

COURT OF APPEALS OF WISCONSIN  
DISTRICT IV

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In the Matter of the Rehabilitation of:

Case No. 10 CV 1576  
Appeal No. 2010-AP-1291-LV

Segregated Account of  
Ambac Assurance Corporation,

OFFICE OF THE COMMISSIONER OF  
INSURANCE OF THE STATE OF  
WISCONSIN,

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Plaintiff/Respondent,

SEAN DILWEG, Commissioner of  
Insurance of the State of Wisconsin,

Petitioner/Respondent,

AMBAC ASSURANCE CORPORATION,

Other Interested Party/Respondent,

v.

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,

Movants/Appellants,

EATON VANCE MANAGEMENT,  
NUVEEN ASSET MANAGEMENT,  
RESTORATION CAPITAL  
MANAGEMENT, LLC, STONE LION  
CAPITAL PARTNERS, LP, THE BANK  
OF NEW YORK MELLON, FEDERAL  
HOME LOAN MORTGAGE  
CORPORATION, WELLS FARGO  
BANK, as Trustee of RMBS certificate  
holders, WELLS FARGO BANK, as  
Trustee of bondholders,

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Movants.

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**RMBS POLICYHOLDERS' RESPONSE  
TO OCI'S MOTION TO DISMISS THE RMBS POLICYHOLDERS  
MOTION FOR INJUNCTION PENDING APPEAL**

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Aurelius 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”), by their attorneys, submit this response to OCI’s Motion to Dismiss the RMBS Note Holders’ Improper Motion for an Injunction Pending Appeal (“OCI’s Motion”). OCI’s motion is incorrect – the RMBS Policyholders properly sought relief in the Circuit Court before petitioning this Court – and OCI’s motion is another part of its effort to shield its actions from any judicial review.

### **Introduction**

AAC and OCI are on the brink of closing a \$4.6 billion settlement – a transaction that would materially deplete the assets available to satisfy the RMBS Policyholders’ claims – without the judicial review mandated by Wisconsin law. An injunction pending appeal is necessary to permit this Court to review the propriety of the proposed settlement before this transaction closes. AAC argues that an injunction pending appeal is improper because the RMBS Policyholders did not first seek the same relief in the Circuit Court. As shown herein, the RMBS Policyholders have fully complied with the statutory prerequisites for an injunction pending appeal.

## Argument

### I. The RMBS Policyholders Sought An Injunction Pending Appeal In The Circuit Court.

OCI argues that the RMBS Policyholders are not entitled to an injunction pending appeal because they “did not first seek that relief from the circuit court.” (OCI’s Motion, at ¶ 1.) OCI repeatedly emphasizes that Wisconsin Statutes Section 809.12 provides that: “A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court.” OCI’s reading of Section 809.12 and the proceedings below is unsupported by Wisconsin law.

In the Circuit Court, the RMBS Policyholders orally moved for an injunction pending appeal during the May 25, 2010 hearing. (May 25, 2010 Hrg. Tr., at 129-31.) Counsel for the RMBS Policyholders requested, in part, that the Circuit Court hold up the CDS Settlement until the Circuit Court and the parties had an opportunity to review it. (*Id.* at 17.) The Circuit Court denied that request, permitting the CDS Settlement to go forward. (*Id.* at 130-31.) At that point, Counsel requested that the Circuit Court grant a motion to stay pending appeal, or alternatively, a motion to stay at least until this Court could decide whether to grant further relief. (*Id.* at 129-31.)

OCI contends that this request was insufficient because in the heat of the moment, counsel phrased his request to hold up the pending transaction in terms of a “stay,” rather than an “injunction.” Despite OCI’s appeal to form over

substance, the gist of the oral motion in the Circuit Court was to stop the closing of the transaction, (*Id.* at 17, 129-31), which is precisely the same relief the RMBS Policyholders now seek. RMBS Policyholders' Motion for Injunction; *see also State v. Smaxwell*, 235 Wis. 2d 230, 612 N.W.2d 756 (Wis. Ct. App. 2000) (reversing the trial court's dismissal of a complaint for using the term "attached" instead of the legal term of art "incorporated by reference" because it elevated "form over substance"). Moreover, the Circuit Court's response to Counsel's motion indicates that the Circuit Court understood that the RMBS Policyholders were seeking an injunction pending appeal, even though he too spoke in terms of a stay. The Court stated: "I believe that the Commissioner can go forward and resume his settlement agreements, and if you want a hold, you will have to present that to the appellate court...[b]ut it would not be my intent to stay that order." (*Id.* at 130.) Therefore, the RMBS Policyholders satisfied Section 809.12's requirement of filing with the Circuit Court prior to seeking relief in the Court of Appeals.

OCI next contends that the RMBS Policyholders did not comply with Section 809.12 because they sought relief orally, rather than in writing. As the OCI would have it, after the Circuit Court denied all relief, denied intervention, entered a final order, and declined to hold up the transaction pending appeal, the RMBS Policyholders were obligated to file a written motion asking for precisely the same relief that had just been denied. Wisconsin law, however, does not require such a futile act.

Under Wisconsin law, the oral motion of the RMBS Policyholders was sufficient to request relief in the Circuit Court. Section 802.01(2) provides that “[a]n application to the court for an order shall be by motion which, *unless made during a hearing or trial*, shall be made in writing.” (Emphasis Added). Thus, Wisconsin law expressly permits oral motions during a hearing, which is precisely what happened in the Circuit Court. Nothing in Section 809.12 indicates a legislative intent to overturn the express language of Section 802.01(2), permitting oral motions made during a hearing.<sup>1</sup>

**II. It Was Impractical For the RMBS Policyholders To Seek Further Relief From The Circuit Court After The Court Entered Its Final Order.**

OCI also asserts that the RMBS Policyholders are foreclosed from pursuing relief pending appeal from this Court because they did not show why it was impractical to do so in the Circuit Court, as required by Section 809.12. (OCI’s Motion, at ¶¶ 5-6.) As shown above, the RMBS Policyholders properly sought the relief they now seek in the Circuit Court. Even if they did not, however, this Court may still issue an injunction pending appeal if it concludes it would have been impractical for the RMBS Policyholders to seek further relief from the Circuit Court. Wis. Stat. § 809.12.

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<sup>1</sup> OCI argues – without citation of authority – that it was premature to request a stay on May 25. OCI suggests that the RMBS Policyholders should have waited for the court to issue its written ruling, and then attempt to get before the Circuit Court again to seek a stay. (OCI’s Motion, at ¶ 3.) This cumbersome procedure would have served no purpose other than to permit OCI and AAC to close the CDS Settlement before it can be reviewed. On May 25, all necessary parties were before the court, the court had just ruled on the record, and it was the proper time to seek a stay.

A further written request in this emergency appeal would have been impractical. The RMBS Policyholders had already requested – and were denied – exactly the relief they now seek. At the end of the May 25, 2010 hearing, counsel for the RMBS Policyholders specifically moved the Circuit Court for a stay of its order pending appeal. (May 25, 2010 Hrg. Tr., at 129-31.) When the Circuit Court denied this motion, the RMBS Policyholders’ counsel requested that it stay its order pending this Court’s review of a motion for stay. (*Id.* at 131.) Again, the Circuit Court denied the request, stating that the CDS Settlement can proceed. (*Id.*) To ask the Circuit Court in writing for what it had twice denied orally would be futile and a waste of judicial resources.

Moreover, OCI cites *Gaugert v. Duve* for the proposition that a verbal denial of a party’s request for a stay does not mean that it would be “impractical” for that party to seek relief in the trial court pursuant to Rule 809.12. (OCI’s Motion, at ¶ 6.) *Gaugert*, however, is legally and factually inapposite. 233 Wis. 2d 190, 607 N.W.2d 310 (Wis. Ct. App. 2000), *rev’d*, 244 Wis. 2d 691, 628 N.W.2d 861 (Wis. 2001). In *Gaugert*, plaintiffs sought specific performance of a contract to purchase real estate, and in connection with that action they initiated a *lis pendens* to protect the property during the pendency of the action. *Gaugert*, 233 Wis. 2d 190, 192-93, 607 N.W.2d 310, 312. The defendant sought to dissolve the *lis pendens* to sell the property to a third party, which the court permitted. *Id.* at 193, 607 N.W.2d at 312.

Contrary to OCI's assertion, in issuing this ruling the circuit court specifically stated that it *would* have entertained a motion for stay had the plaintiffs raised one, but plaintiffs' counsel instead made the strategic decision to rely on their lis pendens rights to protect their interests. *Id.* at 193, 607 N.W.2d at 312. The Court of Appeals then rejected the plaintiffs' later request for a stay because they had slept on their rights to request a stay from the circuit court. *Id.* at 193-94, 607 N.W.2d at 312-13. *Gaugert* stands for the proposition that a party's failure to seek a stay from a circuit court may prevent it from later requesting the same relief from the Court of Appeals. Here, in contrast, the RMBS Policyholders specifically asked for a stay from the Circuit Court – early and often – and the court rejected their requests. Unlike the *Gaugert* plaintiffs, the RMBS Policyholders specifically preserved their right to pursue relief from the Court of Appeals.

### CONCLUSION

The RMBS Policyholders respectfully request that the Court deny OCI's Motion to Dismiss the RMBS Note Holders' Improper Motion for an Injunction Pending Appeal.



Dated this 2nd day of June, 2010.

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