No. 10-2069

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WELLS FARGO BANK, NATIONAL ASSOCIATION,
As Trustee,

Plaintiff-Appellant

v.

LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendant-Appellee

Appeal from the January 11th 2010 Judgment and April 22, 2010 Order of the United States district court for the Western District of Wisconsin, district court Case No. 09-CV-768
The Honorable Judge Rudolph T. Randa, sitting by designation

BRIEF FOR THE NATIONAL FEDERATION OF MUNICIPAL ANALYSTS, AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT, WELLS FARGO BANK

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2069

Short Caption: Wells Fargo, National Association v. Lake of the Torches Economic Development Corp.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Federation of Municipal Analysts

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: ______________________ Date: 7/6/10

Attorney's Printed Name: Leonard Weiser-Varon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ______

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INTERESTS OF THE *AMICUS CURIAE*

The National Federation of Municipal Analysts ("NFMA") is a not-for-profit association of over 1,000 members,[1/] primarily research analysts, who evaluate credit and other associated risks in the bond market.[2/] These individuals represent, among other entities, mutual funds, insurance companies and other purchasers of tax-exempt and taxable debt securities, as well as broker/dealers, bond insurers, rating agencies and financial advisors.

The United States bond market accounts for a significant proportion of the country's capital market, with over $34.7 trillion in outstanding securities as of December 31, 2009. NFMA members are actively involved in the assessment and purchase or sale of bonds and other debt securities issued by municipal or other governmental entities or instrumentalities, a subset of the bond market involving over $2.8 trillion in outstanding securities as of December 31, 2009. NFMA members are involved in virtually every investor's decision to purchase bonds issued by states, cities, towns, counties, districts and tribal issuers, or by public authorities issuing on their behalf. Such bonds finance long-term capital expenditures, including the acquisition of public lands and the construction and improvement of libraries, police stations, fire stations and other public buildings, bridges, roads, water and

[1/] Certain employees and principals of Saybrook Capital LLC, the purchaser and owner of the bonds that are the subject of this case, are members of the NFMA. Saybrook Capital, LLC from time to time has sponsored certain NFMA events.

[2/] NFMA was established in 1983 to promote professionalism in municipal credit analysis and further the skill level of its members through educational programs and industry communication. The NFMA furthers this goal by providing informed perspective regarding legal and regulatory matters relating to the municipal finance industry, and facilitating the flow of information between investors and issuing entities. The NFMA includes six constituent societies: (1) the Boston Municipal Analysts Forum; (2) the California Society of Municipal Analysts; (3) the Chicago Municipal Analysts Society; (4) the Minnesota Society of Municipal Analysts; (5) the Municipal Analysts Group of New York; and (6) the Southern Municipal Finance Society, as well as members unaffiliated with such societies.

sewer systems and other infrastructure, student loans for higher education; low-income and mixed-income housing; hospitals, nursing homes and assisted living facilities; schools, colleges and universities, museums, social services agencies, solid waste disposal facilities, airports, docks and wharves, mass commuting facilities, hazardous waste facilities, high-speed intercity rail facilities, manufacturing facilities, hotels, recreational facilities and the like.

While bonds are debt instruments which in some ways are similar to conventional loan agreements, with a "lender" and a "borrower", they are actually securities which are generally publicly offered to potential bond purchasers (or investors) by issuers, and traded in the public capital markets. In that respect, they are very different from private loan agreements, as bond transactions are effectuated generally through the preparation of disclosure documents (also known as an offering document) and opinions which are provided to potential purchasers of bonds under the regulatory framework of the federal securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934 (together the "Securities Acts") as well as the state blue sky laws. Under these securities laws, as will be discussed herein in greater detail, bond purchasers are entitled to rely upon the completeness and accuracy of the disclosure provided to them, including disclosure regarding potential material risks, in making their investment decision.

The NFMA infrequently files *amicus* briefs, and only in cases, such as this one, that have important implications for bond purchasers generally. The NFMA files this brief in support of plaintiff-appellant Wells Fargo Bank and reversal of the judgment below, pursuant to a motion for leave of court for such filing.

ARGUMENT

From the perspective of a bond purchaser, this case presents a nightmare that Kafka might have rejected as the product of an overactive imagination: The bond investor purchases $50,000,000 of bonds in a bond offering by an economic development corporation to be repaid from the revenues of a tribal casino. The bond disclosure document includes representations from the issuer and legal opinions from tribal counsel as to the validity of the bonds and the related bond documents and the existence of all necessary approvals. The bond offering includes a legal opinion from tribal counsel that specifically opines that "none of the Bond documents . . . constitute a 'management contract' or an agreement that is a 'collateral agreement' to a management contract that relates to a gaming activity regulated by [the Indian Gaming Regulatory Act.]" For a brief period after issuance, the bond investor receives bond interest, and scheduled repayment of approximately $4 million of principal, in accordance with the bond documents. Then matters go awry. The issuer, having spent the $50,000,000 it borrowed from the investor, ceases to honor the bond documents. The trustee for the bonds goes to court to enforce the documents. The issuer now asserts that the documents are void for reasons which are in direct contradiction with its representations and those of counsel in the disclosure documents. The district court allows the issuer to repudiate its debt obligations. Because the borrowing has already occurred but the repayment has not, the federal district court's endorsement of the issuer's about-face on its authority to enter into the bond documents effectively causes the bond offering to operate as a device to deprive the bond investor of its nearly $50 million investment, with no further recourse.

The NFMA files this *amicus* brief because the ruling has reverberated loudly in a bond market that is built on fundamental principles of justified reliance by bond purchasers on issuer disclosure and representations and on legal opinions rendered in connection with bond issues. The NFMA is filing this *amicus* brief to alert this Court that the district court decisions constitute an assault on bona fide bond purchasers which, if such decision stands, will disrupt fundamental premises that enable bond issuance and purchases to occur. Bond investors can and do evaluate information and risks that are disclosed to determine whether to buy particular bonds, but a risk that the issuer affirmatively states does not exist cannot be evaluated by the bond purchaser. Bond investors depend on the courts for enforcement of their rights and of bond issuers' obligations when bond repayments are jeopardized. When a court goes out of its way, as the district court has done, to not only decline to enforce the contract between bondholders and an issuer but to invalidate the entire contract and all related contracts and swat aside all argument against such a surprising, disruptive, draconian and unnecessary outcome, the ruling impacts not just the unfortunate bondholders directly affected but all bond investors who justifiably depend on the integrity of an issuer's disclosure and on the enforceability and enforcement of an issuer's obligation to repay its borrowings.

The NFMA wishes to address certain specific statements and assumptions in the district court's underlying opinions that are inconsistent with the actual operation of the bond market and that are alarming in their broader implications, including statements indicating that investors may not rely for purposes of their investment decisions on information provided by bond issuers in issuing and marketing their securities; statements that reject the use of severability provisions in trust indentures in favor of voiding all debt repayment arrangements and leaving investors without recourse; and statements that misunderstand or mischaracterize the relationship of investors to bond-financed facilities.

1. Bondholders Justifiably Rely on an Issuer's Representations and Legal Opinions, and this Issuer Should be Estopped from Repudiating, to Avoid Repayment, the Representations and Opinions it Used to Borrow $50,000,000.

(i) Bond Investor Reliance is Fundamental to the Purchase of Securities

Reliance by bond purchasers on issuer representations and legal opinions provided in connection with the offering and sale of securities is one of the bedrock precepts on which this country's capital markets operate. The United States securities laws are built around the concept of full and fair disclosure by issuers to investors. *Securities and Exchange Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (stating that the fundamental purpose common to the securities laws is to promote full disclosure). One of the keystones of federal securities laws, Rule 10b-5 under the Securities Exchange Act of 1934, as amended, makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce … [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." The whole purpose of issuer disclosure to investors is to permit investors to review and rely upon such information in deciding whether to purchase the securities offered by the issuer. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (stating that the securities laws "embrace a fundamental purpose… to substitute a philosophy of full disclosure for the philosophy of *caveat emptor."*). Issuers of bonds, such as the issuer in this case, therefore are bound not only to be accurate in their disclosure to potential investors, but also to provide disclosure that is complete, with no material omissions. The very foundation of our national system of securities laws is that issuers must be truthful in their disclosure and that investors are entitled to rely upon the fullness and accuracy of this disclosure.

(ii) The District Court's Ruling that the Bond Purchaser's Reliance was Unreasonable Has no Foundation and Has Disturbing Implications

The district court's decision constitutes a frontal assault on the touchstone of investor reliance. The $50,000,000 Taxable Gaming Bonds Series 2008 (the "Bonds") of the Lake of the Torches Economic Development Corporation (the "Issuer") were issued pursuant to certain bond documents, including a Trust Indenture (the "Trust Indenture") between the Issuer and Wells Fargo Bank, National Association, as Trustee (the "Bond Trustee"), and were offered to the purchaser of the Bonds (the "Bond Purchaser") pursuant to a Limited Offering Memorandum (the "LOM"), a disclosure document subject to the requirements of the Securities Acts and state securities laws. The disclosure and representations relating to the existence of all necessary authorization for the Trust Indenture and related bond documents could not have been clearer. The LOM included an opinion of bond counsel addressed to the Bond Trustee and the Bond Purchaser, among others, that "the Bonds [and] the [Trust] Indenture have been duly and validly authorized, executed, and delivered by the Issuer and are the valid and binding obligations of the

Issuer enforceable in accordance with their terms." A-151.[3/] The LOM included an 8-page Appendix F entitled "Regulation of Indian Gaming" which, in a comprehensive review of tribal law and federal law applicable to the Issuer and the Issuer's casino, mentioned that "Congress delegated to the [National Indian Gaming Commission] authority to … approve management contracts for gaming facilities …" (Doc. 50-5, at F-3)[4/] but which contained no suggestion whatsoever that the Trust Indenture is or could be deemed a "management contract" subject to such approval or that the Trust Indenture could be deemed void. Nor was there any such suggestion in <u>any</u> of the 211 pages of the LOM.

Another legal opinion from the Issuer's counsel[5/] and addressed to the Bond Trustee and the Bond Purchaser, among others, and delivered at the closing of the sale of the Bonds specifically opined that "none of the Bond documents . . . constitute a 'management contract' or an agreement that is a 'collateral agreement' to a management contract that relates to a gaming activity regulated by [the Indian Gaming Regulatory Act.]" (A-112). An exhibit to the Trust Indenture entitled "Representations and Warranties of the [Issuer]", reproduced verbatim in the LOM, contained the Issuer's representation that "[n]o authorization, approval, consent or license of any governmental body or authority, including approvals of the … National Indian Gaming Commission, not already obtained, is required for the valid

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[3/] "A-__" refers to the Supplemental Appendix filed by Plaintiff-Appellant, Wells Fargo.

[4/] The LOM was included in the record below as Docket No. 50-5.

[5/] It is a standard and customary requirement in loan and bond documents and transactions that the borrower procure a legal opinion from counsel that opines, among other things, that the applicable debt instruments and related documents are valid and enforceable. Such opinions are addressed to the lender or, in bond transactions, the trustee for the bondholders and/or the initial bond purchaser(s) for the specific purpose of permitting reliance by the bondholders on such opinions.

and lawful execution and delivery by the [Issuer] of the Indenture and the assumption by the [Issuer] of its obligations thereunder." A-096.

After the Issuer and its counsel made these multiple affirmative disclosures[6/] designed for the express purpose of inducing the Bond Purchaser to believe that the Issuer and its counsel had evaluated all laws, regulations and approval requirements potentially applicable to the enforceability of the Trust Indenture, specifically including the Indian Gaming Regulatory Act ("IGRA") and its approval requirement for management contracts, and determined that the Trust Indenture and all other Bond documents were not management contracts, were not subject to any approval by the National Indian Gaming Commission ("NIGC") that had not been obtained and were fully enforceable, and after obtaining $50,000,000 from the Bond Purchaser and expending the money so received from the Bond Purchaser, the Issuer ceased to comply with the Trust Indenture and, when the Bond Trustee attempted to enforce the Trust Indenture, argued to the district court that the Trust Indenture <u>was</u> a "management contract" after all, that had not approved by the NIGC, and thus void under IGRA. The Bond Trustee, acting on behalf of the Bond Purchaser, argued the natural proposition that the Issuer was estopped from arguing the contrary of the representations and opinions it and its representatives delivered to induce the Bond Purchaser to purchase the Bonds.

Shockingly, the district court summarily dismissed the estoppel argument on the basis that "[The Bond Trustee's] purported reliance upon

[6/] In this case the misdirection includes affirmative, unequivocal statements and opinions that the Trust Indenture and related documents are enforceable and have all required approvals, and is compounded by the fact that the Issuer disclosed, at length, a variety of risks, but omitted to disclose the very material risk that the Trust Indenture and related documents may be voided as management contracts.

the Tribe's initial failure to pursue an NIGC opinion was completely unreasonable. Given the size of the transaction and the complicated nature of the regulatory scheme, it is a bit surprising that [the Bond Trustee] did not insist upon NIGC review and approval."[7/] SA-14-15.[8/] The district court's mystifying assertion that it was "completely unreasonable" for the Bond Purchaser or the Bond Trustee to "purported[ly]" rely upon the Issuer's representations and legal opinion regarding the absence of any need for NIGC approval of the bond documents turns upside down the basic legal tenets of the capital markets that have been in effect for over 75 years since the passage of the Securities Acts, and its implications should be carefully assessed by this Court.

The record is devoid of any foundation whatsoever for the district court's astonishing and alarming finding. The district court's opinion expressly suggests that it is "completely unreasonable" for a purchaser of bonds from this Issuer to rely upon the representations and legal opinion of the Issuer and its legal experts as to legal requirements applicable to the Issuer and its contracts. It holds that it is "completely unreasonable" for a bond purchaser to buy bonds in good faith reliance on expert opinions and issuer representations, but apparently not "completely unreasonable" for an issuer, having sold the bonds using such opinions and representations, to argue for release from the obligation to repay the bonds by blatantly contradicting and repudiating such opinions and its own representations. If the district court's view of the relative responsibilities of bond investors and

[7/] Among the other, more substantive matters, regarding bonds and the bond market that the district court misunderstands, is that the Bond Trustee is not involved in any investment decisions regarding the purchase of bonds. They serve as an agent and fiduciary for bond purchasers once the acquirers have purchased the bonds and made the investment.

[8/] "SA-__" refers to the Required Short Appendix filed by Appellant, Wells Fargo.

issuers stands - a view that permeates and distorts the district court's analysis - the world in which bond investors lend their money to issuers would become, literally, unreliable with adverse consequences for issuers as well as bond investors.

The district court's ruling seemingly announces a sweeping new principle, antithetical to the foundational premise of bond market transactions, that it is generally unreasonable for bond purchasers to rely on the statements of a bond issuer. If it is "completely unreasonable" for a bond purchaser to rely on an issuer's representations and legal opinions, disclosure and legal opinions would play no role in a bond offering, and the protections offered to investors under the securities laws would be eviscerated. The district court decisions offer no explanation of what distinguishes this Issuer, this offering and this bond purchase from any other bond offering. There is a fleeting reference in the district court's opinions to "the size of the transaction and the complicated nature of the regulatory scheme" (SA-15), but the more complex and technical the regulatory scheme affecting an issuer of securities, the more the investor should be reasonably expected to rely upon the special expertise of the issuer and its representatives who are most familiar with the enterprise and its regulation. As to the "size of the transaction", there is no tipping point under the securities laws where the dollar amount involved renders an issuer's representations inherently unreliable. There is nothing in the securities laws in this country to suggest that the risk is shifted between issuer and investor when the size of the transaction is large or the matters are complex.[9/]

[9/] In fact, the size of the transaction in this case, $50 million, is not at all extraordinary in the bond market where it is not at all unusual to see issues of several hundred million of dollars. It is a matter of deep concern that the district

If bond purchasers are put on notice that federal courts, in unexplained circumstances, will permit issuers to make representations in order to attract capital and then argue the exact opposite to avoid repayment to their bondholders, the likely consequences will be (i) reduction in bond financings and thus capital made available to issuers; and/or (ii) substantially higher borrowing costs for all issuers. These are major issues of federal securities law public policy which should not be decided by a district court with the thinness of the record here and no testimony whatsoever.

(iii) Because the Bond Purchaser's Reliance was Justified, the District Court's Voiding of the Trust Indenture was Erroneous and Should be Reversed

The Bond Purchaser will have sustained the expense of a prolonged legal battle and appeal and a lengthy delay in protecting its debt repayment even if the district court's decision on the merits is reversed by this Court. Any claim by the Issuer that the Trust Indenture was void should have been precluded by the doctrine of equitable estoppel, which, like contract law and the securities laws, is built on the concept of justifiable reliance. Under Wisconsin law equitable estoppel "consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment. It is elementary … that the reliance on the words or conduct of the other must be reasonable and justifiable." *State v. City of Green Bay*, 96 Wis. 2d 195, 202, 291 N.W.2d 508 (1980) (citations omitted). As discussed above, bond investors routinely and justifiably rely on bond issuer representations and opinions relating to the legal underpinnings and validity of bond offerings. In

court would have made any assertions regarding the relative size of the transaction without any factual record on the subject.

the context of a defense by the Issuer that the Trust Indenture and related documents are void, the elements of equitable estoppel - action by the Issuer (the representations and the commissioning of a legal opinion that the bond documents were enforceable, had all necessary approvals and did not involve a "management contract" or "collateral agreement" for purposes of NIGC approval requirements) that induced detrimental action by the Bond Purchaser (the lending of $50,000,000, of which over $46,500,000 has not been repaid) - could not be more clearly satisfied. The district court's decisions depriving the Bond Purchaser of its entitlement to rely upon the Issuer's representations and opinions would set a dangerous and troubling precedent. The doctrine of equitable estoppel should have been applied by the district court to preclude the Issuer from directly contravening those assertions it made, and the Bond Purchaser relied upon, and should be applied by this Court on appeal.[10/]

2. <u>Even if Any of the Trust Indenture Provisions Constituted the Operation and Management of a Gaming Activity, Such Provisions Should Not Void the Entire Trust Indenture and Should Have Been Severed.</u>

The district court's decision to invalidate the Trust Indenture as a whole (the predicate to its invalidation of the Issuer's contractual waivers of sovereign immunity and dismissal of the case) inappropriately ignores the severability provision of the Trust Indenture and unjustifiably deprives the Bond Purchaser of the capital loaned to the Issuer. Even if one or more of

[10/] This is not a case of creating jurisdiction by estoppel. Federal court jurisdiction exists by virtue of the Issuer's waivers of sovereign immunity. Equitable estoppel would and should preclude the Issuer from attempting to repudiate the waivers by arguing that the contracts and resolutions in which the waivers are set forth are invalid because the Trust Indenture is a "management contract."

such provisions were deemed to place "management" type control of a casino in the hands of the Bond Trustee or Bond Purchaser, it is gross overkill to treat the entire Trust Indenture as a "management contract" and void the entire contract. This ruling by the district court, that a few provisions in a contract that are inessential to the parties' agreement can be leveraged into voiding an entire contract, also has broad and shocking implications for the bond market.

(i) Background on Severability

The Trust Indenture included a severability clause in which the parties expressly agreed that in the event that any one or more provisions of the Indenture were held to be invalid or unenforceable, the remaining provisions were to be enforced. The parties further agreed that in the event certain provisions were deemed unenforceable the Trust Indenture should be construed as if the invalid provisions were severed, and not included in the Indenture:

> *Section 14.04 Separability of Indenture Provisions.* In case any one or more of the provisions contained in this Indenture or in the Bonds shall for any reasons be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Indenture, but this Indenture shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein.

(hereafter the "Severability Clause"). A-081.

The district court rejected as a "non-starter" the notion that the provisions of the Trust Indenture it found to be invalid could be severed from the remaining portions of that agreement and the remaining terms of the Trust Indenture enforced. SA-013. The district court questioned whether any provision of a contract determined to be void *ab initio* may be enforced, including the severability provision. SA-013. And "[b]ecause many of the 'Event of Default' provisions are illegal," the court noted, "the contract cannot be severed." SA-013 at n. 3. Each of these determinations was reaffirmed when the trial court considered Appellant's Rule 59(e) motions. SA-020-21.

Severability clauses are contractual provisions that almost always are incorporated into bond documents, to preserve the existence of an enforceable agreement in the event certain terms of the agreement are found to be invalid. By inserting a severability clause within a document, a bond purchaser accounts for in advance the precise circumstance encountered here in which significant funds have been transferred, but certain terms within a contractual promise to repay have been deemed invalid. Instead of effectuating what the parties intended, and agreed to through the Severability Clause, i.e. that invalid terms of their agreement be excised and the remaining promises enforced, the district court committed reversible error when it deemed the entire Trust Indenture void and refused to enforce the remaining terms of the Indenture.

(ii) The Court Committed Reversible Error By Refusing to Utilize the Severability Clause as a Means to Modify The Indenture by Excising Those Terms Deemed Invalid and Enforcing The Remaining Terms Of The Agreement.[11/]

It is well established that whether a contract may be divisible "is controlled by the intention of the contracting parties." 15 Williston on Contracts § 45.5 (4th ed.). And "the intent of the parties as revealed by the

[11/] This issue of whether or not to a contract may be severed presents a question of law and calls for a determination by this Court that is made de novo and independent of the legal conclusions reached by the district court. *Dawson v. Goldhammer*, 722 N.W.2d 106, 110 (Wis. Ct. App. 2006).

express contract terms or language is generally held to be the determinative factor" of whether or not a contract may be separated into parts, or instead, can only be considered in its entirety. *Id.*[12/] Here, the parties' intentions are obvious. The Severability Clause expresses in plain terms the agreement that the Trust Indenture could be severed, with invalid provisions excised, while the remainder of the terms of the Trust Indenture would continue to be an enforceable contract.

In circumventing the parties' intentions and refusing to sever the putatively void provisions from the Trust Indenture, the district court committed multiple legal errors. As an "initial matter" the district court endorsed the Tenth Circuit's "observation" in *First Am. Kickapoo*, that it "'may be questioned whether any part of a contract determined to be void *ab initio*, included severability provisions, may be enforced.'" SA-013. The Tenth Circuit did raise that precise issue, but went no further, and instead expressly "decline[d] to address this question." *First Am. Kickapoo*, 412 F.3d at 1178. Wisconsin law does not support such a proposition and the district court did not cite to any decision interpreting Wisconsin law in this regard.

Instead, under Wisconsin law the "rule of severability holds that a contract may survive if an illegal clause can be severed from the remainder of the contract without defeating the primary purpose of the bargain." *Dawson*, 722 N.W.2d at 110. Where a contract "contain[s] a questionable provision which may be destroyed without defeating the primary purpose of the bargain, and where there is an absence of moral turpitude, a recovery would still be allowed." *Simenstad v. Hagen*, 126 N.W.2d 529, 534 (Wis. 1964)

[12/] The Tenth Circuit's decision in *First American Kickapoo Operations v. Multimedia Games, Inc.* – a decision relied upon heavily by the district court – is in accord. 412 F.3d 1166, 1178 (10th Cir. 2005) (finding under Oklahoma law that the intention of the parties determines whether or not a contract can be severed).

(severing provision in contract and enforcing the remaining terms).

The district court's discussion of the Trust Indenture's primary purpose, and its resulting severability analysis, is cursory and does not withstand scrutiny. According to the district court:

> [A]s Wells Fargo repeatedly emphasizes, the primary purpose of the Trust Indenture is to secure repayment of the Bonds. In the case of certain specified Events of Default ... the Trustee is granted certain rights to secure repayment (including the appointment of a receiver.) The Court already held that these 'Event of Default' provisions are illegal management contract provisions. … If the Court excised those provisions, the primary purpose of the Trust Indenture - securing repayment of the Bonds - would be destroyed. SA-021.

The district court's assessment is manifestly incorrect. Excising the two specific remedial provisions the district court deemed managerial provisions would preserve the primary purpose of the Trust Indenture, as it would preserve the Issuer's obligation to repay the debt. The severing of any or all of the provisions found objectionable by the district court would leave the fundamental transaction set forth in the Trust Indenture securely in place – not "destroyed." It is the district court's unwarranted wholesale voiding of the Trust Indenture and related documents that both disregards and destroys the primary purpose of the Trust Indenture.[13/] First and

[13/] In instances where the illegality of a contractual provision arises from an alleged violation of a statute, "the rule of severability is qualified by the controlling statute." *Dawson*, 722 N.W.2d at 110. The determination of whether or not a clause in violation of a statute or regulation renders the entire agreement unenforceable depends upon the intent of the underlying statutory or regulatory provision at issue. *Baierl v. McTaggart*, 629 N.W.2d 277, 282 (Wis. 2001) (finding that the "controlling foremost bond documents, such as the Trust Indenture, are designed to set forth the repayment obligation of the debt. Here the district court has allowed the Issuer to receive funds through the issuance of bonds and then argue, in express contradiction to its representations when it sold the applicable bonds, that certain isolated provisions in the bond documents required regulatory approval, and the district court has used those isolated provisions to void the entire contractual obligation for repayment. The negating of the Severability Clause, thereby allowing the Issuer, after receiving and spending the bond proceeds, to shed entirely its contractual requirements to repay its debt, creates a precedent for the bond market that is extremely troubling.

3. The District Court Committed Further Error By Rejecting The Bond Purchaser's Equitable Claims, Which Provided a Means To Recover Funds Lent and Prevent the Issuer's Securing a Windfall.

The district court concluded that even if the sovereign immunity waiver provision contained in the Trust Indenture "could be saved, the remainder of the Trust Indenture is void, so there would be no remaining obligations to enforce under the contract." SA-013. But even if the district

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analysis in determining whether a statutory or regulatory violation renders a contract unenforceable is the intent underlying the provision that was violated.") The statutory provisions at issue here include the stated purpose of providing for gaming by Indian tribes as a "means of promoting tribal economic development". 25 U.S.C. § 2702. This purpose would not be contravened by severing the provisions in the Trust Indenture. Instead, consistent with 25 U.S.C. § 2711(f) – titled "Modification or voiding,"— NIGC has "the authority to require appropriate contract modifications" as an alternative to voiding a contract containing management provisions, and as a matter of practice instructs parties to modify their agreements and delete contractual provisions implicating management in instances whereby the parties have not intended to enter a management contract. A-118. As such, severing any problematic provisions included in the Trust Indenture is entirely consistent with, and not contrary to, the intent behind the IGRA.

court were correct that all provisions of the Trust Indenture other than the sovereign immunity waiver are void – a conclusion that NFMA strongly disagrees with as discussed above – the district court was overzealous in rejecting the utility of "saving" the sovereign immunity waiver (whether contained in the Trust Indenture, the Bonds, or the Issuer's resolution authorizing the Bonds.)

The additional causes of action set forth in the Bond Trustee's proposed amendments to the pleadings included equitable claims for unjust enrichment and restitution, among others. The district court's wholesale invalidation of the Issuer's multiple waivers of sovereign immunity, whether or not there were "remaining obligations" under the purportedly void Trust Indenture, erroneously deprived the Bond Trustee of the opportunity to seek equitable relief that can and should apply to avoid the Bond Issuer's receipt of an unjustifiable windfall of over $46,500,000 and the Bond Purchaser's inequitable loss of that amount. *See*, *Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 518 (6th Cir. 2004) (noting that the tribe's ability to attack an arbitration clause in a contract not approved by NIGC was undermined by the tribe having accepted $1,000,000 in proceeds in conjunction with that contract). Under an equitable theory such as unjust enrichment, "it is immaterial whether the defendant and plaintiff entered into a void contract. The plaintiff is not seeking to have defendant perform the alleged contract, [but instead] is seeking the return of its money." *Arjay Investment Co. v. Kohlmetz*, 101 N.W.2d 700, 702 (Wis. 1960). Here – at a minimum – the district court should have allowed the Purchaser to pursue its equitable remedies as a means to prevent a patently unfair outcome from occurring.

4. Bond Investors and Bond Trustees Do Not, and Do Not Wish to, Manage Bond Issuers' Operations

Along with other errors or misunderstandings described earlier in this brief, the district court's opinion is premised upon a fundamental mischaracterization of the role of a bond investor. Unlike a contractor that derives its revenue from managing an enterprise, a bondholder's ideal scenario in a financing is one in which the bondholder has limited interaction with the issuer and the facilities owned by the issuer after the bond purchase occurs. The bondholder simply wishes to receive the principal of and interest on the bonds it has purchased as those amounts come due. The bondholder may receive and review periodic financial statements from the issuer, which the bondholder fervently hopes show that the issuer is operating soundly, that the scheduled payment of debt service on the bonds will continue, and that there is no need for any special attention to the issuer or its facilities. Bondholders are passive holders of a debt instrument with neither the desire nor the capacity to manage or operate or make any of the decisions involved in managing or operating the issuer's facilities, be they hospitals, schools, roads, bridges, casinos or any of the many other types of facilities that are financed with bonds. The lower court's interpretation blurs into non-existence the line between managers and investors.

CONCLUSION

The precedent set by the district court in this case, if allowed to stand, creates profound and deeply disturbing implications for the bond market. As described above, the district court erred in its understanding of the basic principles of over 75 years of federal and state securities laws regarding who has the burden to ferret out investment risks as between investors and issuers. The Issuer should have been estopped from arguing against its representations and opinion that induced the Bond Purchaser to lend the Issuer $50 million, and from repudiating its own debt through such argument. The district court below erred in considering such argument, erred in its not severing the few purported offending provisions in the Trust Indenture, and erred in not permitting the pursuit of equitable claims for recovery of the Bond Purchaser's investment in the Bonds even if the Trust Indenture were void, all with no hearing, no testimony and a very thin record. The district court rulings should be reversed, both to reinstate the Bond Purchaser's rights to repayment and to reinstate the confidence of the bond market in the legal significance of issuer disclosure and in the sanctity of bond contracts.

Dated: July 6, 2010

Respectfully submitted,

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CIRCUIT RULE 31(e) STATEMENT

I, Steven J. Torres, certify that an electronic version of the Brief For the National Federation of Municipal Analysts, as *Amicus Curiae* In Support of Plaintiff-Appellant, Wells Fargo Bank, has been submitted herewith and served on counsel of record by CD-Rom on this day, July 6, 2010, pursuant to Circuit Rule 31(e), and that the file contained on said CD-Rom is virus free.

Dated: July 6, 2010

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Steven J. Torres

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)(7)(B)

I Steven J. Torres, one of the attorneys for *Amicus Curiae* the National Federation of Municipal Analysts, hereby certify that the Brief For the National Federation of Municipal Analysts, as *Amicus Curiae* In Support of Plaintiff-Appellant, Wells Fargo Bank, complies with the type-volume limitations set out for briefs by an amicus curiae in Fed. R. App. 32(a)(7)(B). The brief, including headings, footnotes and quotations contains 6,395 words as calculated by the Microsoft word count function.

Dated: July 6, 2010

Steven J. Torres

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he caused hard and electronic copies of the Brief For the National Federation of Municipal Analysts, as *Amicus Curiae* In Support of Plaintiff-Appellant, Wells Fargo Bank, to be served on the persons listed below via overnight mail on this 6th day of July, 2010:

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