

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**AMENDED SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

1           At a stated term of the United States Court of Appeals for the Second Circuit, held at the  
2 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on  
3 the 17<sup>th</sup> day of November, two thousand eight,  
4

5 PRESENT:

6                   HON. JOHN M. WALKER, JR.,  
7                   HON. BARRINGTON D. PARKER,  
8                   HON. REENA RAGGI,

9                                   *Circuit Judges.*

10 \_\_\_\_\_  
11  
12 CITY OF PONTIAC GENERAL EMPLOYEES'  
13 RETIREMENT SYSTEM and SOUTHWEST  
14 CARPENTERS PENSION TRUST, on behalf of  
15 themselves and all others similarly situated,  
16

17                                   *Plaintiffs-Appellants,*

**No. 07-1117-cv  
SUMMARY ORDER**

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19  
20 ANTHONY CAPONE, individually and on behalf of  
21 all others similarly situated, TODD SIMON,  
22 individually and on behalf of all others similarly

1 situated, MARISS PARTNERS, LLP, individually and  
2 on behalf of all others similarly situated, THOMAS  
3 CASSIDY, individually and on behalf of all others  
4 similarly situated, ALAN D. SADOWSKY, individually  
5 and on behalf of all others similarly situated, and  
6 BARBARA Z. KATZIN, individually and on behalf of all  
7 others similarly situated,

8  
9 *Plaintiffs,*

10 -v.-

11  
12 MBIA Inc., JOSEPH W. BROWN, GARY C. DUNTON,  
13 NICHOLAS FERRERI, NEIL G. BUDNICK, DOUGLAS  
14 C. HAMILTON, RICHARD WIELL, and DAVID ELLIOT,

15  
16 *Defendants-Appellees.*

17  
18  
19 FOR APPELLANTS: Sanford Svetcov, *for* Lerach Coughlin Stoia Geller Rudman  
20 & Robbins, LLP (Samuel H. Rudman, David A. Rosenfeld,  
21 Mario Alba, Jr., *on the brief*),

22  
23 FOR APPELLEES MBIA,  
24 BROWN, DUNTON, FERRERI  
25 BUDNICK and HAMILTON: John H. Hall, *for* Debevoise & Plimpton LLP (Steven  
26 Klugman, Michael R. Potenza, Christopher J. Hamilton, *on*  
27 *the brief*),

28  
29 FOR APPELLEE WEILL: Paul J. Fishman, *for* Friedman Kaplan Seiler & Adelman  
30 LLP (John N. Orsini, *on the brief*),

31  
32 FOR APPELLEE ELLIOT: Steven R. Peikin, *for* Sullivan & Cromwell LLP (Joseph J.  
33 Reilly, *on the brief*).

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36  
37 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND  
38 DECREED that the judgment of the District Court is AFFIRMED in part and the case is  
39 REMANDED for proceedings consistent with this order.

40 Plaintiffs-Appellants City of Pontiac General Employees' Retirement System and  
41 Southwest Carpenters Pension Trust ("Appellants") appeal from a judgment of the United States  
42 District Court for the Southern District of New York (Stanton, *J.*). The court granted the motion

1 of Defendants-Appellees MBIA Inc., Joseph W. Brown, Gary C. Dunton, Nicholas Ferreri, Neil  
2 G. Budnick, Douglas C. Hamilton, Richard Weill, and David Elliot (“MBIA”) to dismiss the  
3 complaint, which had asserted claims under sections 10(b) and 20(a) of the Securities and  
4 Exchange Act of 1934 and Rule 10b-5. *See* Fed. R. Civ. P. 12(b)(6). The District Court  
5 concluded that the complaint was time-barred. We assume the parties’ familiarity with the  
6 underlying facts, procedural history and issues on appeal.

7 We affirm the dismissal because, on the record before it at the time of its decision, the  
8 District Court correctly found that inquiry notice arose from the report by Gotham Partners  
9 Management Co. (“Gotham”) and prior disclosures regarding the 1998 reinsurance transactions.  
10 The District Court also correctly found that the December 9, 2002 press release by MBIA did not  
11 negate the inquiry notice.

12 We see no reason to interpret the District Court’s dismissal to be “with prejudice.” Both  
13 the District Court’s Memorandum Opinion and Order of Feb. 13, 2007 and the Clerk’s Judgment  
14 filed on Feb. 15, 2007 indicate that the complaint was merely “dismissed.” The Clerk’s docket  
15 entry reflects dismissal “with prejudice[,]” but, as we held in *Savoie v. Merchants Bank*, 166 F.3d  
16 456 (2d Cir. 1999), where there is conflict between the docket entry and the District Court’s  
17 orders, the docket entry is not dispositive. *Id.* at 464. Interpreting the District Court’s ruling to be  
18 “without prejudice” is also appropriate considering the fact that Appellants had not previously  
19 been given leave to amend and requested such an opportunity in their Reply Memorandum of Law  
20 filed in response to MBIA’s motion to dismiss. *See Oct. 7, 2008 Mem. of Law* at 56-57 (“If the  
21 Court identifies any defects in the Complaint, Plaintiffs request the opportunity to replead to cure  
22 them.”). We have frequently held that requests for leave to amend under such circumstances  
23 should be “freely given.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also* Fed. R. Civ. P.  
24 15(a)(2) (advising that a court “should freely give leave [to amend] when justice so requires”).

1 Although Appellees argue that amendment would be futile, “[w]e prefer to leave this  
2 determination to the district court on remand.” *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 199 (2d Cir.  
3 1990); *see also id.* at 198-199 (finding the district court abused its discretion in its implicit denial  
4 of plaintiff’s request for leave to amend where plaintiff asked for leave to amend in his  
5 supplemental memorandum in opposition to the defendant’s motion to dismiss, had not previously  
6 been given leave to amend, and the panel could not determine on the basis of the record that leave  
7 to amend was futile).

8 Finally, we note that documents proffered by Appellants to us on appeal may add to the  
9 mix of relevant information following remand. The District Court may choose to consider the  
10 documents when it revisits the question of inquiry notice, should the Appellants file an amended  
11 complaint and submit those documents in connection with that complaint.<sup>1</sup>

12 For these reasons, the District Court’s order is AFFIRMED in part and REMANDED in  
13 part. Appellants’ motion to supplement the record on appeal is DENIED as moot.  
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16 For the Court:

17 Catherine O’Hagan Wolfe, Clerk  
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19 By: \_\_\_\_\_

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<sup>1</sup> Alternatively, Appellees argue that we should affirm the District Court’s dismissal of the complaint because Appellants’ claims were barred by the applicable statute of repose. However, the District Court did not consider this argument below, and we decline to address it on appeal. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004) (“In general, we refrain from analyzing issues not decided below . . .”).