

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of: Appeal No. 2010-AP-1291-LV
Segregated Account of Circuit Court No. 10 CV 1576
Ambac Assurance Corporation,

SEAN DILWEG and OFFICE OF THE
COMMISSIONER OF INSURANCE,

Plaintiffs/Respondents,

AMBAC ASSURANCE CORPORATION,

Interested Party/Respondent,

v.

WELLS FARGO BANK/Trustee of
Bondholders, BANK OF NEW YORK
MELLON and DEUTSCHE BANK
NATIONAL TRUST COMPANY,

Defendants,

FEDERAL HOME LOAN MORTGAGE
CORPORATION,

Defendant-Petitioner-Co-Appellant,

AURELIUS CAPITAL MANAGEMENT,
LP, FIR TREE, INC., KING STREET
CAPITAL, L.P., KING STREET
CAPITAL MASTER FUND, LTD.,
MONARCH ALTERNATIVE CAPITAL,
LP, STONEHILL CAPITAL
MANAGEMENT LLC,

Defendants-Petitioners-Appellants,

EATON VANCE MANAGEMENT,
NUVEEN ASSET MANAGEMENT,
RESTORATION CAPITAL
MANAGEMENT, LLC, STONE LION
CAPITAL PARTNERS, LP,

Defendants-Co-Appellants-Petitioners.

**APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF
DANE COUNTY CASE NO. 10 CV 1576
THE HONORABLE WILLIAM D. JOHNSTON PRESIDING**

BRIEF OF CO-APPELLANTS THE LVM BONDHOLDERS

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Appellants Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners L.P. (collectively, the “LVM Bondholders”) submit this brief in support of their appeal of the Findings of Fact and Conclusions of Law Regarding Motions of Certain RMBS Policyholders and Certain LVM Bondholders, dated May 27, 2010 (the “Order”), of the Circuit Court.

Unlike appellants the RMBS Policyholders, the LVM Bondholders appeal only those portions of the Order that (i) approved the \$4.6 billion settlement (the “CDS Settlement” or “Settlement”) between Ambac Assurance Corporation (“Ambac”) and certain banks (the “CDS Banks” or “Banks”) in connection with Ambac’s guaranties of credit default swap agreements (the “CDS Contracts”), and (ii) denied the LVM Bondholders’ request for intervention for the purpose of taking discovery concerning the Settlement.

STATEMENT OF ISSUES PRESENTED

1. May the Circuit Court overseeing an insurance rehabilitation pursuant to Chapter 645 of the Wisconsin Statutes approve a multibillion dollar settlement over the objection of policyholders without undertaking an informed and independent review of the settlement’s merits, and without permitting the objectors to take discovery of key facts in the settling parties’ possession?

The Circuit Court said yes.

2. Are policyholders of an insurer in rehabilitation proceedings entitled to intervene in those proceedings in order to obtain discovery of key facts regarding the fairness of a proposed multibillion dollar settlement?

The Circuit Court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The LVM Bondholders submit that oral argument of this appeal is warranted in light of (a) the importance of the legal issues raised by this appeal, and (b) the magnitude of the \$4.6 billion settlement at issue and its potential impact on thousands of Ambac policyholders. For the same reasons, the LVM Bondholders respectfully submit that publication of the Court's decision would be appropriate.

In addition, because of the pivotal impact this appeal could have on the terms of any plan of rehabilitation in these proceedings, the LVM Bondholders submit that expedited treatment of the appeal is warranted. The LVM Bondholders intend to file a motion requesting that this appeal be advanced on the Court's calendar.

STATEMENT OF THE CASE

I. Nature of the Case

The LVM Bondholders are the owners or managers of funds that, collectively, own a majority of the outstanding “1st Tier” bonds (the “LVM Bonds”) issued by the State of Nevada to fund the construction of a four-mile monorail system in downtown Las Vegas (the “Las Vegas Monorail”). Payment of principal and interest on the LVM Bonds is insured by Ambac, and the Ambac insurance was instrumental to the issuance of these bonds.

On March 24, 2010, the Office of the Commissioner of Insurance of the State of Wisconsin (the “Commissioner” or “OCI”) announced that he had approved the creation of a segregated account (the “Segregated Account”) for certain materially-impaired policies of Ambac – including the policy that protected the LVM Bondholders – and that he had placed the Segregated Account into rehabilitation under Chapter 645 of the Wisconsin statutes. That same day, the Commissioner announced that Ambac had entered into the CDS Settlement.

Although only limited information was disclosed concerning the terms of the Settlement, it was clear that the proposed \$4.6 billion payment to the CDS Banks – consisting of a \$2.6 billion cash payment and the issuance of \$2 billion in notes – would severely deplete Ambac’s assets, thereby potentially jeopardizing its ability to satisfy its funding obligations to the Segregated Account. Moreover, as discussed below, the limited

information then available raised serious questions whether, absent the Settlement, the CDS Banks' claims would be subordinated to those of Ambac's policyholders, in which case the Banks would be entitled to no payment at all in the event that (as appears likely) Ambac is unable to pay its policyholders in full.

The LVM Bondholders therefore moved, by emergency motion, for an order providing that the Commissioner's consent to the Settlement (in his capacity as rehabilitator of the Segregated Account) would not be effective unless and until the rehabilitation court reviewed and approved the Settlement, after affording the LVM Bondholders the opportunity to take discovery and to be heard. The LVM Bondholders also sought to intervene as of right in the rehabilitation proceeding to the extent the Circuit Court deemed such intervention a necessary prerequisite to their right to be heard or to take discovery.¹

In its Order, the Circuit Court denied the LVM Bondholders' motion in all respects. After initially ruling from the bench that it lacked the authority to review and rule on the merits of the Settlement, the court in its Order, without explanation, reversed course and addressed the Settlement's merits at length and in detail. Specifically, the Order adopted verbatim the

¹ Motions seeking substantially similar relief were filed by other policyholders, including the RMBS Policyholders. Some of these other motions (including the RMBS Policyholders' motion) challenged not only the CDS Settlement, but also the lawfulness of Ambac's creation of the Segregated Account. The LVM Bondholders' motion, in contrast, challenged only the CDS Settlement.

17 pages of proposed findings of fact and conclusions of law that the Commissioner had submitted. By “simply accept[ing the Commissioner’s] position on all of the issues of fact and law without stating any reasons for doing so,” the court abdicated its responsibility to undertake an independent review of the Settlement’s merits and abused its discretion. *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 542, 504 N.W.2d 433, 434 (Ct. App. 1993).

The court below further abused its discretion by neglecting its duty to “apprise[] [it]self of all facts necessary for an intelligent and objective opinion” as to the fairness of the proposed Settlement. *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968) (“*TMT Trailer Ferry*”). The LVM Bondholders raised a number of key factual issues bearing on the Settlement’s fairness and sought to take discovery on those issues. The court denied their request to take discovery and, at the hearing, did not even require the settling parties to furnish evidence on these issues. Instead, the court chose to simply ignore these issues, making no mention of them in either its March 25 bench ruling or its March 27 Order.

II. Statement of Facts

A. Ambac

Ambac is a Wisconsin-domiciled insurer that provides financial guaranty insurance. While Ambac’s traditional business was to insure municipal bonds, in the 1990s Ambac began to guaranty riskier and more

speculative structured finance obligations, including residential mortgage-backed securities (often referred to as “RMBS”), collateralized debt obligations (or “CDOs”) of asset backed securities, and credit default swaps (or “CDS”). (R. 2, Rehab. Br. at 1-2, 14-16.) Ambac’s investment in these riskier products ultimately proved fatal for Ambac and was a principal reason for the commencement of the rehabilitation proceedings. (R. 2, Rehab. Br. at 2.)

B. The LVM Bondholders and the LVM Bond Policy

The LVM Bonds are municipal bonds that were issued in 2000 by the Director of the State of Nevada’s Department of Business and Trust to finance the construction of the Las Vegas Monorail. These bonds, which initially had a triple-A rating, 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. The LVM Bonds are currently in payment default, with the main source of repayment expected to be Ambac, under the LVM Bond Policy. Under that policy, Ambac has insured a current outstanding amount of LVM Bonds of more than \$500 million. (R. 43, May 5, 2010 Parrett Aff., Ex. A at 3-6.)

C. The Creation of the Segregated Account and the Commencement of Rehabilitation Proceedings

On March 24, 2010, the Commissioner announced that Ambac, with the Commissioner's approval, had created the Segregated Account pursuant to Wis. Stat. § 611.24, and had allocated to that account certain policies and other liabilities that were considered to have "material projected impairments," such as residential mortgage-backed securities, collateralized debt obligations, and credit default swaps other than those covered by the CDS Settlement. (R. 2, Rehab. Br. at 3.) Ambac stated that the net par exposure allocated to the Segregated Account was approximately \$68 billion. (R. 40, Apr. 30, 2010 Nowicki Aff., Ex. A at 4.)

The Segregated Account has only two assets: a \$2 billion secured note (the "Secured Note") and a reinsurance policy, both issued by Ambac and payable out of its General Account. (R. 1, Rehab. Pet., Tab 1 at 3-4.) The Secured Note and the reinsurance policy each provides that Ambac is not obligated to make *any* payments to the Segregated Account if the surplus amount in Ambac's General Account falls below \$100 million, or such *higher* amount of the Commissioner may set. (R. 1, Rehab. Pet., Tab 1, Ex. G at 3, Ex. H at 4.) Thus, the ability of the Segregated Account to satisfy policyholder claims is entirely dependent on the financial viability of Ambac's General Account.

Also on March 24, 2010, the Commissioner commenced rehabilitation proceedings with regard to the Segregated Account by filing a Verified Petition for Order of Rehabilitation (the "Petition"). (R. 1, Rehab. Pet.) In papers filed in support of the Petition, the Commissioner stated that the condition of the Segregated Account was such that any further transaction of business "would be financially hazardous to many policyholders." (R. 2, Rehab. Br. at 8.) The Commissioner also stated that the anticipated rehabilitation plan would involve an "orderly run-off of the Segregated Account" policies under his supervision. (R. 1, Rehab. Pet. at 7.) Although the Commissioner has not yet proposed a plan of rehabilitation, he announced at the outset of the rehabilitation that claims under policies allocated to the Segregated Account were expected to be paid only about 25 percent in cash, with the remainder to be satisfied by the issuance of "surplus notes" subordinate to Ambac's other obligations. (R. 73, OCI Opp. Br. at 10-11.)

D. The CDS Settlement

Simultaneously with the creation of the Segregated Account and the commencement of rehabilitation proceedings, Ambac announced on March 24, 2010 that it had reached a tentative agreement to settle Ambac's credit default swap obligations to the CDS Banks, a group of 17 mostly foreign

financial institutions.² That agreement – the CDS Settlement – settled, or “commuted,” most of the credit default swaps entered into by an Ambac subsidiary, Ambac Credit Products, LLC (“ACP”), a wholly-owned Ambac subsidiary created for the purpose of entering into CDS to be guaranteed by Ambac. In exchange, Ambac paid the CDS Banks \$4.6 billion, consisting of \$2.6 billion in cash plus the issuance of \$2 billion in surplus notes. (R. 40, Apr. 30, 2010 Nowicki Aff., Ex. A at 6.) The Commissioner stated that any CDS contracts not commuted as part of the Settlement would be allocated to the Segregated Account. (R. 1, Rehab. Pet. at 7.)

The \$2.6 billion cash portion of the Settlement, by itself, will deplete Ambac’s assets by almost one-third (R. 40, Apr. 30, 2010 Nowicki Aff., Ex. D at 2-3: Ambac’s Annual Statement for the year ended Dec. 31, 2009, reflecting assets of approximately \$8.5 billion), thereby severely compromising Ambac’s ability to satisfy its funding obligations to the Segregated Account. Payments under the \$2 billion in surplus notes will further impair Ambac’s financial wherewithal – particularly since those notes are scheduled to mature in 2020 (*see* Ambac Financial Group Form 8-K dated June 8, 2010, at 2), 30 years before the scheduled 2050 maturity date of the Ambac Secured Note that constitutes the Segregated Account’s principal asset (R. 1, Rehab. Pet., Tab 1, Ex. G at 1).

² The CDS Banks are: Banco Bilbao Vizcaya Argentaria SA, Banco Santander SA, Barclays Plc, BNP Paribas, Canadian Imperial Bank of Commerce, Citigroup Inc., Commerzbank AG, Credit Agricole SA, Deutsche Bank AG, Natixis, Rabobank Nederland, Royal Bank of Scotland Plc, Societe Generale and UBS AG, plus three affiliates of these financial institutions.

The limited available information concerning the underlying CDS transactions among Ambac, ACP and the CDS Banks raises serious questions as to the Settlement's fairness. Most fundamentally, the available information suggests that, absent a settlement, the claims of the CDS Banks would be subordinated to the claims of Ambac's policyholders and, as a result, would potentially be entitled to no payment whatsoever. As discussed below:

- the CDS Banks have long claimed that credit default swaps “are not insurance,” because swap buyers are not required to own the underlying debt or to incur any loss (i.e., a swap can be comparable to insurance taken out on a neighbor's house);
- it appears that a great many of the swaps held by the Banks are, in fact, “naked” swaps – that is, bets placed by the Banks on the failure of securities held by others, as to which the Banks themselves have suffered no losses; and
- it appears that ACP, the Ambac subsidiary that wrote the swaps, has no significant assets – and consequently, the CDS Contracts issued by Ambac (guarantying ACP's swap obligations) are no different in economic substance from swaps entered into directly between the Banks and Ambac.

For these reasons, it appears that the CDS Banks would not be entitled to policyholder priority, which, under Wis. Stat. § 645.68(3),

attaches only to “claims under [insurance] policies for losses incurred.” Instead, the Banks would merely be general creditors of Ambac, and therefore would be entitled to payment only after Ambac’s policyholders are paid in full. *See Wis. Stat. § 645.68(5)*. If that is the case, then the payment of \$4.6 billion to the Banks pursuant to the Settlement improperly elevated their priority status, allowing them to be paid ahead of thousands of Ambac policyholders, who (unlike the Banks) suffered real losses but now face the prospect that those losses may never be reimbursed.

III. Proceedings in the Circuit Court

On May 5, 2010, the LVM Bondholders filed an emergency motion, asking the Circuit Court to review the merits of the CDS Settlement prior to its consummation. (R. 41-43, LVMB Motion.) The LVM Bondholders argued that judicial review of the proposed CDS Settlement was critical, in light of the Settlement’s potentially devastating effect on the Segregated Account and its potential contravention of Wisconsin’s statutory priority scheme. (R. 42, LVMB Br. at 2-3, 14-17.)³

³ Five days prior to the filing of the LVM Bondholders’ motion, the RMBS Policyholders filed their own emergency motion, which also challenged the propriety of the CDS Settlement. (R. 37-40, RMBS Motion.) The relief sought by the RMBS Policyholders differed in several respects from that sought by the LVM Bondholders. First, in addition to challenging the Settlement, the RMBS Policyholders challenged the lawfulness of the Segregated Account. Second, with respect to the CDS Settlement, the RMBS Policyholders asked the court to modify its previously-entered Temporary Injunction so as to bar the Settlement’s consummation. In contrast, the LVM Bondholders did not seek to modify the Temporary Injunction but, instead, requested an order directing the Commissioner to submit the proposed Settlement to the court for review pursuant to Wis. Stat. § 645.33(2). (R. 42, LVMB Br. at 19.)

The LVM Bondholders also sought permission to take expedited discovery, and to intervene as of right in the rehabilitation proceeding to the extent the Circuit Court deemed such intervention a necessary prerequisite of the LVM Bondholders' right to be heard or to take discovery. (R. 42, LVMB Br. at 18-20.) The LVM Bondholders served document requests on Ambac and OCI, and requested a commission permitting the service of document requests on ACP. (R. 67-68, LVMB Request for Commission.) The LVM Bondholders also sought to take discovery from the CDS Banks.⁴

On May 20, 2010, just five days before the May 25 hearing on the motions, OCI and Ambac filed extensive papers (approximately 300 pages in all) in opposition to the motions filed by the LVM Bondholders and other moving parties. In their briefs opposing the motions, OCI and Ambac argued as a threshold matter that they were not required to seek court approval as a matter of law because the Settlement involved the General Account, which was not itself in rehabilitation. At the same time, OCI and Ambac addressed the merits of the Settlement at length (R. 69, AAC Opp. Br. at 23-38; R. 73, OCI Opp. Br. at 10-11); they submitted extensive factual affidavits and numerous exhibits purporting to justify the

⁴ Ambac, ACP and OCI each refused to provide any discovery whatsoever. In addition, the LVM Bondholders were unable to take discovery from the CDS Banks because the Banks' identities were not disclosed until May 20, five days before the hearing, when OCI finally identified the Banks in its motion papers. Previously, the LVM Bondholders had asked Ambac to identify the CDS Banks so that subpoenas could be served on them, but Ambac had declined to do so.

Settlement, as well as affidavits by non-parties describing adverse consequences that, according to OCI, would result if the Settlement were delayed. (R. 70, May 20, 2010 Matanle Aff.; R. 74, May 20, 2010 Peterson Aff.; R. 75, May 20, 2010 Lavelle Aff.; R. 76, May 20, 2010 Massengill Aff.; R. 77, May 20, 2010 Vaughan Aff.) In addition, OCI filed 17 pages of proposed findings of fact and conclusions of law. (LVMB App. 17-34; R. 72, OCI Prop. F. Fact & Concl. Law.) Finally, the afternoon before the hearing, the CDS Banks filed an “amicus” brief, accompanied by eight exhibits, in support of the Settlement. (R. 93, Amicus Br. of Bank Insureds.)

On May 25, 2010, the Circuit Court held a hearing on the motions of the LVM Bondholders and others concerning the Settlement, as well as the various motions addressing the lawfulness of the Segregated Account’s creation. The court heard the arguments of counsel, but no testimony was taken nor any documentary evidence offered or admitted into evidence.

At the conclusion of the May 25 hearing, the Circuit Court denied the motions of the LVM Bondholders and other movants from the bench. The court ruled that it lacked authority to review the Settlement because that transaction supposedly involved only the General Account, which was not in rehabilitation. The court repeatedly emphasized that OCI’s actions relating to the CDS Settlement were “not under the authority of the court,” and that the court could not “dip into the activities and try to overview the

activities of the Office of the Commissioner of Insurance.” (LVMB App. 5, 9-10; R. 151, May 25, 2010 Hearing Tr. at 14, 125-26.)⁵ At the same time, the court stated – inconsistently and without explanation – that it was “adopting the[] reasoning” of OCI, Ambac and the Banks. The court explained that it had “looked at their briefs” and concluded that “on these issues, their reasoning is the correct reasoning and their evaluations are correct” (LVMB App. 11; R. 151, May 25, 2010 Hearing Tr. at 127.)

Two days later, the Circuit Court issued its Order. (LVMB App. 35-51; R. 127.) Despite the court’s statements at the May 25 hearing that it lacked authority to rule on the Settlement’s merits, the Order addressed the merits at length and in detail, concluding that “the proposed Bank Group Settlement is a fair and reasonable compromise that will benefit policyholders of both the General and Segregated Accounts” (LVMB App. 47-48; R. 127, Order at 13-14.) In support of this conclusion, the court adopted – verbatim – all 17 pages of the findings of fact and conclusions of law proposed by the Commissioner concerning the Settlement’s merits. (LVMB App. 35-51; R. 127, Order.)⁶ In addition, the

⁵ See also R. 151, May 25, 2010 Hearing Tr. at 120 (“the motions are inviting me to have an opportunity to get into the decision-making process here and pass on that. That is not, I think, my role. . . . I don’t believe I have authority for it”); R. 151, May 25, 2010 Hearing Tr. at 125 (approval of CDS Settlement is “the call of the OCI, not the court’s . . .”).

⁶ A comparison of the Order to OCI’s proposed findings and conclusions shows that the findings and conclusions contained in the Order are identical, word for word, to those submitted by the Commissioner. (Compare LVMB App. 17-34; R. 72, OCI Prop. F. Fact

Order denied discovery, holding that, “as policyholders, Movants do not have standing as parties to seek discovery in this rehabilitation proceeding.” (LVMB App. 50; R. 127, May 27, 2010 Order at 16.) The Order also denied intervention, holding that “Movants have not satisfied the requirements for intervention under Wisconsin law.” (LVMB App. 51; R. 127, May 27, 2010 Order, at 17.)

IV. Proceedings in this Court, and the Closing of the CDS Settlement

On May 28 and June 1, 2010, respectively, the RMBS Policyholders and the LVM Bondholders each filed a Notice of Appeal. The RMBS Policyholders also filed a motion to enjoin the closing of the CDS Settlement pending appeal. This Court denied that motion, finding that the RMBS Policyholders had not shown that they would be irreparably harmed if the CDS Settlement was not enjoined. (June 2, 2010 Ct. App. Order, at 5-6.) On June 1 and June 18, 2010, respectively, OCI filed motions to dismiss the RMBS Policyholders’ and LVM Bondholders’ appeals. On June 18, 2010, this Court denied OCI’s motions to dismiss, holding that the Order was a final order and that the appeals were not moot even though the CDS Settlement had closed. (June 18, 2010 Ct. App. Order, at 4-5.)

& Concl. Law), *with* LVMB App. 35-51; R. 127, May 27, 2010 Order).) The only changes or additions made by the court were (i) the removal of record citations; (ii) the addition of two introductory paragraphs, in which the court “determine[d] that the submissions of fact and law presented by [the Commissioner, the CDS Banks and Ambac] all are adopted and made those of this Court”; and (iii) minor changes to the WHEREFORE clause at the end of the Order.

On June 7, 2010, the CDS Settlement closed. Ambac transferred \$2.6 billion in cash from its General Account to the CDS Banks, and issued \$2 billion of surplus notes to the CDS Banks. (See Ambac Financial Group Form 8-K dated June 8, 2010, at 1.)

STANDARD OF REVIEW

The appellate court's review of the Circuit Court's approval of the Settlement is governed by an abuse of discretion standard. "An abuse of discretion may occur [when the] trial judge [fails] to consider and make a record of factors relevant to a discretionary determination in a particular case." *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 430, 293 N.W.2d 540, 542 (1980); see also *Trieschmann v. Trieschmann*, 178 Wis. 2d at 544-55, 504 N.W.2d at 435 (trial court abused its discretion by simply adopting one party's memorandum as the court's decision without articulating its reasons for rejecting the other party's arguments).

The Circuit Court's denial of the LVM Bondholders' request for intervention as of right is a question of law, which is reviewed *de novo*. *Helgeland v. Wis. Municipalities*, 307 Wis. 2d 1, 23, 745 N.W.2d 1, 11 (2008).

ARGUMENT

I. The CDS Settlement Required Court Approval

Although the Segregated Account is not itself a party to the CDS Settlement, it is undisputed that Ambac was *contractually* required to (and did) obtain the Segregated Account's written consent prior to entering into that Settlement. The Segregated Account, in turn, was *statutorily* required to obtain court approval before giving its consent to the \$4.6 billion Settlement.

The respective contractual rights and obligations of Ambac and its Segregated Account are governed by several agreements that Ambac and the Commissioner (in his capacity as the Segregated Account's rehabilitator) executed on March 24, 2010, immediately following the Segregated Account's creation. One of those agreements, the Cooperation Agreement, expressly forbids Ambac, without the Segregated Account's prior written consent, to enter into certain transactions that might affect Ambac's financial condition (and hence its ability to satisfy its funding obligations to the Segregated Account). Specifically, the Cooperation Agreement provides:

Ambac shall not directly or indirectly enter into any transaction with, or use any asset or property of, any third party (including any affiliate, but excluding the Segregated Account) involving consideration or other proceeds in excess of \$5,000,000 (or such higher amount

as determined by the Segregated Account) without the Segregated Account's prior written consent, which the Segregated Account may withhold or condition in its reasonable discretion; provided, however, that such consent shall in no event be required with respect to (A) the payment of policy claims in the ordinary course of business or (B) any investment made in accordance with Ambac's Investment Policy (as defined in the Secured Note).

(R. 1, Rehab. Pet., Tab 1, Ex. B at § 1.02 (emphasis added).)

The Settlement, of course, involves vastly more than \$5 million, and it is not a payment of policy claims in the ordinary course of business.

Consequently, as Ambac itself has acknowledged (R. 69, AAC Opp. Br. at 22-23), the written consent of the Segregated Account, by the Commissioner as its rehabilitator, was required before Ambac could enter into the Settlement.

It is equally clear that the Commissioner could not give his contractually required consent to the Settlement without first seeking and obtaining the approval of the rehabilitation court. Wisconsin's rehabilitation statute expressly provides that the Commissioner's power to rehabilitate an insurer is subject to court approval: "*Subject to court approval*, the rehabilitator may take the action he or she deems necessary or expedient to reform and revitalize the insurer." Wis. Stat. § 645.33(2) (emphasis added); *see also* Wis. Stat. § 645.32 (rehabilitation order "shall direct the rehabilitator to take possession of the assets of the insurer and to administer them *under orders of the court*") (emphasis added).

To be sure, not every single action taken by a rehabilitator requires judicial review and approval. But the mandate of Wis. Stat. § 645.33(2) that a rehabilitator obtain “court approval” for “action he or she deems necessary or expedient to reform and revitalize the insurer” plainly requires judicial scrutiny of actions that go to the heart of a rehabilitation case – such as actions that potentially deplete an insurer’s principal asset or imperil its prospects for a successful rehabilitation, or that determine the priority of payment among principal creditor groups. Looked at from either perspective, it is hard to imagine a transaction that more clearly warrants judicial review than does the Commissioner’s consent to the CDS Settlement.

Court supervision of a rehabilitator’s actions is no mere formality. To the contrary, it is a statutorily mandated check that ensures that the purposes of rehabilitation are served. As a leading commentator has observed, “[d]espite the broad discretion generally afforded conservators, the powers which they exercise in the rehabilitation of insurance companies are subject to the control of the courts.” 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 5:23 (3d ed. 2000). Courts across the country are in accord. See, e.g., *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 572 A.2d 798, 804 (Pa. Commw. Ct. 1990) (“[T]he Rehabilitator’s broad powers in these proceedings are circumscribed by this Court’s mandate to act as a check on potential discretionary abuse and to insure

equitable apportionment of loss.”), *aff’d in part sub nom, Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992); *In re People ex rel. Van Schaick*, 268 N.Y.S. 88, 95 (1st Dep’t 1933) (“The Legislature had the power to permit the Superintendent of Insurance to liquidate or rehabilitate such companies, but the extent to which that power shall be used must be supervised by the courts.”), *aff’d*, 264 N.Y. 473 (1934).

II. The Circuit Court Erred in Failing to Conduct A Meaningful Review of the Proposed Settlement

The court below appears to have acknowledged, at least tacitly, that the CDS Settlement was subject to judicial review and approval. Despite its initial comments to the contrary in its May 25 bench ruling, the court proceeded, in its May 27 Order, to address the merits of the Settlement at length and in detail, finding it to be “a fair and reasonable compromise.” (LVMB App. 47; R. 127, Order at 13.) However, this finding did not rest upon an informed and independent review of the Settlement’s merits. Instead, the court simply accepted the Commissioner’s positions on all issues of fact and law, without stating any reasons for doing so and without apprising itself of facts necessary to an informed assessment of the Settlement’s fairness.

A. The Circuit Court Was Required to Make an Informed and Independent Judgment, After Apprising Itself of All Relevant Facts

Neither the Wisconsin rehabilitation statute nor the reported Wisconsin case law addresses the standards governing the requirement of “court approval,” set forth in Wis. Stat. § 645.33(2), for an insurance rehabilitator’s actions. As Ambac itself asserted below (R. 69, Ambac Opp. Br., at 27), it is therefore appropriate to look, by analogy, to the standards governing the review and approval of settlements in the bankruptcy context.⁷

Bankruptcy Rule 9019 requires court approval of any settlement entered into by a debtor or bankruptcy trustee. *See* Fed. R. Bankr. Proc. 9019(a) (“On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement”). Applying this rule, courts in the bankruptcy context permit approval of a settlement only if it is fair and equitable, and in the best interests of the debtor and its creditors. *See, e.g., In re American Reserve Corp.*, 841 F.2d 159, 161-63 (7th Cir. 1987); *In re*

⁷ State courts frequently look to federal bankruptcy law for guidance in interpreting state statutes governing insurance rehabilitation and dissolution proceedings. *See, e.g., Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1203 (Pa. 2009) (consideration of bankruptcy law to assist in interpreting state insurance insolvency law is common and proper); *cf. Pine Top Ins. Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 969 F.2d 321, 323-24 (7th Cir. 1992) (it is customary to look to bankruptcy law when interpreting state insurance rehabilitation laws); *see also* R. 7, OCI Temp. Inj. Br., at 14-17 (asking Circuit Court to look to bankruptcy law for guidance on treatment of CDS agreements as executory contracts); R. 69, AAC Opp. Br. at 28 (asking Circuit Court to look to bankruptcy law for guidance on CDS Banks’ acceleration and termination rights).

Ionosphere Clubs, Inc., 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994).⁸

The United States Supreme Court has held that a decision whether to approve a settlement under Bankruptcy Rule 9019 requires “the informed, independent judgment of the bankruptcy court.” *TMT Trailer Ferry*, 390 U.S. at 424; *accord, e.g., In re American Reserve Corp.*, 841 F.2d at 162. Moreover, “[t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.” *TMT Trailer Ferry*, 390 U.S. at 424.

Although a decision to approve or reject a settlement is committed to the bankruptcy court’s discretion,

the bankruptcy judge *must actually exercise his discretion*. He may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely “rubber-stamp” the trustee’s proposal. The bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an “informed and independent judgment” about the settlement.

⁸ When a proposed settlement involves creditors whose claims may be subordinate to those of other creditors – here, the CDS Banks – assessment of the settlement’s fairness must include consideration of whether the settlement is consistent with the relative priorities of competing creditors. *See In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (settlement with creditor cannot be approved “unless the court concludes that priority of payment will be respected as to objecting senior creditors”); *In re American Reserve Corp.*, 841 F.2d at 162 (“‘fair and equitable’ means that the settlement reasonably accords with the competing interests’ relative priorities”) (citations omitted).

In re American Reserve Corp., 841 F.2d at 162 (emphasis added); *accord*, e.g., *In re Rimsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997). The court's exercise of its discretion requires careful consideration of any objections, *see In re Foster Mortgage Corp.*, 68 F.3d 914, 918 (5th Cir. 1995) (bankruptcy court's failure to address points raised by objecting creditors was "itself an abuse of discretion"), as well as the presentation of evidence on key facts, *see In re Gregerson*, 311 B.R. 857, 862 (Bankr. N.D. Iowa 2004) (disapproving settlement where the trustee failed to present evidence on key facts bearing on the merits of the settlement).

When, as here, the pertinent facts and circumstances have not been fully disclosed, the court must permit "sufficient discovery of the underlying claims." *In re Matco Elecs. Group, Inc.*, 287 B.R. 68, 76 (Bankr. N.D.N.Y. 2002); *see also In re Present Co.*, 141 B.R. 18, 23-24 (Bankr. W.D.N.Y. 1992) (declining to approve settlement because its proponents "ha[d] refused to provide to the Creditors' Committee full disclosure," and explaining that "they cannot persuade me to approve this compromise . . . so long as insiders limit the information available to [the objectors]"); *In re Goldstein*, 131 B.R. 367, 371 (Bankr. S.D. Ohio 1991) (disapproving settlement where the trustee had neglected to review pertinent documents); *compare In re Del Grosso*, 106 B.R. 165, 169 (Bankr. N.D. Ill. 1989) (approving settlement where "[a]ll attendant facts and circumstances of the proposed settlement and the underlying cause of

action have been fully disclosed,” enabling “the Court [to] make an informed and independent judgment about the matter”).

The Fifth Circuit’s decision in *In re AWECO, Inc.*, 725 F.2d 293, 297 (5th Cir. 1984), is particularly instructive. There, as here, the court below had approved a settlement on the basis of a limited factual record, denying the request of creditors who requested a stay in order to develop evidence. As here, the court below accepted the settling parties’ representation that any delay would jeopardize the deal. The District Court affirmed, but the Court of Appeals reversed.

The Court of Appeals began by reiterating the basic principles discussed above:

[I]mportant determinations in reorganization proceedings must receive the ‘informed, independent judgment of the Bankruptcy Court.’ The duty of a bankruptcy judge to reach an ‘intelligent, objective and educated evaluation’ of settlements cannot be carried out absent a sufficient factual background. . . .

725 F.2d at 299 (citations omitted). Applying these principles, the court found that “[a]n examination of the record before us reveals gaping holes in the background of information regarding the . . . settlement,” particularly concerning whether the settlement of the junior creditor’s claims would harm senior creditors. *Id.* The court therefore vacated the decision below and remanded for further proceedings, including the development of a full factual record. *Id.* The court’s concluding observations are strikingly apposite to the present case:

Time pressure apparently influenced the bankruptcy judge to deny the [objecting creditors'] request for a continuance to develop evidence Nevertheless, the circumstances below, surrounding approval of this settlement, called for a pause. . . . The bankruptcy judge should not reach for his stamp marked "approved" unless some party supplies concrete facts.

Id. at 299-300.

B. The Circuit Court's Decision Was Neither Independent Nor Informed by the Relevant Facts

1. Rather than undertaking an independent examination of the CDS Settlement's merits, the court uncritically adopted the Commissioner's position on all issues

The court below made no serious attempt to assess the objections to the CDS Settlement advanced by the LVM Bondholders and other objectors. Instead, the court deferred uncritically to the Commissioner's views on all issues:

- In its statements from the bench at the May 25 hearing, the court ruled that OCI's approval of the Settlement was "not under the authority of the court," and that the court therefore was without power to review the Settlement. (LVMB App. 5; R. 151, May 25, 2010 Hearing Tr. at 14.) Inconsistently and without explanation, the court went on to state that it had "looked at the[] briefs" of OCI, Ambac and the CDS Banks, that it believed that "their evaluations are correct," and that it

was “adopting their reasoning.” (LVMB App. 11; R. 151, May 25, 2010 Hearing Tr. at 127.)

- Two days later, the court entered the Order, which simply adopted wholesale the 17 pages of proposed findings of fact and conclusions of law that OCI had submitted. As noted above (at page 14 & n. 6), the court did not change a single word of OCI’s proposed findings or conclusions.
- Neither in its bench ruling nor in its Order did the court so much as mention any of the legal or factual objections to the Settlement raised by the LVM Bondholders or other parties, much less provide an explanation of its reasons for overruling those objections.

In short, the court made no attempt to reach an “informed and independent judgment” as to the CDS Settlement’s fairness. *TMT Trailer Ferry*, 390 U.S. at 424. Rather than “actually exercis[ing] his discretion,” the rehabilitation judge “simply accept[ed] the [Commissioner’s] word that the settlement is reasonable.” *In re American Reserve Corp.*, 841 F.2d at 162.

A Wisconsin Court of Appeals decision, *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 504 N.W.2d 433, is closely on point. There, the trial court had adopted almost verbatim one party’s memorandum as the court’s decision. The Court of Appeals reversed,

holding that the trial court was required “not only to state its findings of fact and conclusions of law, but also state the factors upon which it relied in making its decision.” *Id.* at 542, 504 N.W.2d at 434. In so holding, the Court explained that “[t]he trial court’s decision must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* at 541-42, 504 N.W.2d at 434 (internal citations and quotations omitted). By “simply accept[ing one party’s] position on all of the issues of fact and law without stating any reasons for doing so other than its belief that doing so was the ‘only just solution,’” *id.* at 542, 504 N.W.2d at 434, the trial court had “failed to properly exercise its discretion in reaching its decision.” *Id.* at 540, 504 N.W.2d at 433; *see also Wis. Ass’n of Food Dealers*, 97 Wis. 2d at 434, 293 N.W.2d at 545 (trial court’s failure to consider all factors relevant to its discretionary determination was abuse of discretion).

2. The court failed to apprise itself of key facts bearing on the Settlement’s fairness

In addition to uncritically adopting the Commissioner’s proposed findings and conclusions, the rehabilitation judge failed to “apprise[] himself of all facts necessary for an intelligent and objective opinion” concerning the Settlement’s fairness. *TMT Trailer Ferry*, 390 U.S. at 424. In this respect, too, the court abused its discretion. *See In re AWECO*, 725

F.2d at 299 (“approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion”); *In re Foster Mortgage*, 68 F.3d at 918 (where creditors objected to proposed settlement, bankruptcy court’s failure to carefully consider and make findings on particulars of creditor opposition was “itself an abuse of discretion”).

The LVM Bondholders’ moving papers raised multiple factual issues bearing on the Settlement’s fairness – most fundamentally, issues concerning whether, absent a settlement, the claims of the CDS Banks would be subordinated to the claims of Ambac’s policyholders and, as a result, potentially entitled to no payment whatsoever. Under Wis. Stat. § 645.68(3), the claims of policyholders – specifically, “claims under [insurance] policies for losses incurred” – are entitled to priority over the claims of other creditors. If the Banks are merely general creditors of Ambac, they would be entitled to payment only after Ambac’s policyholders are paid in full, *see* Wis. Stat. § 645.68(5), which may very well never happen.

As the LVM Bondholders noted, the limited available information suggests that the CDS Banks’ claims are *not* “claims under [insurance] policies for losses incurred” and, consequently, would be subordinated to the claims of Ambac’s policyholders. Specifically:

- The CDS Banks themselves have acknowledged that credit default swaps are not insurance. The CDS Banks, along with their brethren in the financial industry, have long claimed that “CDSs are not insurance.” (R. 42, LVMB Br. at 15.) For example, a publication entitled “Frequently Asked Questions About CDS” published by the Securities Industry and Financial Markets Association (“SIFMA”), states:

CDS are not insurance. . . . Unlike insurance, CDS do not require that buyers of protection have an insurable interest in the underlying debt obligations, or incur any loss as a result of credit events. . . . Because CDS do not require an insurable interest, or the incurrence of a loss as a condition to payment, if treated as insurance, they would be prohibited as a result of the very feature that has contributed to the success of this product.

(R. 95, May 24, 2010 Parrett Reply Aff., Ex. B at 3.)⁹ *See also* Wis. Stat. § 631.07(1) (“No insurer may knowingly issue a policy to a person without an insurable interest in the subject of the insurance.”).

- The CDS Banks appear to have suffered no losses. Even if the Banks’ credit default swaps could somehow be deemed “insurance,” their entitlement to policyholder priority would still be highly doubtful. As the LVM Bondholders observed in their motion below, most, if not all, of

⁹ Five of the CDS Banks sit on SIFMA’s board of directors, and all but two of the CDS Banks are members of SIFMA (either directly or through affiliates). *See* <http://www.sifma.org/about/members>; <http://www.sifma.org/about/board.html>.

The CDS agreements for the one Ambac CDS deal whose terms have been publicly disclosed (namely, the deal that Ambac has challenged in its suit against Citigroup) are consistent with these principles. These agreements expressly state that “Buyer shall not at any time have any obligation to hold any part of the Reference Obligation.” (R. 95, May 24, 2010 Parrett Reply Aff., Ex. C at 7, ¶ 9.)

the swaps covered by the CDS Settlement appear to be “naked” swaps – that is, bets placed by the Banks on the failure of CDO securities held by *other parties*. (R. 42, LVMB Br. at 16; R. 94, LVMB Reply Br. at 3-4; R. 95, May 24, 2010 Parrett Aff., Ex. B at 3, Ex. C, Sched. A at 6.) Neither Ambac, nor OCI, nor the CDS Banks disputed – let alone put in evidence rebutting – that point anywhere in their extensive opposition papers. If it is true that the swaps are, in fact, naked, that would mean that the CDS Banks have suffered no actual losses. In that event, any payment by Ambac to them would not be a reimbursement of loss, but instead would be pure profit to them – the fruits of a winning wager – and consequently, the Banks’ claims would not be entitled to the priority status that Wis. Stat. § 645.68(3) accords to “claims under [insurance] policies *for losses incurred*” (emphasis added).

- ACP appears to have no significant assets. In their brief below, the CDS Banks contended that it matters little whether they suffered any losses on their swaps, because those swaps were written not by Ambac, but by its special purpose subsidiary ACP – that is, Ambac merely guarantied ACP’s swap obligations. According to the Banks, the “losses” they suffered were those caused by ACP’s inability to satisfy its CDS obligations to the Banks – that is, to make good on the Banks’ winning wager. (R. 93, Amicus Br. of Bank Insureds at 9-11.)

This argument elevates form over substance. If ACP, Ambac's wholly-owned subsidiary, did not have the financial wherewithal to satisfy its swap obligations to the Banks, then the transactions between ACP and the CDS Banks were, in economic substance, no different than CDS written directly by Ambac – an artifice designed to get around Wisconsin's regulations forbidding insurers to issue CDS directly. (R. 42, LVMB Br. at 15.) As we pointed out in our moving papers below, the limited available information suggests that ACP, in fact, was little more than a shell – certainly not a financially viable stand-alone company.¹⁰ (R. 42, LVMB Br. at 15.) In response, neither Ambac, nor the Commissioner, nor the CDS Banks made any effort to establish that ACP was in fact financially viable.

In addition to the crucial matter of the CDS Banks' priority vis-à-vis Ambac's policyholders, significant factual questions also exist concerning the value of the broad releases that Ambac gave to the CDS Banks as part of the Settlement (*see* R. 70, May 20, 2010 Matanle Aff., Ex. 1 at 5). For example, Ambac's papers in opposition to the motions below revealed for the first time that the CDS Banks (whose names Ambac had previously refused to divulge) include Citigroup, which Ambac is currently suing for

¹⁰ For example, the Commissioner stated in his Rehabilitation Brief that ACP "had *no significant assets* upon the allocation to the Segregated Account of its member interests and the policies related to certain of its CDS." (R. 2, Rehab. Br. at 19 (emphasis added).) In other words, ACP's only significant assets were the equity interests it held in certain subsidiaries (which are believed to be worthless), as well as its right to receive premiums under its CDS policies, all of which it allocated to the Segregated Account when that Account was created.

fraud in connection with Citigroup's creation of \$2 billion of CDO obligations that Ambac guaranteed. (R. 74, May 20, 2010 Peterson Aff. at 15; R. 95, May 24, 2010 Parrett Reply Aff. at Ex. D.) In addition, Ambac's current financial statements value its claims against issuers of real estate mortgage-backed securities as an asset worth *more than \$2 billion*. (R. 40, Apr. 30, 2010 Nowicki Aff., Ex. A at 68.) Yet the papers filed by Ambac and the Commissioner did not even mention – let alone describe and attempt to value – the claims against the CDS Banks that Ambac is releasing. The Settlement's fairness cannot properly be assessed without a careful examination of this issue, in addition to the all-important subordination issue

Notwithstanding these and other critical unanswered questions regarding the proposed Settlement, the Circuit Court rejected out of hand the LVM Bondholders' request for discovery. In so doing, the court abused its discretion.

III. The Circuit Court Further Erred in Denying the LVM Bondholders' Request for Intervention as an Alternative Ground for Taking Discovery

The LVM Bondholders sought to intervene as of right, pursuant to Wis. Stat. § 803.09(1), in the rehabilitation proceedings as an additional, independent means of ensuring their right to be heard and to take discovery as to the merits of the CDS Settlement. As explained in Point II.A above,

that right is inherent in the court's obligation to undertake a meaningful review of the Settlement's fairness; consequently, a reversal of the Circuit Court's intervention ruling is in no way necessary to the relief sought on this appeal. Nevertheless, the denial of the LVM Bondholders' request to intervene as of right constituted a further error of the court below.¹¹

Wisconsin's intervention statute authorizes intervention as of right in any civil proceeding upon the satisfaction of three requirements:

[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 to the movant's ability to protect that interest, unless [C] the movant's interest is adequately represented by existing parties.

Wis. Stat. § 803.09(1).

¹¹ The Circuit Court also ruled that, "as policyholders, [the LVM Bondholders] do not have standing as parties to seek discovery in this rehabilitation proceeding." (LVMB App. 50; R. 127, May 27, 2010 Order at 16.) This ruling, too, was error. There can be little doubt that the LVM Bondholders satisfy Wisconsin's liberal standing rules, which require merely that the party seeking standing was "injured in fact," in the sense that it alleges a personal stake in the outcome of the controversy, and that "the interest allegedly injured is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *McConkey v. Van Hollen*, 783 N.W.2d 855, 860 (Wis. 2010); see also *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 320 N.W.2d 199, 203-04 (1982).

The injuries of the LVM Bondholders, like those of other policyholders, are direct and substantial. Consequently, even Ambac and OCI acknowledged below that policyholders are entitled to "have the opportunity to be heard" as interested parties in connection with the rehabilitation proceeding. (R. 73, OCI Opp. Br., at 14; see also *Ambac's First Brief in Opposition to Various Motions and Objections to Injunction Order*, dated August 17, 2010 (Case No. 2010 CV 1576, Docket No. 350), at 4: "As this Court explained at the July 9 Hearing, Movants have been, and will be, heard as interested policyholders")

Each of these requirements was satisfied here. *First*, 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) (1994). *Second*, in light of the allocation of the LVM Bond Policy to the Segregated Account and the immediate threat that is posed by the CDS Settlement, 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.* *Third*, in light of the Commissioner’s determination to proceed with the CDS Settlement despite the request of the LVM Bondholders and other policyholders that it be deferred pending court review, it is plain that the LVM Bondholders’ interest is not “adequately represented” by the Commissioner. *Id.* See *M&I Marshall & Ilsley Bank v. Urquhart Cos.*, 287 Wis. 2d 623, 635, 637-38, 706 N.W.2d 335, 341-43 (Ct. App. 2005) (reversing denial of creditor’s motion to intervene as of right in receivership proceeding where creditor had “an interest in ensuring that the receiver carries out his court-ordered and statutory obligations,” noting that the burden of showing inadequacy of representation by existing parties “should be treated as minimal,” and concluding that the receiver’s having

aligned himself with the party opposing creditor's intervention alone "demonstrates the point").¹²

OCI argued below that the intervention statute does not apply in rehabilitation proceedings because Wisconsin's insurance code contains no provision specifically permitting intervention. What this argument overlooks is that Section 801.01(2) of the Wisconsin Code of Civil Procedure expressly states that Chapters 801 to 847 govern "procedure and practice in Circuit Courts of this State in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin *except where different procedure is prescribed by statute or rule.*" Wis. Stat. § 801.01(2) (emphasis added). As the Court of Appeals has ruled, these provisions apply in all civil proceedings, including rehabilitations, unless expressly overridden. *See In re Commitment of Brown*, 215 Wis. 2d 716, 721-22, 573 N.W.2d 884, 886 (Ct. App. 1997) ("Under § 801.01(2), STATS., the procedures established in Chapters 801 to 847, STATS., including § 801.58, automatically apply to civil proceedings except where a different procedure is prescribed by a statute or a rule."); *cf. M&I Marshall*, 287 Wis. 2d at 643-44, 706 N.W.2d at 344-45

¹² There is a rebuttable presumption of adequate representation where a governmental officer is charged by law with representing the interests of the movant and shares the same ultimate objective in the action. *See Helgeland*, 307 Wis. 2d at 19, 745 N.W.2d at 9. Here, that presumption is overcome by the fact that OCI's position with regard to the Settlement is directly contrary to the LVM Bondholders' interest in obtaining full payment of their claims under the insurance policy they purchased from Ambac.

(permitting intervention pursuant to Wis. Stat. § 809.03(1) in receivership proceeding). Thus, the provisions of section 803.09(1) are fully applicable here.¹³

The LVM Bondholders were therefore entitled to intervene as of right in this proceeding, and the Circuit Court erred in denying this request.

CONCLUSION

The LVM Bondholders respectfully request that the Court reverse the Order and remand for further proceedings, including discovery and the development of a full factual record

Dated this 13th day of September, 2010.

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¹³ Courts in other jurisdictions have permitted policyholders and other interested parties to intervene in rehabilitation and liquidation proceedings. *See, e.g., Koken v. Legion Ins. Co.*, 831 A.2d 1196, 1202 (Connw. Ct. 2003) (policyholders permitted to intervene in rehabilitation proceeding), *aff'd*, 878 A.2d 51 (Pa. 2005); *In re Ambassador Ins. Co.*, 965 A.2d 486, 489 ¶ 8 n.4 (Vt. 2008) (policyholder permitted to intervene in liquidation proceeding); *Fewell v. Pickens*, 39 S.W.3d 447, 450 (Ark. 2001) (shareholders permitted to intervene in insurance company receivership proceeding).

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font. The length of this brief is 7,591 words.

Dated this 13th day of September, 2010.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

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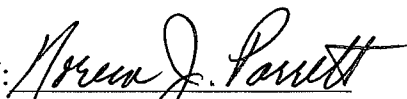
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Dated this 13th day of September, 2010.

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CERTIFICATION OF APPENDIX

I hereby certify that filed in connection with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

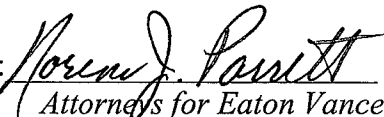
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify that on September, 13, 2010, I served by first class mail, postage prepaid, upon counsel listed below the LVM Bondholders' brief and appendix.



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