

COURT OF APPEALS OF WISCONSIN  
DISTRICT IV

---

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

Segregated Account of  
Ambac Assurance Corporation,

Appeal No. 2010-AP-1291-LV

SEAN DILWEG and OFFICE OF THE  
COMMISSIONER OF INSURANCE,

Plaintiffs-Respondents,

AMBAC ASSURANCE,

Interested Party-Respondent,

v.

WELLS FARGO BANK/TRUSTEE of  
BONDHOLDERS, BANK OF NEW  
YORK MELLON and DEUTSCHE BANK  
NATIONAL TRUST COMPANY,

Defendants,

FEDERAL HOME LOAN MORTGAGE  
CORPORATION,

Defendant-Petitioner,

AURELIUS CAPITAL MANAGEMENT,  
LP, FIR TREE, INC., KING STREET  
CAPITAL MASTER FUND, LTD., KING  
STREET CAPITAL, LP, MONARCH  
ALTERNATIVE CAPITAL, LP, and  
STONEHILL CAPITAL MANAGEMENT  
LLC,

Defendants-Petitioners-Appellants,

EATON VANCE MANAGEMENT,  
NUVEEN ASSET MANAGEMENT,  
RESTORATION CAPITAL  
MANAGEMENT, LLC, and STONE LION  
CAPITAL PARTNERS, LP,

Defendants-Co-Appellants-Petitioners.

---

**RMBS POLICYHOLDERS' COMBINED RESPONSE TO (1)  
AMBAC ASSURANCE CORPORATION'S MOTION TO DISMISS  
AND (2) OCI'S AMENDED MOTION TO DISMISS THE RMBS  
POLICYHOLDERS' APPEAL OF THE DENIAL OF TEMPORARY  
INJUNCTIVE RELIEF**

---

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  
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

The RMBS Policyholders, by their attorneys, submit this combined response to (1) Ambac Assurance Company's ("AAC") Motion to Dismiss RMBS Investors' Purported Appeal of Right of the Circuit Court's Non-Final Denial of Temporary Injunctive Relief ("AAC's Motion to Dismiss") and (2) OCI's Amended Motion to Dismiss RMBS Note Holders' Purported Appeal of Right of Trial Court's Non-Final Denial of Temporary Injunctive Relief ("OCI's Amended Motion to Dismiss"). The RMBS Policyholders incorporate herein their previous Response and Supplemental Response, dated June 2, 2010 and June 8, 2010, respectively. 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.

**1. The Circuit Court Denied Each And Every Claim For Relief Requested In The RMBS Policyholders' Motion To Modify The Order For Temporary Injunctive Relief And Motion To Intervene.**

The RMBS Policyholders argue that Wis. Stat. 809.10(4) provides that every issue decided by the Circuit Court merges into the Circuit Court's final judgment and is therefore before this Court. In its motion, AAC first argues that the only parties to the rehabilitation proceeding are OCI and the Segregated Account, and that therefore Wis. Stat. § 809.10(4)

is inapplicable to the RMBS Policyholders because it is not “triggered by the entry of a final judgment or order under Wis. Stat. §808.03,” which provides that “[a] final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties.” (AAC’s Motion to Dismiss, at ¶ 10.) AAC’s argument that the RMBS Policyholders may not appeal any issue other than the intervention issue because they are not parties assumes that the Circuit Court correctly ruled the RMBS Policyholders were unable to intervene. The appeal of that issue, which all parties concede is before this Court on appeal, will determine whether the RMBS Policyholders should participate as parties. If this Court agrees the RMBS Policyholders should be parties to the litigation, and it was error for the Circuit Court to deny the RMBS Policyholders’ Motion to Intervene, the RMBS Policyholders will be subject to Wis. Stat § 809.10(4), even under AAC’s interpretation of that statute.

The Circuit Court’s final order is before this Court. That May 27 Order denied each and every claim for relief the RMBS Policyholders brought. AAC and OCI mischaracterize the nature of the RMBS Policyholders’ motion and the effect of the Circuit Court’s May 27 Order. The request for relief in the lower court was not simply a request for

temporary injunctive relief. On April 30, 2010, the RMBS Policyholders moved to modify the Circuit Court's March 24, 2010 Order for Temporary Injunctive Relief ("Injunction Order"). In that motion, the RMBS Policyholders requested several forms of relief, not just a modification of the Injunction Order. Specifically, the RMBS Policyholder also requested:

[1] Expedited discovery regarding the formation of the Segregated Account and the adequacy of the capitalization of the Segregated Account, including the sufficiency of the General Account to support the Segregated Account through the Secured Note and Reinsurance Agreement, and the impact that the Statement of Intent and the transactions contemplated therein would have on the adequacy of the General Account to fund an equitable rehabilitation of the Segregated Account;

[2] For an Order modifying the Injunction Order by removing from the Segregated Account those policies held by the RMBS Policyholders and returning those policies to the AAC General Account;

[3] For an Order that the establishment of the Segregated Account was invalid due to non-compliance with the Wisconsin Insurance Statutes and its stated purpose and violation of the United States Constitution and the Wisconsin Constitution; and

[4] Such further relief that the Court deems just, equitable and consistent with the purpose of the Wisconsin Insurance Statutes as set forth in § 601.01(2).

(RMBS Policyholders' Emergency Motion to Modify Order for Temporary Injunctive Relief, at 2.) The Circuit Court did not just deny a motion to modify a temporary injunction as AAC and OCI claim, rather, the Circuit

Court denied *all* of the relief sought by the RMBS Policyholders, including requests for expedited discovery, an order removing the RMBS Policyholders from the Segregated Account, and an order that the Segregated Account was invalid. (*Id.*)

The Circuit Court's order completely resolved the RMBS Policyholders' request to modify the injunction and motion to intervene. As such, there are no pending proceedings in the Circuit Court involving the RMBS Policyholders and the Circuit Court's final order is before this Court on appeal as of right.

**2. The RMBS Policyholders Should Not Have To Wait Until The End Of The Rehabilitation For Relief.**

AAC argues that the right to appeal orders in the rehabilitation under Wis. Stat. § 809.10(4) will not be triggered until the Segregated Account rehabilitation is over. (AAC's Motion to Dismiss, at ¶ 10.) OCI has yet to propose a rehabilitation plan. (Order for Rehabilitation, at ¶ 9.) Indeed, it could be at least months before the rehabilitation is completely finalized.

AAC suggests that there can be no review of any order in the AAC Rehabilitation – even orders that resolve all of the claims of a party – until that date.

There are two answers to AAC's argument.

First, as a result of the Circuit Court's May 27 Order, the RMBS Policyholders have no pending requests for relief in the current rehabilitation proceeding. The claims filed by the RMBS Policyholders have been resolved – with finality. The RMBS Policyholders should not have to wait months or years for the entire rehabilitation to end before this Court reviews the Circuit Court's May 27 discrete ruling denying all of their claims for relief.

Because the Circuit Court's May 27 Order resolved all claims filed by the RMBS Policyholders, including their Motion to Intervene, Wisconsin law is clear that all nonfinal judgments, orders and rulings adverse to the RMBS Policyholders are properly before this Court. The plain language of Wis. 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.” The RMBS Policyholders’ Notice of Appeal is therefore sufficient under Wisconsin law to obtain review of all interlocutory decisions of the Circuit Court.

Federal bankruptcy law, which is often instructive when a court is adjudicating rehabilitation proceedings,<sup>1</sup> provides a useful comparison. In federal bankruptcies, where a court supervises an ongoing rehabilitation, a party may obtain review of a discrete dispute within a larger case if the order disposing of the discrete dispute “leaves a claimant nothing more to do than await the outcome of third-party litigation.” *In the Matter of Morse Electric Co.*, 805 F.2d 262, 264 (7th Cir. 1986). The rationale for this approach is that “there are not conventional ‘judgments’ in many of the claims that arise in bankruptcy; there are only dispositions on the way to the approval of the final plan.” *Id.* at 265. This rationale applies with equal force to this case. Based on the Circuit Court’s Order, the RMBS Policyholders do not currently have any relief pending in the Circuit Court

---

<sup>1</sup> Federal bankruptcy law is frequently relied on by state courts interpreting state statutes governing insurance rehabilitation and dissolution proceedings. *See, e.g., Pine Top Ins. Co. v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 969 F.2d 321, 324 (7th Cir. 1992) (looking to bankruptcy law regarding voidable preference doctrine is customary when interpreting a voidable preference dispute under state insurance law); *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1203 (Pa. 2009) (using bankruptcy law for guidance in interpreting ambiguous state insurance insolvency law is commonly accepted). Additionally, courts can look to similar statutes in other states for assistance in interpretation. *Creditor’s Comm. of Jumer’s Castle Lodge, Inc. v. Jumer*, 472 F.3d 943, 947 (7th Cir. 2007) (court looked to interpretations of “reasonably equivalent value” under Uniform Fraudulent Transfer Act for its analysis of same under Illinois Uniform Fraudulent Transfer Act). OCI and AAC themselves in their pleadings in the Circuit Court have argued by analogy to concepts found in the Federal bankruptcy law. (*See, e.g.,* OCI Brief in Support of Motion for Temporary Injunctive Relief, at 14-17; AAC Opp. Br., at 27-28.)



and should not have to wait months or years until the rehabilitation is complete to obtain appellate review.

Second, the RMBS Policyholders have separately sought to invoke the discretionary jurisdiction of this Court, if that is necessary. AAC's argument that the RMBS Policyholders must wait until the entire rehabilitation proceeding is concluded, provides further support for that motion. Otherwise, the parties will need to wait until the rehabilitation is concluded to determine if the first orders in the case were incorrect. If they were, it would be difficult to unscramble the entire rehabilitation. It would be far better to resolve the preliminary matters now, so that if errors were made, they can be corrected before the rights of parties are irrevocably altered.

**3. The Consummation Of The CDS Settlement Does Not Moot This Appeal.**

Contrary to OCI's and Ambac's arguments, the RMBS Policyholders not only sought to enjoin the CDS Settlement until the court had the opportunity to review the propriety and legality of the transaction; they also sought an order for expedited discovery regarding the CDS Settlement and the formation and capitalization of the Segregated Account, an order removing the RMBS Policyholders from the Segregated Account,

and an order that the Segregated Account was invalid as inadequately capitalized. (RMBS Policyholders' Emergency Motion to Modify Order for Temporary Injunctive Relief, at 2.) The Circuit Court denied *each* of the RMBS Policyholders' claims in its May 27 Order. (May 27, 2010 Cir. Ct. Order, at 14-17.) The RMBS Policyholders acknowledge that the CDS Settlement closed. However, the closing of the CDS Settlement changes nothing with regard to the RMBS Policyholders' remaining claims. In its Notice of Appeal, the RMBS Policyholders indicated that they were appealing from the "whole of the judgment and order, entered on May 27, 2010," not just the denial of their request to modify the Injunction Order. (Notice of Appeal, at 1.)

Moreover, the propriety of the CDS Settlement remains at issue. As this Court previously recognized, if the CDS Settlement is found to be improper the RMBS Policyholders may seek to recover the disbursed funds. (June 2, 2010 App. Ct. Order, at 6.) Accordingly, the propriety of the CDS Settlement is still ripe for appeal.

### **Conclusion**

The RMBS Policyholders respectfully request that the Court deny (1) AAC's Motion to Dismiss RMBS Investors' Purported Appeal of Right of the Circuit Court's Non-Final Denial of Temporary Injunctive Relief,

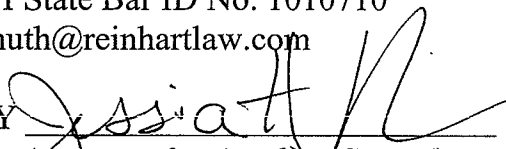
and (2) OCI's Amended Motion to Dismiss RMBS Note Holders'  
Purported Appeal of Right of Trial Court's Non-Final Denial of Temporary  
Injunctive Relief. In the alternative, the RMBS Policyholders request that  
the Court grant their Supplemental Petition for Leave to Appeal.

Dated this 18th 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