

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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,

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,

COPY

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.

**SUPPLEMENTAL RESPONSE OF RMBS POLICYHOLDERS
TO OCI'S MOTION TO DISMISS THE RMBS POLICYHOLDERS'
APPEAL OF THE DENIAL OF TEMPORARY INJUNCTIVE
RELIEF**

Bryan K. Nowicki
WI State Bar ID No. 1029857
bnowicki@reinhardtllp.com
Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhardtllp.com
R. Timothy Muth
WI State Bar ID No. 1010710
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, Wisconsin 53703
Telephone: (608) 229-2200
Facsimile: (608) 229-2100

Attorneys for 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*

Of Counsel:

David M. Greenwald
John B. Simon
Jenner & Block LLP
353 N. Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
Facsimile: (312) 840-7774
dgreenwald@jenner.com
jsimon@jenner.com

Patrick J. Trostle
Jenner & Block LLP
919 Third Avenue, 37th Floor
New York, New York 10022
Telephone: (212) 891-1665
ptrostle@jenner.com

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 supplemental 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.

Procedural Background

Ambac Rehabilitation. With the approval of the Wisconsin Office of the Commissioner of Insurance (the “OCI”), Ambac Assurance Corporation (“AAC”) established a Segregated Account, pursuant to Wis. Stat. § 611.24, which authorizes the creation of an account separate from the company as long as it is adequately capitalized. AAC transferred from its General Account certain policies that AAC “expected to suffer material losses,” including the policies that protect the RMBS Policyholders, to the Segregated Account. (OCI’s Verified Pet. for Order of Rehabilitation (“Rehabilitation Pet.”), ¶ 9, App. 8; Plan of Operation, § IV, attached to Rehabilitation Pet. as Tab 1, App. 17-19.) The principal funding source for

the Segregated Account is AAC's General Account. OCI then petitioned the Circuit Court to enter an Order of Rehabilitation for the Segregated Account. (Rehabilitation Pet., at 1, App. 1.) Simultaneously, OCI announced a transaction that would commute almost all of the credit default swap ("CDS") contracts entered into by an AAC subsidiary in exchange for the immediate payment of \$2.6 billion in cash and a \$2 billion note (the "CDS Settlement"), both to be paid from the General Account.

Circuit Court Proceedings. In order for there to be meaningful review of OCI's actions to determine their legality and appropriateness, and to assure that all policyholders be treated equitably and fairly, the RMBS Policyholders sought to intervene in the proceeding. The RMBS Policyholders sought to modify the Circuit Court's Order for Temporary Injunctive Relief entered on March 24, 2010 ("Injunction Order") and requested a reasonable opportunity to review the legality of the establishment of the Segregated Account, and an opportunity to be heard and present evidence obtained through discovery. The RMBS Policyholders also moved to enjoin the CDS Settlement from closing until the Court and the parties could evaluate it and its effect on the Segregated Account.

On May 25, 2010, the Circuit Court held a hearing at which it heard the arguments of counsel, but did not hear testimony or admit evidence. The Court orally denied the RMBS Policyholders' motion to modify the Injunction Order. Additionally, the Circuit Court held that the Segregated Account was formed in compliance with Wisconsin law. Contrary to Wisconsin law and a Cooperation Agreement integral to the rehabilitation, the Circuit Court ruled that it lacked jurisdiction to review the CDS Settlement. The RMBS Policyholders submit that these rulings were in error.

RMBS Policyholders File Petition for Leave to Appeal. On May 26, 2010, the RMBS Policyholders filed a Preliminary Emergency Petition for Leave to Appeal, requesting leave to appeal the Circuit Court's denial of the RMBS Policyholders' motion to modify the Injunction Order. On May 27, this Court denied the RMBS Policyholders' emergency appeal as premature because the Circuit Court had not yet entered its order. (May 27, 2010 App. Ct. Order at 3, App. 587.) The Court invited the RMBS Policyholders to renew their request once the Circuit Court entered an order. (*Id.*)

RMBS Policyholders File Notice of Appeal. Later on May 27, the Circuit Court entered a single written order, denying all of the RMBS

Policyholders' requested relief, including their motion to intervene. As such, the Circuit Court's written order was a final, appealable order. The RMBS Policyholders timely filed a Notice of Appeal on May 28, 2010, appealing the Circuit Court's May 27 order in its entirety. The RMBS Policyholders also sought injunctive relief pending appeal.

OCI Moves to Dismiss Appeal. On June 1, 2010, OCI filed a motion to dismiss the RMBS Policyholders' appeal of the trial court's denial of the RMBS Policyholders' motion to modify the Injunction Order ("Motion to Dismiss"). In that motion, OCI conceded that the Circuit Court's denial of the RMBS Policyholders' Motion to Intervene was a final appealable order, and that appellate jurisdiction of that portion of the order was properly invoked by the Notice of Appeal. (Motion to Dismiss, at ¶ 8.) OCI contends that the Notice of Appeal was insufficient to obtain review of that portion of the Circuit Court's order that declined to modify the injunction.

The RMBS Policyholders filed a written response on June 2, 2010. In that response, the RMBS Policyholders argued that they are entitled to review by appeal as of right the entirety of the Circuit Court's ruling, which denied all of the relief the RMBS Policyholders requested. By operation of law, all nonfinal judgments adverse to the RMBS Policyholders are

properly before this Court as part of the RMBS Policyholders' appeal as of right, including the RMBS Policyholders' motion to modify the Injunction Order. Wis. Stat. § 809.10(4).

On June 2, 2010, this Court denied the RMBS Policyholders' request for an injunction pending appeal. The Court's order made clear that it was not expressing a view on the other issues in the case. For example, while the Court declined to grant a stay pending appeal, the Court stated it was not deciding the merits of the appeal, only that the movants had not established irreparable injury necessary for injunctive relief pending appeal. In that order, the Court permitted the RMBS Policyholders to file a response to the OCI's pending motion to dismiss that portion of the appeal that addressed injunctive relief on or before June 11, 2010.¹

This filing is made pursuant to the Court's order of June 2, 2010.

The Court Has Jurisdiction To Hear The RMBS Policyholders' Appeal Of The Entire Circuit Court Order

As shown herein, review of the entire order is appropriate.

First, Wisconsin Stat. § 809.10(4) provides that “[a]n appeal from a final judgment or final order brings before the court all prior nonfinal

¹ Because the RMBS Policyholders' written response to the Motion to Dismiss was filed the same day as the Court issued its June 2 Order, the RMBS Policyholders are not aware if the Court had the benefit of that filing when the Court issued its Order.

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.” As a result, the Circuit Court’s denial of the RMBS Policyholders’ Motion to Intervene was a final appealable order, and the RMBS Policyholders’ appeal from that final order brings before the Court the entirety of that order, including the rulings pertaining to the Segregated Account.

Second, the Circuit Court’s order did not only deny temporary injunctive relief. It completely resolved the RMBS Policyholders’ request to modify the Circuit Court’s prior injunction, and thus it is a final order. No further proceedings are possible in the Circuit Court. As a result, the May 28, 2010 Notice of Appeal is sufficient to invoke appellate jurisdiction over the request to modify the injunction.

Third, if the denial of the RMBS’s Policyholders’ request to modify the injunction can only be obtained through permissive appeal, the RMBS Policyholders have invoked that jurisdiction of the Court. Because OCI contends that the RMBS Policyholders may only obtain review of that portion of the Circuit Court’s order that denied the modification of injunction by permission, and the time to request that review is limited, the RMBS Policyholders have – out of an abundance of caution – herewith

filed a petition for leave to appeal. This filing preserves their right to request to modify the injunction in the event that OCI's Motion to Dismiss is granted. If the Court agrees with the RMBS Policyholders that the Notice of Appeal was sufficient to review the entire case, the Court may dismiss the Petition as moot.

1. The Notice Of Appeal Permits Review Of The Circuit Court's Order.

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. 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.)

The RMBS Policyholders' Notice of Appeal is sufficient under Wisconsin law to obtain review of all interlocutory decisions of the Circuit Court. 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, orders, and rulings adverse to the RMBS Policyholders are properly before this Court. Therefore, this Court's review of the Circuit Court's entire order, including its approval of the Segregated Account and its denial of the RMBS Policyholder's motion to modify the temporary injunction, is authorized by Wisconsin law.

2. The Denial Of The RMBS Policyholders' Request To Modify The Injunction Was Final And Appealable.

The Notice of Appeal is sufficient to create appellate jurisdiction over the request for equitable relief for a second reason. The Circuit Court's May 27 order disposed of the entire request for modification of the injunction, and was therefore final. It completely resolved the RMBS Policyholders' request to modify the injunction. There are no pending proceedings in the Circuit Court involving the RMBS Policyholders' request for modification of the injunction. As a result, the May 28, 2010 Notice of Appeal is sufficient to invoke appellate jurisdiction over the request to modify the injunction. *See In re the Incorporation of the Town*

of Fitchburg, Dane County, 98 Wis. 2d 635, 649, 299 N.W.2d 199, 206 (Wis. 1980) (the grant of an injunction order was final and appealable because it terminated the only matter in litigation with respect to the party).

3. In The Alternative, The RMBS Policyholders Have Filed A Petition For Permissive Appeal.

As we contend in this filing, the Circuit Court's May 27 order is final, and the RMBS Policyholders' Notice of Appeal invokes the jurisdiction of this Court over every aspect of the case. If OCI is correct, however, and the refusal to modify the injunction can only be reviewed by permission, the RMBS Policyholders have today filed a Renewed Petition for Leave to Appeal. Only if the Court agrees with OCI's jurisdictional argument need the Court consider this Petition.

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. In the alternative, the RMBS Policyholders request that the Court grant their Supplemental Petition for Leave to Appeal.

Dated this 8th day of June, 2010.

Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, Wisconsin 53703
Telephone: (608) 229-2200
Facsimile: (608) 229-2100

Bryan K. Nowicki
WI State Bar ID No. 1029857
bnowicki@reinhartlaw.com
Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhartlaw.com
R. Timothy Muth
WI State Bar ID No. 1010710
tmuth@reinhartlaw.com

Mailing Address:
P.O. Box 2018
Madison, Wisconsin 53701-2018

BY 

*Attorneys for 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*

Of Counsel:

David M. Greenwald
John B. Simon
Jenner & Block LLP
353 N. Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
Facsimile: (312) 840-7774
dgreenwald@jenner.com
jsimon@jenner.com

Patrick J. Trostle
Jenner & Block LLP
919 Third Avenue, 37th Floor
New York, New York 10022
Telephone: (212) 891-1665
Facsimile: (212) 909-0835
ptrostle@jenner.com