

Case Caption (Case Name)

In the Matter of the Rehabilitation of:

DOCKETING STATEMENT

Segregated Account of Ambac Assurance Corporation

Circuit Court Case No. 10 CV 1576

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Appellant)

Assured Guaranty Re Ltd. and Assured
Guaranty Corp.

Attorney's Name and Address

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Respondent(s) (Cross-Respondent)

Office of the Commissioner of Insurance of the
State of Wisconsin, Theodore K. Nickel,
Commissioner of Insurance of the State of
Wisconsin

and

Ambac Assurance Corporation

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CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
1. no more than 3 issues are raised;
 2. the parties' briefs will not exceed 15 pages in length; and
 3. the briefs can be filed in a shorter time than normally allowed.

These requirements can be modified somewhat in appropriate cases.

- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

Yes No If yes, date of entry June 14, 2011.

Is appeal timely? (See §808.04, Wisconsin Statutes)

Yes No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

Yes No (If "no", explain jurisdiction basis for appeal on separate sheet.)

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

The action in the circuit court is an insurance rehabilitation proceeding. The insurer being rehabilitated is the Segregated Account of Ambac Assurance Corporation ("Ambac's Segregated Account").

This appeal concerns a discrete dispute and order within the rehabilitation proceeding. On April 15, 2011, the Wisconsin Commissioner of Insurance, Theodore K. Nickel, as court-appointed rehabilitator (the "Rehabilitator"), filed a motion to enforce an injunction of the rehabilitation court against Assured Guaranty Re Ltd. and Assured Guaranty Corp. (together, the "Assured Reinsurers"). Ambac Assurance Corporation ("Ambac") joined the Rehabilitator's motion on April 20. The Assured Reinsurers are parties to two reinsurance contracts with Ambac, neither of which is allocated to Ambac's Segregated Account. The Rehabilitator and Ambac sought an order requiring the Assured Reinsurers to refrain from seeking arbitration of disputes with Ambac, to withdraw a petition to compel arbitration that they had filed in New York state court, and to make certain monetary payments pursuant to the reinsurance contracts.

On June 14, 2011, the rehabilitation court entered an order granting the relief sought by the Rehabilitator and Ambac. The rehabilitation court's order is almost identical to a proposed order the Rehabilitator submitted along with his motion in April

ISSUES – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*

(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

- (1) Did the rehabilitation court have personal jurisdiction over AG Re?
- (2) Does the rehabilitation court's injunction enjoin the Assured Reinsurers from arbitrating a dispute about their contracts with Ambac, which have not been allocated to Ambac's Segregated Account?
- (3) Is the Rehabilitator equitably estopped from arguing that the rehabilitation court's injunction enjoins the Assured Reinsurers from arbitrating a dispute about their contracts with Ambac?
- (4) Under the McCarran-Ferguson Act, are the Assured Reinsurers' rights under the Federal Arbitration Act reverse preempted?
- (5) Does the rehabilitation court's injunction require the Assured Reinsurers to pay, in cash, a proportionate share of payments made in non-cash surplus notes?
- (6) Was the contract dispute between the Assured Reinsurers and Ambac, which regards two contracts not allocated to Ambac's Segregated Account, properly raised by motion and adjudicated in the rehabilitation proceeding?
- (7) Do the Assured Reinsurers' contracts with Ambac permit the Assured Reinsurers to demand arbitration of their contract dispute?
- (8) Do the Assured Reinsurers' contracts with Ambac require the Assured Reinsurers to pay, in cash, a proportionate share of payments made in non-cash surplus notes?
- (9) To the extent it it was required to exercise its discretion, did the rehabilitation court err in adopting the Rehabilitator's proposed order nearly verbatim without providing its own reasoning?

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

- (1) Personal jurisdiction is a question of law that the court of appeals reviews de novo. *Capitol Fixture v. Woodma Distributors*, 147 Wis. 2d 157, 160, 432 N.W.2d 647 (Ct. App. 1988).
- (2) The meaning of a court order is a question of law that the court of appeals reviews de novo. *Park v. Health*, 2007 WI App 176, ¶ 13, 304 Wis. 2d 512, 737 N.W.2d 88.
- (3) "When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established." *Milas v. Labor Ass'n of Wisconsin, Inc.* 214 Wis. 2d 1, 8, 571 N.W.2d 656. The appellate courts review this question de novo. *Id.*
- (4) The interpretation of a statute and its application to a given set of facts is a question of law that the court of appeals reviews de novo. *Klemm v. American Transmission Co.*, 2011 WI 37 ¶ 17, ___ Wis. 2d ___, ___ N.W.2d ___.
- (5) The meaning of a court order is a question of law that the court of appeals reviews de novo. *Park*, 304 Wis. 2d 512, ¶ 13.
- (6) The court of appeals must interpret provisions of Chapter 645, Wisconsin Statutes, and must consider the Assured Reinsurers' constitutional due process rights when determining whether it was appropriate to adjudicate the contract dispute between Ambac and the Assured Reinsurers upon a motion in the rehabilitation proceeding. The interpretation of a statute and its application to a given set of facts is a question of law that the court of appeals reviews de novo. *Klemm*, 2011 WI 37, ¶ 17. So is the question whether the Assured Reinsurers were afforded due process. *Xerox Corp. v. Wis. Dep't of Revenue*, 2009 WI App 113, ¶ 12, 321 Wis. 2d 181, 772 N.W.2d 677.
- (7) & (8) Contract interpretation presents a question of law that the court of appeals reviews de novo. *Johnson v. Heritage Mut. Ins. Co.*, 188 Wis. 2d 261, 265, 525 N.W.2d 85 (Ct. App. 1994).
- (9) To the extent the rehabilitation court's decision was discretionary, the court of appeals reviews that decision to determine whether the court examined the relevant facts and law, demonstrated a rational decision-making process, and reached a reasonable conclusion. *Ttrieschmann v. Trieschmann*, 178 Wis. 2d 538, 504 N.W.2d 433.

Do you wish to have this appeal placed on the expedited appeals calendar? (*See Criteria For Expedited Appeals.*)
 Yes No If "no", explain : More than three issues are raised. The parties' briefs also are certain to exceed 15 pages in length: the Commissioner and Ambac's briefs to the circuit court totaled 65 pages, and the Assured Reinsurers' totaled 75.

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?
 Yes No

Will you request oral argument?
 Yes No


<u>Party</u>	<u>Attorney's Name and Telephone Number</u>	<u>Reason for not Participating</u>
Many parties and attorneys have been involved in the rehabilitation proceedings in the circuit court. The Assured Reinsurers do not expect that any of them will participate in this appeal except the Assured Reinsurers, the Rehabilitator, and Ambac. The Rehabiliator and Ambac's motion against the Assured Reinsurers was discrete from the remainder of		

the rehabilitation proceeding.
No other parties took a position on the motion, and no parties except the Assured Reinsurers are aggrieved by the rehabilitation court's June 14 order.

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?

Yes No Name of Case Please see attached

Appeal Number Please see attached


Signature of Person Preparing Docketing Statement
Matthew J. Splitek
Name Printed or Typed
06/28/2011
Date

Appellant Note:

You MUST attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also furnish all opposing counsel with a copy of this completed Docketing Statement and attached trial court documents.

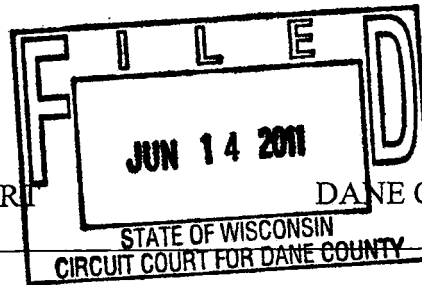
Pending or Completed Appeals Arising out of Dane County Case No. 10 CV 1576

1. Ted Nickel v. United States of America, 11 AP 987
2. Ted Nickel v. Depfa Bank, plc, 11 AP 561
3. Ted Nickel v. One State Street LLC, 11 AP 300
4. Ted Nickel v. Depfa Bank, plc, 10 AP 2835
5. Sean Dilweg v. Access to Loans for Learning Student Loan Corp., 10 AP 2721
6. Sean Dilweg v. Wells Fargo bank/Trustee of Bondholders, 10 AP 2164
7. Ted Nickel v. Wells Fargo Bank, 10 AP 2022
8. Ted Nickel v. Wells Fargo Bank, 10 AP 1291

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY



In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

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Segregated Account of Ambac Assurance Corporation

**ORDER GRANTING REHABILITATOR'S MOTION TO ENFORCE INJUNCTION
AGAINST ASSURED GUARANTY CORP. AND ASSURED GUARANTY RE LTD.**

This matter came before the Court on the Rehabilitator's motion (the "Motion") to enforce this Court's March 24, 2011 Order for Temporary Injunctive Relief (the "Injunction"), as made permanent by Section 10.02 of the Plan of Rehabilitation and paragraph 9 of this Court's January 24, 2011 Order confirming the Plan, against parties-in-interest Assured Guaranty Corp. ("AGC") and Assured Guaranty Re Ltd. ("AGRe") (collectively, "Assured"). Having considered the arguments of the parties and the briefs, affidavits, and other written materials on file in these proceedings, and for good cause shown, the Motion is hereby GRANTED and relief is ordered as set forth below.

In connection with this Motion, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Assured is a party to two reinsurance agreements (the "Agreements") with Ambac Assurance Corporation ("Ambac"), whereby Assured reinsures exposures related to certain Ambac financial guaranty insurance policies that have been allocated to the Segregated Account of Ambac (the "Segregated Account") and are subject to payment pursuant to the Plan of Rehabilitation.

2. Under the Plan, the Segregated Account makes a portion of claims payments in cash and the remaining portion in surplus notes. The Plan also permits the Rehabilitator to reach settlements with policyholders that are payable in both cash and surplus notes.

3. Under the Agreements, Assured is “liable for its proportionate share of the risk associated with each Policy, including all Losses under the Policies.” “Losses” include “the amount of liability paid or to be paid with respect to claims, losses, [or] liabilities . . . including, with limitation, any settlements or compromises[.]”

4. The Agreements include identical insolvency clauses, which state: “In the event of the insolvency of the Company or of Proceedings . . . against the Company pursuant to Chapter 645 of the Wisconsin Insurance Code . . . , the reinsurance under this Agreement shall be payable to the Company (or its manager) or to its liquidator, receiver or statutory successor, on the basis of the liability of the Company under Policies reinsured without diminution because of the insolvency of or Proceedings against the Company, or because the liquidator, receiver or statutory successor of the Company has failed to pay all or any part of a claim.”

5. The Agreements include identical arbitration provisions, which state: “Except as provided . . . in the event of the Company being subject to Proceedings, any dispute or claim arising out of this Agreement shall be submitted to arbitration[.]”

6. On March 14, 2011, the Rehabilitator and Ambac reached a settlement with the holder and beneficiaries of Segregated Account policy number AB0632BE (the “Northstar Settlement”), whereby the policy was terminated in exchange for a one-time payment of \$7 million (\$4 million in cash and \$3 million in surplus notes). Assured reinsured the policy

Exposure and was liable to Ambac for a 6.66667 percent share of the \$7 million settlement, which amounted to \$446,667.

7. On March 22, 2011, Assured informed the Rehabilitator that it would not pay its share of the portion of the settlement paid in surplus notes, contending that payment in surplus notes did not constitute payment giving rise to a “loss” under the Agreements. Assured also indicated that it would maintain this position with regard to future payments under the Plan of Rehabilitation, which will consist of a combination of cash and surplus notes.

8. On April 7, 2011, Assured sent Ambac letters demanding arbitration over the scope of Assured’s reinsurance obligations. The next day, Assured filed a petition to compel arbitration against Ambac in the New York Supreme Court for New York County.

9. Assured was properly served with notice of this rehabilitation and the Injunction in March 2010, it has participated in this proceeding, and it has been informed regarding developments in this proceeding since its commencement.

CONCLUSIONS OF LAW

10. The Injunction, including paragraphs 1 and 7 thereunder, was entered pursuant to Wisconsin law regulating the business of insurance. The Injunction preempts and renders inapplicable any conflicting contractual provisions or conflicting federal statutes, if those statutes do not specifically relate to the business of insurance. The Federal Arbitration Act does not specifically relate to the business of insurance, and is therefore preempted and rendered inapplicable to this dispute.

11. Paragraph 1 of the Injunction states: “All persons or entities are enjoined and restrained from commencing or prosecuting any actions, claims, lawsuits or other formal legal proceedings . . . against Ambac . . . in respect of the Segregated Account or policies

(including financial guarantee insurance policies and surety bonds), contracts or liabilities allocated to the Segregated Account. . . . This Court has exclusive jurisdiction over any such actions, claims or lawsuits.” Demands for, and petitions to compel, arbitration constitute legal proceedings outside this Court.

12. By demanding arbitration and filing a petition to compel arbitration in another forum to litigate issues in respect of the Segregated Account and policies allocated to the Segregated Account, Assured has violated paragraph 1 of the Injunction. Further prosecution of such proceedings will result in a continuing violation of the Injunction.

13. Paragraph 7 of the Injunction states: “All persons and entities are enjoined and restrained from withholding or failing to pay or setting-off premiums or other payments (including without limitation recoveries[and] reimbursements) owed (or that would have been owed but for the occurrence of the [rehabilitation] or the financial condition of the Segregated Account, . . . or the Ambac General Account) to . . . the Ambac General Account under or in connection with policies or contracts allocated to the Segregated Account[.]” Reinsurance agreements with Ambac that cover Segregated Account policy exposures or liabilities constitute agreements to pay Ambac in connection with policies allocated to the Segregated Account.

14. By withholding amounts owed under the Agreements for payments made in surplus notes on the Northstar Settlement, AGC has violated paragraph 7 of the Injunction. Further withholding of amounts owed under the Agreements for payments made in surplus notes that relate to Segregated Account policies will result in continuing violation(s) of the Injunction.

15. In addition, and in the alternative, the insolvency clauses of the Agreements are applicable, and the arbitration clauses inapplicable, under the circumstances of this proceeding. Under the specific terms of the Agreements’ insolvency and arbitration clauses,

this rehabilitation constitutes “Proceedings . . . pursuant to Chapter 645 of the Wisconsin Insurance Code” against the part of Ambac’s business (the Segregated Account) from which the present dispute arises. The insolvency clauses require Assured to make reinsurance payments “without diminution” on account of these proceedings or because the Rehabilitator “has failed to pay all or any part of a claim.”

16. In addition, and in the alternative, payments made by Ambac, the Segregated Account, or the Rehabilitator constitute “claims paid or to be paid” within the meaning of the Agreements.

17. Section 4.04 of the Plan establishes that a Segregated Account claim payment made in whole or in part with surplus notes constitutes full payment and satisfaction of that claim. By failing to object to confirmation of the Plan, Assured has waived any objection to the legal characterization of such payments described therein.

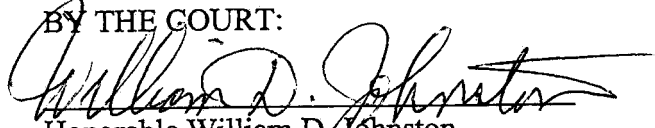
NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the above-described written materials and arguments, and for good cause shown, it is hereby ORDERED as follows:

1. Within 14 days, Assured shall remedy its present violation of paragraphs 1 and 7 of the Injunction, as described herein.
2. Assured’s failure to timely remedy its present violations of the Injunction, or to take any recurring or future actions in violation of the Injunction, will result in sanctions.
3. Assured shall not withhold, suspend, or disallow any reinsurance payment to Ambac or the Segregated Account relating to any policy exposure or other liability that is allocated to the Segregated Account, on the basis that (1) Ambac, the Segregated Account, or the Rehabilitator has or will pay all or any part of the claim or settlement of that policy exposure or

other liability in a form other than cash, or (2) that the Segregated Account or the Rehabilitator has failed to pay such claim in part or in full. This paragraph does not apply to the extent Assured takes actions or exercises rights that are expressly permitted by the Plan of Rehabilitation or the Ceded Reinsurance Guidelines on file with this Court.

Dated this 14th day of June, 2011.

BY THE COURT:


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

cc: To All Parties
6/15/11
JB

CC: SERVICE LIST in Dane County Case # 10-CV-1576

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Bane, Mark I.
Bartzen, James E.
Bensky, Anne M
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Callan, Laura E.
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Franke, John
Friedman, James A.
Gaughan, Anthony J.
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Greenwald, David M.
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Johnson, Michael E.
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Munson, Jr. Earl
Muth, R. Timothy
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Trostle, Patrick J.
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Weed, Michael C.
Weiss, Allison H.
Welsch, Thomas J.
Klugman, Steven
Whitmer, Steven T.
Williamson, Brady C.
Wisniewski, Kevin A.
Zeavin, Robert A.

Honorable William D. Johnston

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DeVore, Andrew G.
Carter, Rodney
Dama, Michelle L.
Smith, Ann Ustad
Ermatinger Hanan, Beth
Brody, Michael
Schott, Donald K.
Splitek, Matthew J.
Morgan, Stephen L.