COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1486 **Cir. Ct. No. 2010CV1576**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE REHABILITATION OF: SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION:

TED NICKEL AND OFFICE OF THE COMMISSIONER OF INSURANCE,

PETITIONERS-RESPONDENTS,

AMBAC ASSURANCE,

INTERESTED PARTY-RESPONDENT,

ACCESS TO LOANS FOR LEARNING STUDENT LOAN CORPORATION, AURELIUS CAPITAL MANAGEMENT LP, BANK OF AMERICA, N.A., BANK OF NEW YORK MELLON, COUNTRYWIDE HOME LOANS SERVICING L.P., CUSTOMER ASSET PROTECTION COMPANY ("CAPCO"), DEPFA BANK PLC., DEUTSCHE BANK NATIONAL TRUST COMPANY, DEUTSCHE BANK TRUST COMPANY AMERICAS, EATON VANCE MANAGEMENT, FEDERAL HOME LOAN MORTGAGE CORPORATION ("FREDDIE MAC"), FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), FIR TREE INC., GOLDMAN SACHS & CO., INC., HSBC BANK USA NATIONAL ASSOCIATION, KING STREET CAPITAL MASTER FUND, LTD., KING STREET CAPITAL MANAGEMENT L.P., KNOWLEDGEWORKS FOUNDATION, LLOYDS TSB BANK PLC, MONARCH ALTERNATIVE CAPITAL LP, NUVEEN ASSET MANAGEMENT, ONE STATE STREET LLC, PNC BANK, RESTORATION CAPITAL MANAGEMENT LLC, STONEHILL CAPITAL MANAGEMENT LLC, STONE LION CAPITAL PARTNERS LP,

TREASURER OF THE STATE OF OHIO, UNITED STATES OF AMERICA, U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, N.A., WELLS FARGO BANK, N.A AS TRUSTEE FOR LVM BONDHOLDERS, WILMINGTON TRUST COMPANY AND WILMINGTON TRUST FSB,

INTERESTED PARTIES,

ASSURED GUARANTY CORP. AND ASSURED GUARANTY RE LTD.,

INTERESTED PARTIES-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge.[1] *Affirmed*.

Before Higginbotham, Sherman and Reilly, JJ.

¶1 PER CURIAM. Assured Guaranty Corp. and its affiliate Assured Guaranty Re Ltd. (collectively, Assured; individually AGC and AG Re) appeal an order enforcing against them an injunction that was issued during the course of a Chapter 645 proceeding to rehabilitate a segregated account of the Ambac Assurance Corporation (Ambac). The circuit court ruled that the injunction barred Assured from pursuing arbitration in New York on two reinsurance contracts and obligated them to make certain reinsurance payments to Ambac. We affirm for the reasons discussed below.

[1] Judge William D. Johnston of LaFayette County sat by special assignment.

BACKGROUND

¶2 In 2003, AGC entered into a surplus share agreement with Ambac to reinsure a portion of certain insurance policies issued by Ambac. In 2004, AG Re entered into a facultative agreement to reinsure a portion of certain insurance policies issued by Ambac and its affiliate Ambac Assurance UK Limited (Ambac UK). Each contract included a clause agreeing to submit to arbitration any dispute or claim arising out of the agreement. The arbitration clauses would not apply, however, in the event that Ambac (with respect to the surplus note agreement) or Ambac together with Ambac UK (with respect to the facultative agreement) became subject to a proceeding pursuant to WIS. STAT. ch. 645 (2011-12).[2] The contracts also contained insolvency clauses providing that in the event of ch. 645 proceedings, any reinsurance would be due to Ambac or its rehabilitator, based on the basis of the liability of Ambac, without diminution based upon the failure of the rehabilitator to pay all or any part of a claim.

¶3 On March 24, 2010, pursuant to WIS. STAT. § 611.24(2), Ambac established a segregated account for some troubled parts of its insurance business, primarily related to mortgage-backed securities, credit default swaps and municipal bond debts. Among the assets allocated to the segregated account were a number of Ambac policies that were reinsured by Assured. The Office of the Commissioner of Insurance (commissioner) then petitioned for an order directing rehabilitation of the segregated account, under which the commissioner, acting as the rehabilitator, would take possession of the segregated account's policies,

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

contracts, assets and liabilities and administer them under orders of the court. WIS. STAT. §§ 645.31, 645.32. The commissioner explained in documents filed with the court that its office was not seeking to rehabilitate Ambac as a whole, in part because to do so would trigger delinquency proceeding default provisions in numerous Ambac policies and transactions documents unrelated to the troubled assets, which could have a significant detrimental effect on various world markets and limit the pool of resources available to pay claims.

¶4 The circuit court subsequently approved a rehabilitation plan for the segregated account, which this court is affirming in a separate opinion being released today. Under the rehabilitation plan, the holders of policies allocated to the segregated account were to receive 25% of their claim amounts in cash and the remaining 75% in surplus notes. The commissioner was given absolute discretion over whether or when to allow payments on the surplus notes.

¶5 Also as part of the rehabilitation proceeding, the circuit court issued an injunction restraining all persons and entities from commencing or prosecuting any claims against Ambac's segregated account or against Ambac or its general account with respect to any policies, contracts, or liabilities allocated to the segregated account. The injunction further restrained all persons and entities from withholding or failing to make payments owed to Ambac's segregated account, general account or allocated subsidiaries under or in connection with any policies allocated to the segregated account, or any transaction documents associated therewith or related thereto.

¶6 Following confirmation of the rehabilitation plan, the commissioner sought to enter commutation or settlement agreements with the holders of a number of Ambac policies reinsured by Assured that had been assigned to the

segregated account. Assured acknowledged it had an obligation to pay a proportional share of any cash payments made by the segregated accounts to policyholders, but asserted that—under the definitions of loss in its surplus share and facultative reinsurance contracts—it was not obligated to reimburse the segregated account for the value of any surplus notes provided to policyholders in consideration of their claims, unless and until the segregated account made cash payment on those notes.

¶7 In April 2011, Assured filed a petition in a New York court seeking to compel arbitration of the dispute about its reinsurance obligations with respect to the surplus notes being provided to the holders of policies allocated to the segregated account. In response, the commissioner filed a motion with the rehabilitation court, seeking to enjoin arbitration of any disputes with Ambac in any court other than the rehabilitation court and to enforce the injunction so as to prohibit Assured from withholding payment to the segregated account for the value of the surplus notes provided by Ambac to its policyholders. The rehabilitation court granted the requested relief, and Assured appeals. We will set forth additional facts as necessary in our discussion below.

DISCUSSION

¶8 Assured raises the following claims on appeal: (1) the rehabilitation court lacked personal jurisdiction over AG Re; (2) the contracts under which Assured sought arbitration are outside the scope of the injunction in the rehabilitation plan because they were not assigned to the segregated account; (3) the injunction did not require Assured to pay a proportionate share of the principal amounts of surplus notes paid by the segregated account by settlements rather than claims; (4) the rehabilitation court lacked authority to decide the

contract disputes between Assured and Ambac under contracts not allocated to Ambac's segregated account; (5) the reinsurance agreements permit Assured to demand arbitration with Ambac; and (6) the reinsurance agreements do not require Assured to pay, in cash, their proportionate share of the principal amounts of the surplus notes.

Personal Jurisdiction

¶9 As a threshold matter, AG Re, a company organized under Bermuda law, challenges the rehabilitation court's exercise of personal jurisdiction over it.

¶10 A determination as to whether a court of this state has personal jurisdiction over a nonresident defendant involves a two-step inquiry. First, the plaintiff bears the burden of showing that there are statutory grounds for the court to exercise jurisdiction under at least one of the subsections in WIS. STAT. § 801.05. ***Johnson Litho Graphics of Eau Claire, Ltd. v. Sarver***, 2012 WI App 107, ¶¶6, 15-16, 344 Wis. 2d 374, 824 N.W.2d 127. Because WIS. STAT. § 801.05 was intended to codify the minimum contacts test for the Due Process Clause of the Fourteenth Amendment, a showing that the statute applies also creates a prima facie case that the Due Process Clause of the Fourteenth Amendment has been satisfied. ***Id.***, ¶15. Second, once the plaintiff's burden has been met, the defendant is afforded an opportunity to show that exercising statutory jurisdiction would nonetheless violate due process principles of fair play and substantial justice. ***Id.***

¶11 WISCONSIN STAT. §§ 801.05(2) and 645.04(5)(b) provide special personal jurisdiction in a rehabilitation proceeding over any reinsurer who has been served pursuant to WIS. STAT. § 801.11 and "who has at any time written a policy of reinsurance for an insurer against which a rehabilitation or liquidation

order is in effect when the action is commenced ... in any action on or incident to the reinsurance contract." § 645.04(5)(b). In addition, WIS. STAT. § 801.05(10) provides a separate basis for long-arm personal jurisdiction over any defendant who has been served pursuant to § 801.11 and who has made a promise to insure a resident of this state upon or against the happening of an event.

¶12 AG Re contends that neither WIS. STAT. §§ 645.04(5)(b) nor 801.05(10) have been satisfied because the commissioner did not serve AG Re a summons in compliance with WIS. STAT. § 801.11. AG Re's argument is completely inapposite, however, because §§ 645.04(5)(b) and 801.05(10) set forth the requirements for initiating a new action. As the commissioner points out in the response brief, it filed a motion with the rehabilitation court to enforce an injunction that was issued in an ongoing rehabilitation proceeding. AG Re did not respond to that point in its reply brief, and we are persuaded that the distinction identified by the commissioner is dispositive of the issue. It would make absolutely no sense for the commissioner to serve AG Re a summons including notification that a plaintiff has filed a lawsuit or other legal action against the defendant and a direction that an answer must be provided within a specified time period, when no such lawsuit has been filed and no such answer is required. In sum, because AG Re entered into a contract to reinsure Ambac, a Wisconsin company, and does not dispute that it was notified about a rehabilitation plan that would potentially affect polices subject to that contract, the rehabilitation court had continuing jurisdiction over AG Re regarding a motion to enforce an injunction incorporated into the rehabilitation plan.

¶13 The "minimum contacts" test for determining whether exercising jurisdiction over a nonresident defendant comports with due process notions of fair play and substantial justice has five factors: (1) the quantity, nature and quality

of the defendant's contacts; (2) the source and connection of the cause of action with those contacts; (3) the interest of the forum state in adjudicating the dispute; (4) the interests of all affected states in judicial economy and furtherance of substantive social policies; and (5) the respective convenience or burden to the parties. ***Rasmussen v. General Motors Corp.***, 2011 WI 52, ¶21, 335 Wis. 2d 1, 803 N.W.2d 623; ***Johnson Litho Graphics***, 344 Wis. 2d 374, ¶32.

¶14 Here, the only contact that the parties inform us AG Re had with Wisconsin was entering into the facultative agreement to reinsure the Wisconsin insurance company, Ambac. However, the Wisconsin Supreme Court has previously held that a single contact, such as the issuance of a policy, is sufficient in the highly regulated area of insurance. ***McNamee v. APS Insurance Agency, Inc.***, 110 Wis. 2d 72, 80, 327 N.W.2d 648 (1983). The current dispute between the parties is directly related to AG Re's single contact with this state, because part of the relief AG Re is seeking is a declaratory judgment about the arbitration language in its reinsurance contract with Ambac. In addition to the general public policy interests all states have in ensuring a convenient forum for insurance disputes involving their residents, Wisconsin has a "manifest interest" in providing an efficient forum for delinquency proceedings regarding its insurers. ***Id.*** at 83. Wisconsin's interest in hearing the dispute is even more pronounced in this case, because the commissioner is asserting that the arbitration clause AG Re is seeking to enforce is barred by an injunction issued by a Wisconsin court. No other state could have as great an interest in enforcing the injunction than the state of the court that issued it. Finally, the burden of litigating in another state in the event of delinquency proceedings is a reasonably foreseeable event for a reinsurer. We therefore conclude that litigating the disputes regarding the applicability of the

arbitration clauses and the requirements of the reinsurance contracts and injunction does not violate due process.

Availability of Arbitration

¶15 In overlapping arguments set forth in its second, fourth and fifth claims on appeal, Assured contends that it ought to be permitted to arbitrate its coverage dispute with Ambac in New York as provided in the reinsurance contracts because: (1) the arbitration exclusion clauses in the reinsurance contracts have not been triggered because it is the segregated account rather than Ambac that is the subject of an insurance delinquency proceeding; and (2) the rehabilitation court's injunction does not apply to a dispute over policy language in the reinsurance contracts because those contracts were assigned to Ambac's general account rather than the segregated account. The commissioner disputes both of those propositions, and further asserts that, regardless of any language in the reinsurance contracts or the injunction, WIS. STAT. § 645.04(3) independently provides that a rehabilitation court has exclusive jurisdiction to determine "any matter" relating to a delinquent insurer that would otherwise be subject to an arbitration proceeding.

¶16 If Assured were seeking a ruling on its obligations under the reinsurance contracts to reimburse Ambac for claims arising from policies *other* than those in the segregated account, we would agree that there was nothing in the arbitration exclusion clauses, the injunction, or the rehabilitation statutes that would bar arbitration of the dispute in New York. We emphasize, however, that the specific dispute Assured sought to have arbitrated in this case was the application of certain loss clauses in its reinsurance contracts *to demands for reimbursement for surplus notes provided by the segregated account to holders of*

Ambac policies that had been assigned to the segregated account, as provided in the rehabilitation plan. We are therefore persuaded that the commissioner's argument with respect to WIS. STAT. § 645.04(3) is dispositive. Assured could not avail itself of the arbitration provisions in its reinsurance contracts to resolve a coverage dispute regarding the surplus notes, because the surplus notes were integral to the effectiveness of the rehabilitation plan as a whole and thus subject to the exclusive jurisdiction of the rehabilitation court.

Coverage for Surplus Notes

¶17 Finally, in its second and sixth claims, Assured contends that neither the injunction nor the reinsurance contracts required it to pay a proportionate share of the principal amounts of surplus notes paid by the segregated account in settlement of claims, because: (1) any payment obligations it has stem only from its reinsurance contracts, which were not allocated to the segregated account; and (2) the provision of surplus notes does not qualify as a loss under the insolvency clauses of the reinsurance contracts. Again, we disagree.

¶18 As we noted above, the injunction restrained entities from withholding or failing to make payments owed to Ambac's segregated account, general account, or allocated subsidiaries under or in connection with any policies allocated to the segregated account or any transaction documents associated therewith or related thereto. Assured's contention that its payment obligations stem *only* from its reinsurance contracts is unpersuasive because it ignores the fact that the very nature of a reinsurance contract links it to underlying policies. Thus, demands to be reimbursed under a reinsurance contract for claims made on policies covered by the reinsurance contract are plainly "in connection with" the underlying policies, as well as the contracts. The circuit court was therefore well

within its discretion to conclude that its injunction against withholding payments applied to the coverage dispute at issue here, which involved settlements or commutations of claims on policies in the segregated account. *See generally*, ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 15, 539 N.W.2d 916 (Ct. App. 1995) (a circuit court has discretion in interpreting the scope of its own injunction).

¶19 As to whether the segregated account's reinsured losses included the value of surplus notes paid in settlements of claims or commutations of exposure on policies in the segregated account, the rehabilitation plan established that payment by a combination of cash and surplus notes would constitute full payment of claims, regardless of the existence of any provision in an underlying policy or contract that would otherwise require the discharge of obligations through cash. The insolvency clauses in the contracts prohibited Assured from reducing its payment to Ambac or its successor—in this case the segregated account under the control of the rehabilitator—for its entire liability, merely because only part of the claims on the underlying policies had been paid in cash.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.