

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

OCI'S BRIEF RE EVIDENTIARY STANDARDS IN THESE PROCEEDINGS

The Wisconsin Office of the Commissioner of Insurance and Sean Dilweg, Commissioner of Insurance of the State of Wisconsin, by their counsel, Foley & Lardner LLP, urges this court to exercise its discretion to allow a less-than-strict application of the Rules of Evidence in these rehabilitation proceedings. As a practical matter, a rigid application of the Rules of Evidence will needlessly complicate these proceedings and likely extend, significantly, the time needed to address the complex, multiple issues before the court. Moreover, a flexible and reasonable application of those rules, rather than a strict application, is consistent with the informal and flexible procedures utilized in rehabilitation proceedings.

While Ch. 645 contains no specific provisions concerning evidence, it contains many references making clear that rehabilitation proceedings are not litigation, but non-adversarial, regulatory management actions designed to rehabilitate a business. *See Wis. Stat. Ann. §§ 645.01 and 645.32 cmts.* (“Rehabilitation should emphasize the management process, not the legal process. Flexibility and expertise should be encouraged . . .” Rehabilitation is designed to be a flexible procedure reflecting “a management rather than a legal task.”). In this context, it is appropriate for this court, in the exercise of its discretion to see that fairness and flexibility, not the Rules of Evidence, are given priority.

Moreover, while rehabilitation proceedings are not administrative proceedings, they clearly are not conventional litigation and, in that respect, the law of evidence in administrative proceedings offers some guidance. In administrative proceedings, the general rule is that the Rules of Evidence do not apply, and that all evidence having a “reasonable probative value” shall be admitted. *See* Wis. Stat. § 227.45. As recognized by the courts, the Rules of Evidence in administrative proceedings are “very relaxed.” *See Rutherford v. LIRC*, 2008 WI App 66, ¶¶ 21-22, 309 Wis. 2d 498, 752 N.W.2d 897. *See also Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶¶ 49-50, 278 Wis. 2d 111, 692 N.W.2d 572 (Agency or hearing examiner not ordinarily bound by Rules of Evidence; hearsay medical reports admissible).

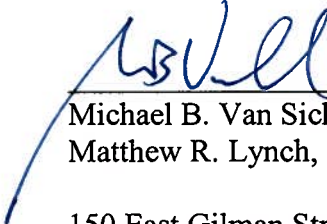
The Wisconsin courts have also recognized that, while safeguards must be maintained, the “wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts,” is inappropriate in less formal administrative type proceedings. *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 367, 262 N.W.2d 218 (1978), *citing FCC v. Pottsville Broadcasting Co.*, 309 US 134, 143 (1940).

Even if this matter were a traditional contested litigation tried before a jury, Wisconsin recognizes broad discretion in the circuit court regarding the admission of evidence. *Estate of Hagarty v. Beauchaine*, 2006 WI App 248, ¶ 151, 297 Wis. 2d 70, 727 N.W.2d 857. Indeed, the statutes provide that, with limited exceptions, a judge is not bound by the Rules of Evidence in addressing general questions of admissibility. *See* Wis. Stat. § 901.04(1).

This is not, however, a traditional contested litigation tried before a jury. It is a rehabilitation proceeding that is supervised, not tried, before a court. Under these circumstances, it is appropriate for the court to employ a relaxed standard of evidence, more akin to that employed in administrative proceedings, than to that employed in typical contested litigation.

Dated this 15th day of November, 2010.

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