 150 “swap surety policies.” (*Id.*)

It is unclear whether the “swap sureties” and “leveraged lease transactions” to which the Commissioner refers are in any way comparable to the LVM Bond Policy, and the Commissioner has not provided information that would allow the LVM Bondholders to make such a comparison. Most important, however, whether the policies are comparable is irrelevant to this motion. As discussed below, what matters is that Ambac has left most (apparently the great bulk) of its municipal bond policies in its General Account, while allocating at least one such policy (the LVM Bond Policy) to the Segregated Account, in violation of (i) the provisions of Wisconsin’s segregated account statute, which permits the segregation of an insurer’s business by type of insurance, but not by claim status, and (ii) the Equal Protection Clauses of the U.S. and Wisconsin Constitutions, which require that policies of the same type receive similar treatment.

same type into two groups – one for unimpaired policies, the other for policies that are impaired or expected to be impaired – and to put the latter policies into a segregated account receiving subordinated treatment. Yet that is exactly what Ambac has done: It has allocated the LVM Bond Policy to the Segregated Account on the ground that it is impaired, while leaving other (unimpaired) municipal bond policies in the General Account.

Second, in addition to violating Wisconsin's statute, the allocation of the LVM Bond Policy to the Segregated Account violates the Equal Protection Clauses of the United States and Wisconsin Constitutions. As the courts have long recognized, the Equal Protection Clause requires that insureds of substantially the same type, or class, receive similar treatment in a rehabilitation or liquidation proceeding. Here, however, the LVM Bond Policy is receiving distinctly inferior treatment to that given to other municipal bond policies: By virtue of its allocation to the Segregated Account, the LVM Bond Policy's right to payment is subordinated to that of the other municipal bond policies, and as a result, it faces a substantially greater risk of non-payment. The Equal Protection Clause prohibits precisely this sort of discrimination.

A. The Allocation of the LVM Bond Policy to the Segregated Account Violates Wisconsin's Segregated Account Statute

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

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

Wis. Stat. § 611.24(2) (2006).

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

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

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

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

Ambac's allocation of the LVM Bond Policy to the Segregated Account violates these clear principles. As discussed above, Ambac has left most, if not all, of its municipal bond policies in its General Account. At the same time, Ambac has allocated the LVM Bond Policy to

the Segregated Account. Its basis for doing so is not, and could not be, that the LVM Bond Policy differs in type from the other municipal bond policies remaining in the General Account; all are municipal bond policies – the traditional backbone of Ambac’s business, prior to its expansion into the much riskier structured finance sector. Ambac’s and the Commissioner’s only basis for allocating the LVM Bond Policy to the Segregated Account is that it is in default and has “material projected impairments.”

In short, Ambac and the Commissioner have allocated the LVM Bond Policy to the Segregated Account on the basis of its claim status – as an impaired policy that is expected to have substantial claims – rather than its policy type. This is an unauthorized use of a segregated account, in plain contravention of the terms and the express purpose of Wis. Stat. § 611.24.

Indeed, such a use of a segregated account not only contravenes the governing statute; it undermines the very purpose of buying insurance. The LVM Bondholders, like all municipal bond policyholders, bought insurance so that they would be paid on their policy if the issuer defaulted. And yet, precisely *because* the issuer has defaulted, the LVM Bond Policy has been pooled with other defaulted or soon-to-be-defaulted policies and given payment rights subordinate to those of Ambac’s other municipal bond policyholders – and as a result, the LVM Policy now faces a substantial risk of non-payment. Such treatment is contrary to the most basic of insurance law principles, namely, the “equitable apportionment of loss.” Wis. Stat. § 645.01(4)(d); *see also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)(“The primary elements of an insurance contract are the spreading and underwriting of a policyholder’s risk. ‘It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that *such losses are spread over all the risks . . .*’”) (quoting 1 G. Couch, *Cyclopedia of Insurance Law* § 1:3 (2d ed. 1959) (emphasis added)).

B. The Allocation of the LVM Bond Policy to the Segregated Account Violates the Equal Protection Clause of the U.S. Constitution

It is a fundamental tenet of insurance law that the power of the state to modify a policyholder's contractual rights in connection with the rehabilitation or liquidation of an insurer is not unlimited. To the contrary, that power is constrained by the Equal Protection Clause of the United States Constitution – and of the constitutions of many states, including Wisconsin – which, among other things, requires that “insureds of substantially the same class [be] treated similarly.” *Couch on Insurance* 3D, § 5.24.⁵

This constitutional prohibition against discrimination among insureds of the same class has been recognized at least since the seminal case of *Carpenter v. The Pacific Mutual Life Ins. Co. of California*, 10 Cal. 2d 307 (Cal. 1937), *aff'd sub nom Neblett v. Carpenter*, 305 U.S. 297 (1938). In that case, the California Supreme Court – in a decision affirmed by the U.S. Supreme Court – ruled that, while the “contract of the policyholder is subject to the reasonable exercise of the state's police power,” the state's action “*shall not be arbitrary or improperly discriminatory.*” *Id.* at 329 (rehabilitation plan that treated life insurance policies more liberally than non-cancellable accident and health policies, but that gave equal and non-discriminatory treatment to all claims within each class, did not violate equal protection); *see generally Couch on Insurance* 3D, § 5.24 (“[d]ifferential treatment of classes of insureds does not violate equal protection as long as insureds of substantially the same class are treated similarly”).⁶

⁵ The Wisconsin Supreme Court “applies the same interpretation to the state Equal Protection Clause found in Wis. Const. art. I § 1, as that given to the federal provision, U.S. Const. amend. XIV § 1.” *State v. Post*, 197 Wis. 2d 279, 318 n.21, 541 N.W.2d 115, 128 n.21 (1995). Thus, to the extent the Commissioner's allocation of policies violates the Equal Protection Clause of the U.S. Constitution, it also violates the parallel provision of the Wisconsin Constitution.

⁶ These general anti-discrimination principles are embodied in multiple sections of the Wisconsin Insurance Statutes. For example, Wis. Stat. § 645.68 expressly provides that “no subclasses shall be

Courts considering the actions of state insurance agencies in insurance rehabilitations have not hesitated to enforce this settled principle when the agency's action would discriminate among insureds of substantially the same class. For example, in *Commercial Nat'l Bank v. Superior Court of Los Angeles County*, 14 Cal. App. 4th 393 (Cal. Ct. App. 1993), the court rejected a proposed rehabilitation plan that utilized a "dual valuation" system in which municipal guaranteed investment contracts ("Muni-GIC's") were valued at different rates. *Id.* at 414. Observing that all of the Muni-GIC's were structured as single premium annuities, with a stream of periodic payments generated by an internal rate of interest, the court held that the plan "improperly discriminate[d] between substantially identical policies in the same class," because it "ignore[d] the substantively similar benefits promised in all of the annuities and focuse[d] instead upon the relatively insignificant formal difference that one group of contracts specifie[d] a guaranteed interest rate and initial accumulation values while the other [did] not." *Id.* at 399, 414. See also *In re Conservation of Alpine Ins. Co.*, 318 Ill. App. 3d 457, 741 N.E. 2d 663 (Ill. Ct. App. 2000), in which the Illinois Court of Appeals rejected as "impermissibly discriminatory and therefore illegal" a rehabilitation plan that distinguished between policyholders insured solely by the insurer undergoing rehabilitation, and policyholders having additional insurance through other carriers. The court explained that the state insurance code "does not provide for the punishment of multiple policy claimants insureds based on the fortuitous circumstance of their seeking out additional coverage." *Id.*, 741 N.E. 2d at 665, 668.

established within any class." See also, e.g., Wis. Stat. § 601.01(2) (central purpose of insurance statutes is "[t]o ensure that policyholders, claimants and insurers are treated *fairly and equitably*") (emphasis added); Wis. Stat. § 645.01(4)(d) (purpose of rehabilitation statute is "protection of the interests of insureds, creditors, and the public generally . . . , through . . . *[e]quitable apportionment of any unavoidable loss*") (emphasis added).

Here, like the dual-valuation system in *Commercial National Bank*, the Commissioner's allocation of the LVM Bond Policy to the Segregated Account is improperly discriminatory and violates the Equal Protection Clause. The Commissioner does not dispute that, as in *Commercial National Bank*, his disparate treatment of the LVM Bond Policy is *not* due to the bargained-for "substantive benefits" of the policy being materially different from Ambac's other municipal bond policies. *Commercial National Bank*, 14 Cal. App. 4th at 414. To the contrary, the risks insured under the AAA-rated LVM Bond Policy were of the same low level as those under Ambac's other municipal bond policies. And yet "virtually the entire municipal bond portfolio" of Ambac was kept in the General Account (March 25 press release), while the LVM Bond Policy and perhaps a limited number of other public-finance policies were allocated to the Segregated Account, where they will receive considerably less favorable treatment.

The Commissioner has explained that allocations were made to the Segregated Account based on the impaired status and projected losses associated with each policy. But it is simply not permissible for the Commissioner, in deciding which of Ambac's policies to place into rehabilitation, to cherry-pick from among all of the municipal bond policies of Ambac and relegate to a Segregated Account for rehabilitation purposes only those that happen to be in default. Such disparate treatment of substantially similar policies in the same class is "impermissibly discriminatory and therefore illegal." *Alpine*, 318 Ill. App. 3d at 463, 741 N.E. 2d at 668; *see also Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 284 Wis. 2d 573, 672, 701 N.W.2d 440, 489 (2005) (statutory cap on recovery in medical malpractice actions violated equal protection by discriminating against those who actually suffered damages in excess of the cap); *GTE Sprint Comm'ns. Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 187,

454 N.W.2d 797, 798 (1990) (tax on certain telecommunications carriers and not others denied the taxed carriers “the constitutional guarantee of equal protection of the laws”).

II. The LVM Bondholders Are Entitled to be Heard, and to Take Discovery, in Connection With This Motion

The LVM Bondholders respectfully submit that, even without formal intervention, they are entitled to be heard – and, among other things, to take discovery – in connection with this motion. As a matter of common sense and fairness, many courts have recognized that major stakeholders in an insurance company insolvency proceeding are entitled to be heard on issues directly affecting their interests, without the need for an order authorizing their intervention. *See, e.g., In re Liquidation of Midland Ins. Co.*, 2008 WL 151786, at *3 (N.Y. Sup. Jan. 14, 2008) (permitting policyholders to be heard without formal intervention on selected issues affecting their interests); *O’Neal v. Oxendine*, 237 Ga. App. 171, 177, 514 S.E.2d 908, 912 (Ga. App. 1999) (“[a]lthough the trial court technically ‘denied’ [judgment creditor’s] motion to intervene, it allowed [the creditor] to participate fully in the approval hearing and to raise objections to the reinsurance agreement.”); *Lucas v. Manufacturing Lumbermen’s Underwriters*, 349 Mo. 835, 849, 163 S.W.2d 750, 757 (Mo. 1942) (observing that “[t]he court is the forum where the parties interested may assert their rights and object to any proposal made by the superintendent [of insurance].”). Indeed, considerations of Due Process require that a policyholder be afforded the opportunity to be heard in connection with actions that materially compromise its contractual rights. *Milwaukee Dist. Council 48 v. Milwaukee County*, 244 Wis. 2d 333, 356, 627 N.W.2d 866, 877-888 (Wis. 2001) (“[t]he fundamental requisite of due process of law is the opportunity to be heard.”).

Should the Court nevertheless determine that the LVM Bondholders are not entitled to be heard, or to take discovery, without formal intervention, we respectfully request leave to intervene as of right under Wis. Stat. § 803.09(1), which provides:

[U]pon timely motion anyone shall be permitted to intervene in an action when [A] the movant claims an interest relating to the property or transaction which is the subject of the action and [B] the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless [C] the movant's interest is adequately represented by existing parties.

The requirements of Section 803.09(1) are satisfied here.⁷ By virtue of their beneficial ownership of the LVM Bonds, the LVM Bondholders plainly have an "interest relating to the property or transaction which is the subject of the [proceeding]." Wis. Stat. § 803.09(1). Moreover, in light of the allocation of the LVM Bond Policy to the Segregated Account, and the disparate treatment that will be afforded to that policy in rehabilitation, it is clear that a "disposition of the [proceeding] may as a practical matter impair or impede [the LVM Bondholders'] ability to protect that interest." *Id.* Finally, the decision of Ambac and the Commissioner to afford such disparate treatment to the LVM Bond Policy, and their refusal to transfer the policy back to the General Account as requested by the LVM Bondholders, demonstrates that the LVM Bondholders' interest is not "adequately represented" by these parties. *Id.* The LVM Bondholders are therefore entitled to intervene as of right (and, among other things, to take discovery) to challenge the allocation of the LVM Bond Policy to the Segregated Account. *See, e.g., Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1202 (Pa. Cmwlth.

⁷ In its May 27 Decision, the Court denied the LVM Bondholders' request to intervene for the purpose of challenging the proposed CDS Settlement. The present motion seeks intervention for a different purpose – namely, to challenge the allocation of the LVM Bond Policy to the Segregated Account – and is therefore outside the scope of the Court's prior intervention ruling. As discussed in the text above, the requirements for intervention as of right turn on issues specific to the particular matter as to which intervention is sought, such as whether the movants' interests in that matter are "adequately represented by existing parties."

2003) (policyholders permitted to intervene in rehabilitation proceeding); *In re Ambassador Ins. Co., Inc.*, 184 Vt. 408, 413, 965 A.2d 486, 489 ¶ 8 n.4 (Vt. 2008) (policyholder permitted to intervene in liquidation proceeding); *Fewell v. Pickens*, 344 Ark. 368, 373, 39 S.W. 3d 447, 450 (Ark. 2001) (shareholders permitted to intervene in insurance company receivership proceeding).

We ask, finally, that the Court establish an orderly process for discovery and an evidentiary hearing (if needed) in connection with this motion. Specifically, if the Court rules that the LVM Bondholders are entitled to take discovery,⁸ and if Ambac or OCI indicate that they may offer evidence or ask the Court to make factual findings in opposition to this motion, we ask the Court to schedule an evidentiary hearing for a date that affords the LVM Bondholders sufficient time to take needed discovery. We note, in this regard, that most of the facts that Ambac or OCI may claim are relevant are exclusively in their possession.

Conclusion

For the reasons set forth above, the LVM Bondholders respectfully request entry of an Order:

1. Declaring that the allocation of the LVM Bond Policy to the Segregated Account was unlawful;

⁸ Ambac and OCI have taken the position that policyholders are not entitled to take discovery in connection with disputed matters in these Rehabilitation proceedings. Moreover, the May 27 Decision contains a conclusion of law denying the LVM Bondholders' and RMBS Policyholders' request for discovery in connection with their prior motions on the ground that, "[a]s policyholders, Movants do not have standing as parties to seek discovery in this rehabilitation proceeding.." (May 27 Decision, Conclusions of Law ¶ 8.) We ask, however, that the Court consider our entitlement to discovery in connection with the specific issues raised by the present motion, including our request to intervene in connection with this motion – a request that, as noted above, is properly treated on a motion-by-motion basis.

2. Authorizing the LVM Bondholders to be heard and to take discovery in connection with this motion, by means of an order authorizing their intervention as of right in the event the Court deems such intervention necessary; and

3. Granting such other and further relief as is just and proper.

Dated this 9th day of June, 2010.

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