

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of:

Segregated Account of
Ambac Assurance Corporation,

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

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

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,

Movants.

**RMBS POLICYHOLDERS' RESPONSE
TO OCI'S MOTION TO DISMISS THE RMBS POLICYHOLDERS
APPEAL OF TRIAL COURT'S NON-FINAL
DENIAL OF TEMPORARY INJUNCTIVE RELIEF**

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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 RMBS Movant’s Purported Appeal of Right of Trial Court’s Non-Final Denial of Temporary Injunctive Relief (“Motion to Dismiss”). As shown herein, the RMBS Policyholders have invoked the jurisdiction of this Court to hear an appeal of the Circuit Court’s final order and all other orders of that Court.

The Notice Of Appeal Permits Review of The Circuit Court’s Order

Throughout these rehabilitation proceedings, OCI and AAC have not only refused to provide any meaningful information regarding their CDS Settlement, but they have repeatedly attempted to insulate their actions from judicial review, contrary to the commands of Wisconsin law. OCI’s Motion to Dismiss is its latest attempt to insulate its actions from review.

On May 27, 2010, the Circuit Court entered a final and appealable order. The RMBS Policyholders filed a Notice of Appeal on May 28, 2010 to review that Order. The Notice of Appeal is sufficient under Wisconsin law to obtain review of all interlocutory decisions of the Circuit Court. As a result, review in this Court is proper, and OCI’s Motion to Dismiss should be denied.

OCI concedes that the Circuit Court’s Order denying intervention is a final order, and that the RMBS Policyholders properly invoked the jurisdiction of this Court by filing a Notice of Appeal. (Motion to Dismiss, at ¶8.) OCI nonetheless

argues that this Court may not review the Circuit Court's denial of the RMBS Policyholders' motion to modify the temporary restraining order. (Motion to Dismiss, at ¶¶ 8-10.) OCI cites Wisconsin Stat. § 808.03 for the proposition that only final orders are appealable as a matter of right.

While OCI is correct that the denial of the RMBS Policyholders' request to modify the injunction is not itself a final order that could be separately appealed, OCI misconstrues Wisconsin law. The RMBS Policyholders' Notice of Appeal, which OCI concedes is proper, permits review of all other orders in the Circuit Court proceeding. Wisconsin Stat. § 809.10(4) provides that "[a]n appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." Here, as OCI concedes, the Circuit Court's denial of the RMBS Policyholders' Motion to Intervene was a final appealable order, and the RMBS Policyholders have appealed from that final order. (Motion to Dismiss, at ¶ 8.) As such, by operation of law, all nonfinal judgments adverse to the RMBS Policyholders are properly before this Court. Therefore, this Court's review of the Circuit Court's denial of the RMBS Policyholder's motion to modify the temporary injunction is authorized by Wisconsin law.

The RMBS Policyholders Have Standing to Seek Review

Finally, OCI argues that the RMBS Policyholders may not pursue an appeal because they lack standing to challenge the actions of OCI. (Motion to Dismiss, at

¶ 12.) Obviously, standing is an issue for the merits of the appeal. The RMBS Policyholders contend that the Circuit Court erred in finding they could not intervene.

Moreover, the RMBS Policyholders have meritorious arguments that they have standing. For example, a beneficiary of an insured trust, such as the RMBS Policyholders, has standing to sue when the trustee has failed to bring a meritorious claim. Under the RMBS trust documents, the time for the Trustee to decide whether to bring an action has not even expired. While certain of the Trustees joined and supported the RMBS Policyholders in the Circuit Court, those Trustees have not yet joined the appeal. The RMBS Policyholders certainly have standing. Denying standing to the RMBS Policyholders would serve OCI's and AAC's overriding goal to avoid review. It would not fulfill Wisconsin law that permits judicial review of insurance rehabilitations.

Conclusion

The RMBS Policyholders respectfully request that the Court deny OCI's Motion to Dismiss RMBS Movants' Purported Appeal of Right of Trial Court's Non-Final Denial of Temporary Injunctive Relief.

Dated this 2nd day of June, 2010.

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