



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
 P.O. BOX 1688
 MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
 Facsimile (608) 267-0640
 Web Site: www.wicourts.gov

DISTRICT IV

June 2, 2010

To:

Hon. William D. Johnston
 Circuit Court Judge
 Lafayette County Courthouse
 P.O. Box 40
 Darlington, WI 53530

John B. Simon
 David M. Greenwald
 Jenner & Block LLP
 353 N. Clark Street
 Chicago, IL 60654

Carlo Esqueda
 Clerk of Circuit Court
 Room 1000
 215 South Hamilton
 Madison, WI 53703

R. Timothy Muth
 Daniel Kelly
 Reinhart Boerner Van Deuren SC
 P.O. Box 2965
 Milwaukee, WI 53201-2965

John M. Rosenthal
 Kristine E. Bailey
 Morgan, Lewis & Bockius LLP
 One Market St., Spear Street Tower
 San Francisco, CA 94105

David G. Walsh
 Michael B. Van Sicklen
 Matthew Lynch
 Foley & Lardner LLP
 150 E. Gilman St.
 Madison, WI 53703-1481

Paul A. Lucey
 Paul E. Benson
 Michael Best & Friedrich LLP
 Ste. 3300
 100 E. Wisconsin Ave.
 Milwaukee, WI 53202-4108

Nathan Moenck
 Michael Best & Friedrich LLP
 P. O. Box 1806
 Madison, WI 53701

Laura E. Callan
 Solheim Billing & Grimmer, S.C.
 P.O. Box 1644
 Madison, WI 53701-1644

Stephen L. Morgan
 Murphy & Desmond, SC
 P.O. Box 2038
 Madison, WI 53701-2038

Susan E. Lovern
 David I. Cisar
 von Briesen & Roper, S.C.
 411 E. Wisconsin Ave., Ste. 700
 Milwaukee, WI 53202

Bryan K. Nowicki
 Reinhart Boerner Van Deuren, S.C.
 P. O. Box 2018
 Madison, WI 53701-2018

Connie L. O'Connell
 Parrett & O'Connell, LLP
 10 E. Doty St., Ste. 621
 Madison, WI 53703

Brittany S. Ogden
Murphy Desmond S.C.
P. O. Box 2038
Madison, WI 53701-2038

Noreen J. Parrett
La Follette Godfrey & Kahn
P.O. Box 2719
Madison, WI 53701-2719

Jessica Hutson Polakowski
Reinhart Boerner Van Dueren, S.C.
22 E. Mifflin St., Ste. 600
Madison, WI 53703

Peter A. Ivanick
William G. Primps
Emily L. Saffitz
Dewey & Leboeuf LLP
1301 Avenue of the Americas
New York, NY 10019

Jane C. Schlicht
Cook & Franke, S.C.
660 E. Mason St.
Milwaukee, WI 53202-3829

Daniel W. Stolper
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Christopher J. Stroebel
von Briesen & Roper SC
Suite 1000
3 S Pinckney St
Madison, WI 53703

Patrick J. Trostle
Jenner & Block LLP
919 Third Avenue, 37th Floor
New York, NY 10022

Steven T. Whitmer
Kevin A. Wisniewski
Lock, Lord, Bissell & Liddell LLP
111 South Wacker Drive
Chicago, IL 60606

You are hereby notified that the Court has entered the following order:

2010AP1291-LV

Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)

Before Higginbotham, J.

Auerlius Capital Management, LP, Fir Tree, Inc., King Street Capital, L.P., King Street Capital Master Fund, Ltd., Monarch Alternative Capital LP, and Stonehill Capital Management LLC (collectively the "RMBS Policyholders")¹ are attempting to appeal from an order that

¹ The respondents suggest that the group should be referred to collectively as the RMSB "Investors" or "Note Holders" rather than the RMSB "Policyholders." To avoid confusion, we refer to them in this order as the "Policyholders" because that is how we referred to them in our previous order

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denied their motion to intervene, and that denied their motion to enjoin a settlement between Ambac Assurance Corporation and a group of international bankers, known by the parties as the Bank Group. The RMBS Policyholders have filed a notice of appeal as well as a petition for leave to appeal. Both the Wisconsin Office of the Commissioner of Insurance and Sean Delwig, Commissioner of Insurance (collectively referred to as "OCI") and Ambac have filed responses and their own motions.

The underlying proceeding in the circuit court is an insurance delinquency proceeding under WIS. STAT. ch. 645 (2007-08),² the subject of which is a segregated account established under WIS. STAT. § 611.24. On March 24, 2010, the circuit court granted the OCI's petition for rehabilitation of the segregated account. On the same date, Ambac entered into a non-binding statement of intent with the Bank Group to commute all of Ambac's outstanding policies guaranteeing the performance of an Ambac subsidiary under credit default swaps relating to asset-backed securities collateralized debt obligations. Ambac and the Bank Group are in the process of negotiating a final, binding agreement.

The RMBS Policyholders filed a motion to intervene in the rehabilitation proceeding in the circuit court, and also asked the circuit court to enjoin the consummation of the settlement agreement with the Bank Group. The circuit court held a hearing on May 25, 2010, and at the end of the hearing denied the RMBS Policyholders' motion. The RMBS Policyholders then filed a petition for leave to appeal in this court and asked us to enjoin the settlement agreement pending appeal. By an order dated May 27, 2010, we denied the motion because the circuit court

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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had not yet entered an order. That same afternoon, the circuit court entered an order that denied the RMBS Policyholders' motion to intervene and request for an injunction.

The RMBS Policyholders filed a notice of appeal from that order on May 28, 2010, and have now filed a renewed Emergency Motion for Injunction Pending Appeal, asking this court to enjoin the consummation of the settlement agreement and the distribution of funds as a result of that agreement, pending appeal. Both Ambac and OCI oppose the motion.

OCI and Ambac first argue that the RMBS Policyholders did not move the circuit court for relief pending appeal as required by WIS. STAT. RULE 809.12 prior to moving for relief pending appeal here. Our review of the transcript of the hearing held on May 25, 2010, and the other documents submitted to this court, suggest that both Ambac and OCI may be correct that the RMBS Policyholders did not first move the circuit court for the relief they ask from us pending appeal. The transcript shows that at the end of the May 25 hearing they asked the circuit court "to stay this court's judgment pending review of a motion for stay with the appellate court." The circuit court denied the motion to stay its order. In their motion for relief pending appeal in this court, the RMBS Policyholders do not actually ask this court to stay the circuit court's order.³ Rather, they ask us to enjoin the settlement agreement pending appeal. They did not technically ask this of the circuit court after the circuit court entered the order dated May 27. The request for an injunction, however, was the substance of the motion before the circuit court.

³ It is not at all clear to this court what the effect of a stay of that order would be. Staying that order would neither allow the requested intervention nor enjoin the settlement agreement. The motion before this court, however, does not ask us to stay the circuit court's order but rather asks us to enjoin the settlement agreement.

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In any event, because denying the motion on this basis would only lead to another round of motions both in the circuit court and here, we will address the request for relief pending appeal.

We review the order of a circuit court denying a request for a stay pending appeal under an erroneous exercise of discretion standard. *State v. Gudenschwager*, 191 Wis. 2d 432, 439, 529 N.W.2d 225 (1995). “An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* at 440. A stay pending appeal is appropriate when the moving party makes a strong showing that (1) it is likely to succeed on the merits of the appeal; (2) it will suffer irreparable injury unless the stay is granted; (3) no substantial harm will come to other interested parties; and (4) the stay will not harm the public interest. *Id.*

First, it is not clear on the record before this court whether we have jurisdiction to enjoin the settlement agreement. Second, the RMBS Policyholders have not established that the circuit court erroneously exercised its discretion when it denied either the motion for an injunction or the request for a stay made at the end of the hearing. Third, the RMBS Policyholders have not established the criteria for an injunction pending appeal. Specifically, it is not clear from the papers in front of this court whether the RMSB Policyholders have standing to challenge the settlement agreement. Further, the RMSB Policyholders have not established that they will suffer irreparable harm if the stay is not granted, or that other parties and the public interest will not be harmed if the injunction is granted. The RMBS Policyholders argue that if the injunction is not granted, the funds at issue (\$4.6 billion) will be distributed to foreign banks and may not be recoverable. The respondents argue, and the circuit court found, that this harm is speculative because the Bank Group is “clearly collectible.” Further, the respondents assert that the effect of

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enjoining the settlement agreement will be to cause substantial harm to Ambac by causing various members of the Bank Group to drop out of the settlement agreement. The respondents also argue that the financial impact of a break down in this agreement will harm the public interest.

In essence, the RMBS Policyholders are asking us to decide the merits of the appeal on the motion papers. Assuming for the purposes of this motion only that we have jurisdiction and that the RMBS Policyholders have standing, we are not convinced that the RMBS Policyholders will suffer irreparable harm if the injunction is not granted. We are not convinced that the fact that the Bank Group is comprised of foreign banks means that the funds will be dissipated and uncollectible. Because the movants have not established that they will suffer irreparable harm, the request for an injunction is denied.

OCI has also filed a motion to dismiss the appeal of a non-final order denying injunctive relief. The court currently has pending before it both a notice of appeal and a petition for leave to appeal filed by the RMBS Policyholders. Before deciding the motion to dismiss, the court requires the RMBS Policyholders to file a response that addresses the court's jurisdiction over the order from which it appeals.

Therefore,

IT IS ORDERED that the motion for an injunction pending appeal is denied.

IT IS FURTHER ORDERED that OCI's motion to dismiss the RMBS Policyholders' "Improper Motion for an Injunction Pending Appeal" is denied as unnecessary.

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IT IS FURTHER ORDERED that the RMBS Policyholders' shall file a response to the motion to dismiss the appeal by June 11, 2010.

David R. Schanker
Clerk of Court of Appeals