UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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| IN THE MATTER OF THE REHABILITATION OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION | Case No. 10-cv-778<br><br>(Removed From Dane Court Circuit Court – No. 10 CV 1576) |

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**REPLY BRIEF IN SUPPORT OF MOTION TO REMAND BY THE WISCONSIN COMMISSIONER OF INSURANCE**

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The Wisconsin Commissioner of Insurance ("the Commissioner"), as court-appointed Rehabilitator of the Segregated Account ("the Segregated Account") of Ambac Assurance Corporation ("Ambac"),[1] files this reply brief in support of his motion to remand this insurance rehabilitation proceeding to the Dane County Circuit Court ("the State Rehabilitation Court"), which has been overseeing it since the Commissioner commenced it on March 24, 2010.

**INTRODUCTION**

The IRS's opposition is premised in large part on the assertion that the State Rehabilitation Court does not have *in rem* jurisdiction over the claims-paying resources designated to fund the Commissioner's Rehabilitation Plan because they are in Ambac's General Account. (IRS Opp'n at 15.) As explained below, the IRS's premise is based on a misunderstanding of Wisconsin law and the relationship between the Segregated Account rehabilitation and the claims-paying resources designated to fund the Plan.

The purpose of the IRS's removal and its accompanying motion to dissolve the Supplemental Injunction is to seize over $708 million in tax refunds, in violation of the McCarran-Ferguson Act, *U.S. Department of the Treasury v. Fabe*, 508 U.S. 491 (1993), and the Wisconsin insurance priority statute, which subordinates the payment of federal government claims behind policyholder loss claims. That is what this case is really about: the IRS wants this Court to facilitate its effort to "jump the line," even though the above sources of law and the IRS's own regulation explain why it should not be permitted to do so.

The Commissioner's motion to remand should be granted for the following reasons. *First*, the statutory prerequisites for removal have not been met. Specifically, no "civil

[1] On January 3, 2011, Theodore K. Nickel was appointed Wisconsin Commissioner of Insurance, replacing former Commissioner Sean A. Dilweg, who initiated this Rehabilitation Proceeding.

action" has been initiated against the IRS, any more than it has been initiated against any of the scores of other potential claimants in the Rehabilitation Proceeding.

*Second*, this Rehabilitation Proceeding should be remanded: (a) based on the McCarran-Ferguson Act, which reverse-preempts the cited removal statutes as used by the IRS in this situation because the clear import and purpose of Wis. Stat. Chapter 645 is to consolidate insurance delinquency proceedings in one court only; and (b) based on federalism and comity concerns under the *Burford* abstention doctrine.

*Finally*, the Commissioner addresses an IRS argument that relates to its motion to dissolve the Supplemental Injunction rather than the issue of remand. (*See* IRS Opp'n at 2-8.) The IRS argues that, because its power to tax derives from the Constitution, the McCarran-Ferguson Act does not preempt the tax collection statutes it seeks to invoke. The IRS is mistaken. Because McCarran-Ferguson applies to every "Act of Congress" irrespective of its constitutional derivation, and because the tax collection statutes at issue are "Act[s] of Congress," the IRS cannot avoid reverse-preemption under McCarran-Ferguson by cloaking itself in an alleged "Constitutional prerogative" to tax.

## ARGUMENT

### I. THE IRS MISAPPREHENDS THE RELATIONSHIP BETWEEN THE SEGREGATED ACCOUNT REHABILITATION AND THE CLAIMS-PAYING RESOURCES DESIGNATED TO FUND THE PLAN

The IRS incorrectly assumes that there is no legal nexus between the Segregated Account rehabilitation and the claims-paying resources in the General Account it seeks to take by prejudgment levy.[2] (*See* IRS Opp'n at 15-17.) But the IRS ignores the nature of Wisconsin segregated accounts and their use in pursuing rehabilitation of a Wisconsin insurer under Wis. Stat. § 611.24(3) and (3)(e). As reflected in the official comments to Wis. Stat. § 611.24(3):

> The basic idea behind segregated accounts is that different operations can be kept independent without formally creating a separate corporation. A segregated account is in some respects like a "corporation within a corporation." . . . Sub. (3)(a) requires that a segregated account be equipped with an adequate *share* of the corporation's capital and surplus. . . . *If it carries no risks not assumed by the corporation's general account, the commissioner may set the required figure at zero* under s. 611.19(1). . . .

Wis. Stat. Ann. § 611.24 cmt. (emphasis added).

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[2] The IRS argues that "the Segregated Account was allocated vast insurance policyholder liabilities but no meaningful assets, while substantial assets remain with the other components of the corporate group." (IRS Opp'n at 1.) However, there are only two meaningful members of the Ambac consolidated tax group—the non-insurance parent holding company, Ambac Financial Group, Inc. ("AFGI"), which is in a Chapter 11 bankruptcy, and Ambac, its Wisconsin-domiciled insurance operating subsidiary. The $708 million of tax refunds at issue were paid to Ambac pre-rehabilitation, and are a significant source of claims-paying resources that the Commissioner's Plan will draw upon pursuant to the Secured Note and Reinsurance Agreement in place to fund payments due claimants in accordance with the pending Plan of Rehabilitation.

The IRS also asserts that the Supplemental Injunction is somehow dependent upon the allocation of the IRS's potential claim to the Segregated Account. It is not. Wisconsin insurance rehabilitation law contains no limitations on *who* may be enjoined, but rather permits injunctions against *any* "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders." Wis. Stat. § 645.05(1)(k) (emphasis added).

The IRS's arguments also ignore the law of the case as articulated by the State Rehabilitation Court. For instance, in its October 26, 2010 Order (as corrected on November 1, 2010), which denied various motions challenging the legality and structure of the Segregated Account, the State Rehabilitation Court held that:

> The plan of operation, the secured note and reinsurance agreement that has been provided by the OCI [gives] the Segregated Account access to all of the assets of Ambac on par with the general account policyholders unless the payment of Claims would cause Ambac's assets to fall below $100,000,000.00, which is less than two percent of Ambac's claim paying assets. The net effect of this is that the Segregated Account is capitalized at 98 percent of Ambac's current assets despite having liabilities of less than 1000 of Ambac's 15,000 insurance policies. The OCI has exercised reasonable discretion in requiring the Segregated Account policyholders have access to virtually all of the resources available to pay their claims prior to the allocation of their policies to the Segregated Account. Under Wis. Stats. Sec. 611.24, the Segregated Account is to have an adequate share of the corporation's capital and surplus. No legal basis in this matter has been shown on which to require additional capitalization of the Segregated Account.

(12/17/10 Declaration of Michael B. Van Sicklen ("Van Sicklen Decl."), Ex. L at 9-10 (Dkt. 14).)

As the Commissioner has explained, "[b]y utilizing the Segregated Account in this manner, the Commissioner was able to accomplish the functional rehabilitation of Ambac as a whole while avoiding the dangerous contractual pitfalls of a formal, full rehabilitation." (Comm'r Br. at 12.) "[A]ll material risks to the claims-paying resources of Ambac are controlled and treated no differently than they would be in a full rehabilitation of Ambac, but the strains on Ambac's claims-paying resources are substantially reduced by avoidance of trigger-related claims for loss, which increases the amount of the likely recovery for all claimants with policies, contracts, or liabilities allocated to the Segregated Account." (*Id.* at 11-12 (internal citations omitted).) The Commissioner retains full oversight over the claims-paying resources of

Ambac and those assets cannot be materially depleted or transferred outside the normal course of business without the Commissioner's consent. (*See* Declaration of Hilarie Snyder ("Snyder Decl."), Ex. 5 at § 1.02 (Dkt. 24).)

When the specialized nature of a Wisconsin segregated account rehabilitation proceeding and its nexus here with general account claims-paying resources is considered in light of the above-quoted legislative history and State Rehabilitation Court Order, the IRS's "*in rem*" argument falls apart. As this Court noted in *Metropolitan Life Insurance Co. v. Board of Directors of Wisconsin Insurance Security Fund*, 572 F. Supp. 460 (W.D. Wis. 1983), in the context of discussing abstention, it is necessary to look at the *effect* of the collateral federal proceeding on the state insurance delinquency proceeding rather than the label placed on it:

> Whether plaintiffs' suit is essentially against the segregated account (because the obvious result of a ruling in plaintiffs' favor will be to reduce the amounts in the segregated account available for use for the payment of disability insurance claims), and thus an *in rem* proceeding, or whether the suit is viewed as an *in personam* action which interferes with the state court's *in rem* liquidation proceedings, the result is the same: *this court must defer to the state court proceedings to avoid the "unseemly and disastrous conflicts" that would arise if this court were to issue rulings that reduced the funding in the account and thereby defeated that part of the state's liquidation efforts which involves the provision of continuing coverage to holders of Reliable disability insurance policies.*

*Id*. at 471 (emphasis added). The same types of "unseemly and disastrous conflicts" would occur here if the IRS's position were adopted.

## II. THE STATUTORY PREREQUISITES FOR REMOVAL ARE NOT MET

### A. There Is No "Civil Action" Against The IRS

The plain language of the statutes upon which the IRS bases its removal—28 U.S.C. §§ 1441 and 1442(a)—only permit the IRS to remove a "civil action" brought in state court "against" it. The IRS acknowledges that it is not a defendant (or even a party) to the

Rehabilitation Proceeding, but urges the Court to look "to the substance rather than the form of the state proceeding" to determine whether removal is appropriate. (IRS Opp'n at 10.) The Commissioner agrees, and notes that the IRS does not dispute the Commissioner's description of the substance of the Rehabilitation Proceeding—a comprehensive framework to provide for the preservation of assets and the orderly and equitable payment of claims over time—or the key role the First-Day and Supplemental Injunctions play in ensuring an orderly and fair rehabilitation process. (*See* Comm'r Br. at 1-5, 9-14, 20-26.)

In its opposition, the IRS cites a number of non-insurance cases wherein the removal of discrete ancillary disputes (*i.e.*, the compliance with third-party subpoenas) was permitted, presumably to demonstrate that sometimes independent disputes within a larger proceeding are separately removable. That principle is true, but irrelevant here. As the Commissioner noted in his opening brief, "[t]here may be individual, ancillary disputes litigated within that larger state-court management framework [for insurance rehabilitation], and that litigation may occur in courts other than the State Rehabilitation Court." (*Id.* at 21.) But the question at hand is whether *this* dispute—concerning the applicability of an injunction that affects the IRS in the same manner as all other potential claimants of the Segregated Account—is properly characterized as a discrete "civil action" "against" the IRS.

The answer is "no." The IRS's objection to the Supplemental Injunction is functionally no different than the objections the State Rehabilitation Court already has heard from various claimants, and may continue to hear if new claims arise. *Compare* IRS Opp'n at 4-5 (asserting that the IRS cannot be required to recover from the Segregated Account) *with* Van Sicklen Decl., Exs. L, M (addressing arguments by claimants (based on the Constitution and common law) that they cannot be required to recover from the Segregated Account); *also* *compare* IRS Opp'n at 5-6 (asserting that injunction improperly impairs IRS's rights to levy, lien and take other direct actions to protect its interests) *with* Van Sicklen Decl., Exs. L, M (addressing arguments by claimants that the injunction improperly impairs their preexisting rights to accelerate contracts, liquidate collateral, and take other actions to protect their interests).

The IRS's characterization of its challenge to the Supplemental Injunction as a discrete "federal tax issue" does not make it so. (IRS Opp'n at 18.) As the Commissioner has explained, the discrete federal tax issue (*i.e.*, whether or not the tax refunds were properly calculated) is not covered by the Supplemental Injunction and is being litigated in the AFGI bankruptcy proceedings.[3] (Comm'r Br. at 4.) Instead, the real issue here is the validity of the Commissioner's injunctive relief to preserve claims-paying resources for paying claims according to the statutory priority structure.

Neither the Rehabilitation Proceeding nor the general injunctive relief entered in it constitute a "sufficient separate action" against the IRS (or any other potential claimant), so as to fall within the scope of 28 U.S.C. §§ 1441 or 1442. *Wisconsin v. Schaffer*, 565 F.2d 961, 964 (7th Cir. 1977) (cited in IRS Opp'n at 10-11). Insurer delinquency proceedings seek to protect the interests of all policyholders, creditors and the public by "an orderly and efficient process" that will "settle all of [the insurer's] affairs and dispose of all of its property" should such property prove insufficient to satisfy all valid claims against it. *Blackhawk Heating & Plumbing*

[3] On November 8, 2010, AFGI commenced a voluntary Chapter 11 Bankruptcy proceeding in the Southern District of New York, captioned *In re Ambac Fin. Group, Inc.*, Case No. 10-15973 (Bankr. S.D.N.Y.). In conjunction with that case, AFGI immediately commenced an adversary proceeding against the IRS in which it is seeking a declaratory ruling in favor of it and Ambac regarding the propriety of the tax refunds at issue here totaling approximately $708 million that were received from the IRS in September of 2009 and February 2010, and remitted by AFGI to Ambac in the ordinary course pursuant to the inter-corporate Tax Sharing Agreement in effect between AFGI and Ambac. That adversary proceeding is captioned *Ambac Fin. Group, Inc. v. United States*, Adv. Pro. No. 10-04210 (Bankr. S.D.N.Y.).

*Co. v. Geeslin*, 530 F.2d 154, 159 (7th Cir. 1976). Actions by any one claimant to interfere with the allocation of a distressed insurer's assets necessarily affect all other claimants; such efforts cannot be "distinct and separable" from an orderly and efficient process to equitably address all claims. *Cf. Metropolitan Life*, 572 F. Supp. at 471 (noting the "disastrous conflicts that would arise if this court were to issue rulings that reduced the funding in the account [used to provide coverage for policyholder claimants] and thereby defeated that part of the state's liquidation efforts").

Here, the IRS seeks to bypass the Rehabilitation Proceeding and exercise its own process over the assets available to the insurer "summarily and without prior notice or judicial determination," disposing of that property without regard to the priority structure of Wisconsin insurance law and without concern for the effect of its actions on the rights of thousands of other potential claimants. (IRS Opp'n at 6, 18-19 & nn.13-14.) The IRS admits as much, expressly "*invok*[*ing] this Court's jurisdiction to resolve any disputes regarding the . . . priority*[] *of any federal tax liability*" relative to other claims in the rehabilitation. (*Id.* at 18 (emphasis added); *see also id.* at 19 n.14.) Thus, this dispute is not comparable to third-party subpoena disputes ancillary to routine civil actions, which is the narrow context in the cases cited by the IRS. (*See id*. at 11.)

Finally, the IRS's own regulation bars it from using its statutory collection tools to disrupt ongoing state receivership proceedings. Specifically, 26 C.F.R. § 301-6331.1(3) prevents the IRS, during the pendency of "a bankruptcy proceeding or a receivership proceeding in either a Federal or a State court," from levying "upon assets in the custody of a court, whether or not such custody is incident to a bankruptcy or receivership proceeding, *except where the* *proceeding has progressed to such a point that the levy would not interfere with the work of the court* or the court grants permission to levy." *Id.* (emphasis added).

The IRS contends that it can disregard its own regulation here because of the nature of the Segregated Account structure. (*See* IRS Br. at 18.) In addition to being a formalistic and flawed distinction that ignores this Court's reasoning in *Metropolitan Life* (*see* discussion in Section I *supra*), the IRS cannot dispute the rationale underlying its own regulation: the types of collection actions the IRS seeks permission to pursue against the assets available to fund the rehabilitation would "interfere with the work of the court" overseeing the proceeding. *See Blackhawk Heating*, 530 F.2d at 159 ("The states have a paramount interest in seeing that liquidation proceedings conducted by court-appointed liquidators and overseen by their courts are free from the interference of outside agencies. This interest is of even greater importance when the company undergoing liquidation is a domestic insurance company or other financial institution.").

In short, equitable remedial proceedings like this one—in which the state court is exercising jurisdiction over the distribution of a limited pool of assets to various competing claimants—are not removable as to a single potential claimant's assertion of a right to the assets in question, because sorting through the competing rights of claimants to the same pool of assets does not create distinct civil actions against each of them. To hold otherwise would essentially federalize any insurance delinquency proceeding in which one or more claimants raise a colorable claim under any one of the several statutory bases for removal. *Cf. United States v. Rural Elec. Convenience Coop. Co.*, 922 F.2d 429, 435-36 (7th Cir. 1991) (rejecting arguments that could lead to the "total federalization of state actions" involving federal government interests and noting the resulting "costs to our federal system").

### B. IRS's Treatment Of The Statutes And Caselaw Lacks Merit

There is no basis for a different result when the United States (or the IRS) is one of the potential claimants in an insurer rehabilitation proceeding, or when agencies seek to remove under Section 1442(a) rather than Section 1441. *See Sheda v. U.S. Dep't of the Treasury*, 196 F. Supp. 2d 743 (N.D. Ill. 2002); *California v. Bozarth*, 356 F. Supp. 667, 669 (N.D. Cal. 1973) (finding that state action regarding return of seized property in which IRS claimed a tax lien was "[c]learly . . . not removable under Section 1442(a)" because the state proceeding "is not against any officer or agent of the United States" and "no such officer was a party to the State Court proceeding"); *In re 73rd Precinct Station House*, 329 F. Supp. 1175 (E.D.N.Y. 1971); *Fountain Park Coop., Inc. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 289 F. Supp. 150 (C.D. Cal. 1968).[4]

The IRS cannot avoid this doctrine by claiming that it has an absolute right of access to a federal court whenever a state proceeding implicates the interests of the United States. As established by *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936)—a case discussed at length in the Commissioner's opening brief but not addressed in the IRS's opposition—the federal government is not entitled to a federal forum in insurance delinquency proceedings. There, as here, an insurance delinquency proceeding was commenced in state court to conserve, administer and equitably distribute assets to claimants. *Id.* at 475-76. Likewise, the state insurance official "was protected by a sweeping injunction in the unimpeded liquidation" of

[4] The IRS asserts that any cases decided prior to 1996—or that rely on pre-1996 precedent—are distinguishable on the ground that the 1996 amendment to Section 1442(a) changed the landscape of federal agency removal. (IRS Opp'n at 14 & n.11.) However, that amendment did nothing more than "explicitly permit[] the removal to be effected by the agency itself[,]" rather than limiting the right of removal to agency officers sued for acts in their official capacity. 28 U.S.C.A. § 1442 cmt. on 1996 amend. of § 1442. None of the cases cited above rest on any distinction relevant to that change in the statutory language.

the property at issue. *Id.* And, like the IRS here, the federal government in *Bank of New York* sought a federal forum "not merely to establish a debt or a right to share right to share in property," but rather to assert its right to "obtain possession of the respective funds" and "to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." *Id.* at 478.

Under these circumstances, the Supreme Court rejected the federal government's assertion of an absolute right to a federal forum for its claims: "In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held." *Id.* at 480-81. The same is true here.

## III. THIS ACTION SHOULD BE REMANDED TO THE STATE REHABILITATION COURT

### A. The McCarran-Ferguson Act Deprives This Court Of Jurisdiction Over The Rehabilitation Proceeding

Under the plain language of the McCarran-Ferguson Act and Seventh Circuit precedent applying it, *any* federal statute is subject to reverse preemption if it satisfies the three conditions embodied in the statute: (1) the federal statute does not "specifically relate[] to the business of insurance"; (2) the state statute was enacted "for the purpose of regulating the business of insurance; and (3) enforcement of the federal statute at issue would "invalidate impair, or supersede" the state insurance law. 15 U.S.C. § 1012(b); *Fabe*, 508 U.S. at 500-01;

*Am. Deposit Corp. v. Schacht*, 84 F.3d 834, 844 (7th Cir. 1996) (noting that "any" federal law is "within the reach of the McCarran-Ferguson Act").[5]

Rather than apply this three-part reverse-preemption test to the removal statutes at issue—as the Commissioner and the courts in the multiple cases cited in his opening brief have done[6]—the IRS seems to contend that a McCarran-Ferguson analysis is unnecessary. It does not offer any basis for why the three conditions are not present here, but rather fights the test with the blanket assertion that "[t]he Commissioner cannot rely on McCarran-Ferguson to reverse preempt the federal right to remove." (IRS Opp'n at 13.)

Though the IRS acknowledges that the Commissioner's opening brief (at 33-34) cited numerous cases to the contrary—all of which held that operation of the removal statutes to permit removal of disputes directly relating to insurance delinquency proceedings impaired state laws establishing a uniform, comprehensive forum for such proceedings—the IRS does not offer *any* argument that those cases were wrongly decided. Instead, the IRS attempts to distinguish them based on the fact that none of those cases involved "an action against a federal agency involving a claim presenting federal questions." (IRS Opp'n at 14.)

However, this distinction has no bearing on the McCarran-Ferguson reverse-preemption analysis. The McCarran-Ferguson Act distinguishes only between acts of Congress

[5] The IRS bases much of its argument about McCarran-Ferguson on a law review article, which advocates for the Supreme Court to overrule *Fabe*. *See* Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act's Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 364 (2000) (cited in IRS Opp'n at 7). If the IRS's position is dependent on overturning *Fabe*, as suggested in its opposition (at 19 n.14), it will need to pursue that through a writ of certiorari from the Supreme Court of Wisconsin. In the meantime, however, the IRS cannot sidestep the law as it stands today. Despite its efforts to elevate its authority to some higher plane, the IRS tax collection statutes at issue are no more sacrosanct than "any other federal law," and thus "within the reach of the McCarran-Ferguson Act." *Am. Deposit*, 84 F.3d at 844.

[6] *See* Comm'r Br. at 29-35.

that specifically relate to insurance and those that do not; it does not distinguish between "Acts of Congress relating to the removal of cases involving federal agencies or federal questions" and "Acts of Congress relating to the removal of cases involving everyone and everything else."

The sole case that the IRS cites in support, *Granite Reinsurance Co. v. Frohman*, No. 8:08CV410, 2009 WL 2601105 (D. Neb. Aug. 17, 2009), highlights this point. (IRS Opp'n at 15.) In *Granite Reinsurance*, the dispute was between the state insurance commissioner and the Federal Crop *Insurance* Corporation, an agency of the United States created under the Federal Crop *Insurance* Act. The Federal Crop Insurance Act "includes provisions outlining the substance and method of providing federal crop insurance[,]" establishes the right of the Federal Crop Insurance Corporation to "implement a federal crop insurance program," and grants the federal courts exclusive jurisdiction over disputes by and against the Federal Crop Insurance Corporation. *Id.* at *4-*5.

The *Granite Reinsurance* court did not rest its holding on the grounds suggested by the IRS, but rather on the existence of federal statutes specifically directed at the crop insurance questions at issue:

> The McCarran-Ferguson Act reflects a strong federal policy of deferring to state regulation of the insurance industry, including insolvency statutes. The underlying policy of affording state courts exclusive jurisdiction over insurer insolvency actions is to eliminate the risk of unequal treatment of claimants or conflicting rulings in different forums.
>
> However, the McCarran-Ferguson [Act] includes a significant exception which was neither applicable nor discussed in this court's prior rulings. Unlike Granite's complaint, in the prior federal district court cases cited by Granite and the Director, none of the parties was a federal agency *charged with implementing a federal insurance program*. The McCarran-Ferguson Act expressly does not apply, and therefore state law does not preempt, *federal enactments specifically relating to the business of insurance*.

*Id.* (internal quotations and citations omitted, emphasis added). Contrary to the IRS's contention, *Granite Reinsurance* does not hold that the outcome of other cases finding reverse-preemption of removal statutes "would have been different had the removal been filed by a federal agency invoking federal jurisdiction as to a federal question." (IRS Opp'n at 15.) Rather, the case stands for nothing more than the undisputed proposition that the McCarran-Ferguson Act does not reverse-preempt federal statutes specifically relating to the business of insurance.

The IRS identifies no federal statute applicable here that specifically relates to the business of insurance. The IRS also fails to identify any cases that hold that the McCarran-Ferguson Act does not reverse-preempt general federal removal statutes when such statutes would impair state insurance delinquency proceedings. (*See* IRS Opp'n at 13, citing *Int'l Ins. Co. v. Duryee*, 96 F.3d 837 (6th Cir. 1996) (holding that general state prohibition against the removal of actions against foreign insurers in any type of suit commenced in the state did not "regulate the business of insurance" as applied to routine litigation outside the delinquency context); *Koken v. Pension Benefit Guar. Corp.*, 383 F. Supp. 2d 712 (E.D. Pa 2005) (stating without analysis that McCarran-Ferguson did not apply to removal of separate petition by Commissioner for ancillary declaratory relief in which a federal court decision could not disrupt the state priority scheme); *Appleton Papers, Inc. v. Home Indem. Co.*, 2000 WI App 104 & n.11, 235 Wis. 2d 39, 612 N.W.2d 760 (leaving the McCarran-Ferguson analysis to the federal court based on the state court's interpretation of the meaning of Wisconsin insurance law outside the delinquency context, and noting that "[w]e do not imply that a Wisconsin court may not issue an injunction under Wis. Stat. ch. 645 dealing with rehabilitation and liquidation of insurers").)

In sum, the IRS cites no case in which a court applied the McCarran-Ferguson analysis required by the Supreme Court and the Seventh Circuit to reach the result the IRS seeks here. The IRS also offers no principled justification for distinguishing the numerous cases—*Hudson*, *Amwest*, *Covington*, *Warfield* and *Corcoran*—identified by the Commissioner (at 33-34 of his opening brief), which hold that removal statutes are reverse-preempted because they would, among other things, interfere with "the clear import and purpose of the [state] statutes . . . to consolidate all insolvency proceedings in one court only." *In re Amwest Sur. Ins. Co.*, 245 F. Supp. 2d 1038, 1045 (D. Neb. 2002). This Court should similarly find reverse-preemption here.[7]

[7] Wisconsin's statute concerning federal receiverships, Wis. Stat. § 645.45, does not undermine the Wisconsin legislature's "insistence on exclusive state jurisdiction," as the IRS contends. (IRS Opp'n at 12 n.9, 23 n.15.) Instead, Section 645.45 gives *the Commissioner* the discretion to petition the federal court for the implementation of a federal receivership "[w]henever *in the Commissioner's opinion*, [the proceeding] would be facilitated by a federal receivership," Wis. Stat. § 645.45(1) (emphasis added)—namely, when other *states* in which the insurer is licensed seek to take their own conflicting regulatory actions relating to assets of the insurer in those states. (*See* Snyder Decl., Ex. 7 (legislative commentary to § 645.45.) Such circumstances are rare: the Commissioner's petition for a federal receivership would constitute "an extraordinary remedy in the equity sense, and the state courts should continue to provide the forum for nearly all receiverships." (*Id.*)

In other words, the statute reveals nothing more than (1) Wisconsin's insistence that the Commissioner maintain the discretion to take the steps he deems appropriate to serve the purposes of Chapter 645; and (2) the fundamental recognition that insurer delinquency proceedings, regardless of forum, must be unified and comprehensive to avoid the "debacle" in which there are not only competing claimants for the insurer's assets, but also competing jurisdictions seeking to affect their equitable allocation. (*See generally id*.)

### B. Even If There Were A Basis For The Assertion Of Federal Jurisdiction, This Action Should Be Remanded Based On *Burford* Abstention

The IRS inaccurately describes the circumstances in which the *Burford* doctrine applies, claiming that:

> Abstention under *Burford* is only appropriate when (1) federal courts are asked to decide difficult questions of state law on policy problems of substantial public import whose result transcends the result in the case then at bar *and* (2) the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

(IRS Opp'n at 20 (emphasis added); *see id*. at 22 (suggesting that both formulations must be satisfied for *Burford* abstention to apply).) In fact, the above excerpt is describing two *different* types of *Burford* abstention, and therefore should be described using the disjunctive "or" rather than the conjunctive "and." *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989); *Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 362-63 (7th Cir. 1998); *Teed v. JT Packard & Assocs., Inc.*, Case Nos. 08-cv-303-bbc, 09-cv-313-bbc, 2010 WL 446468, at *1 (W.D. Wis. Feb. 2, 2010).

The second type of *Burford* abstention is applicable in cases such as this one, involving comprehensive state insurer delinquency proceedings. *See Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 425-26 (7th Cir. 1990) (*Burford* abstention appropriate where Illinois had implemented state court rehabilitation proceeding that would address plaintiff's claim); *Mountain Funding, Inc. v. Frontier Ins. Co.*, 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004) (*Burford* abstention appropriate where New York rehabilitation proceeding was single unified forum for addressing thousands of claims in detailed and equitable manner); *Metropolitan Life*, 572 F. Supp. at 469-73 (*Burford* and *Colorado River* abstention appropriate in view of the State's ongoing rehabilitation-liquidation proceeding of insurer); *see also* Comm'r Br. at 37 (collecting cases).

### 1. The Elements For *Burford* Abstention Are Present Here

As explained in the Commissioner's opening brief, the two essential elements of the second type of *Burford* abstention are present here:

> (1) the State Rehabilitation Court is a forum in which all claims directly related to the Rehabilitation Proceeding may be litigated; and
>
> (2) the State Rehabilitation Court is the forum that stands "in a special relationship of technical oversight or concentrated review to the evaluation of those claims."

(*See* Comm'r Br. at 38-41 (citing *Property & Casualty Ins. Ltd. v. Central Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991), and *Teed*, 2010 WL 446468, at *2).)

In its opposition, the IRS relegates its discussion of these elements of *Burford* abstention to a footnote, asserting that the "Commissioner has not presented any evidence that the Circuit Court of Dane County stands in any specialized relationship of technical oversight or concentrated review to the evaluation of what is *at issue here – the government's tax claims*." (IRS Opp'n at 23 n.15 (emphasis added).) However, the IRS frames the issue incorrectly; it is not a question of the state court's expertise in reviewing federal tax claims. The merits of the underlying tax refund issue are currently being litigated in the AFGI bankruptcy proceeding, and the Commissioner takes no position as to that merits issue.

The issue relevant to the application of *Burford* abstention here is whether the Rehabilitation Proceeding is designed to centrally and uniformly resolve all claims against the insurer—including any claim the IRS may submit based on the outcome of the disputed tax issue—and there is no question that the Commissioner initiated the Rehabilitation Proceeding for this specific purpose. *See Prop. & Cas. Ins. Ltd.*, 936 F.2d at 324 (rehabilitation that involves "specialized claims proceeding . . . for the purpose of centrally and uniformly resolving" all claims against the insurer constitutes a "specialized proceeding" for purposes of *Burford*);

*Mountain Funding*, 329 F. Supp. 2d at 999 (Where purpose of rehabilitation proceedings was "to facilitate judicial review of all of [insured's] claimants, to expedite the resolution of such claims, to prevent the unnecessary expenditure of assets, and to provide a fair, equitable and unified procedure for all claimants[,]" such a proceeding was "exactly what the Seventh Circuit in *Property & Casualty Insurance Ltd.* found would satisfy the *Burford* requirements.").

### 2. The IRS's Arguments Against The Application Of *Burford* Abstention Are Flawed

Unable to refute that the elements of *Burford* abstention are met here, the IRS makes a number of unfounded arguments.

*First*, the IRS asserts that "*Burford* abstention is only available where a federal court is asked to provide some form of equitable or discretionary relief" and the United States is not "seeking discretionary relief but rather has invoked its removal jurisdiction because it is entitled to be *free of the state court's injunction* . . . ." (IRS Opp'n at 21 (emphasis added).) The IRS's assertion is a non sequitur. As the Supreme Court has explained, "the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief[,]" including suits for injunctive relief and also over certain classes of declaratory judgments. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (citation omitted).[8] Because the grant of injunctive relief is both equitable and discretionary, so too is a ruling on the IRS's motion to dissolve the Supplemental Injunction.

*Second*, the IRS argues that the facts in this case—with an insurer being potentially liable for $700 million in tax refunds—is atypical and unique, and therefore "it is

[8] Even in cases involving damages—as opposed to equitable or other discretionary relief—"*Burford* might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law." *Quackenbush*, 517 U.S. at 730-31.

unlikely that this Court's decision will disrupt the Wisconsin insurance regulatory scheme." (IRS Opp'n at 22.) This IRS assertion also is unpersuasive. As a threshold matter, there is nothing atypical or unique about the United States having a tax claim in an insurer delinquency proceeding. As the Commissioner has explained previously, such claims are sufficiently common that Wis. Stat. § 645.68(3c) expressly categorizes federal government claims in the statutory priority scheme, and the legislative commentary to Section 645.68 expressly noted that the intent was to subordinate federal government claims—including "claims on taxes"—to policyholder loss claims. (*See* Comm'r Opp'n at 7-9 & Exs. 2-3 thereto (Dkt. 21).)

More importantly, the IRS's tactic in this case—to remove a comprehensive state insurer rehabilitation proceeding to federal court, argue that any issues the IRS may want to contest should remain in federal court (even if those issues are the same as, or overlap with, issues raised by other claimants in the State Rehabilitation Court that are on appeal in the state court system),[9] and assert that the rest of the Rehabilitation Proceeding should be remanded to

[9] For example, the IRS asserts that this Court should retain jurisdiction over its objection to the allocation of potential tax liabilities to the Segregated Account (and other issues). (IRS Opp'n at 18-19.) However, the State Rehabilitation Court already has rejected legal challenges regarding OCI's application of the Segregated Account statute, including a challenge to the allocation of a disputed contingent non-policyholder liability. (*See generally* Van Sicklen Decl., Exs. G, I, L.) It has also rejected legal challenges to injunctive relief that protects General Account assets from seizure or impairment on account of Segregated Account liabilities. (*Id.*, Ex. G at 14-17; Ex. I at 4-6; Ex. L at 7-19.) Such challenges are now on appeal. (*Id.*, Exs. H, J & M.) A ruling from this Court regarding application of the same statutes and same relief while the appeals process in state court remains pending would foster uncertainty and inefficiency, two outcomes that state delinquency proceedings seek to avoid. *See Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998) ("Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company. Unquestionably, that result would directly impact the policyholders because it deals with a purported asset of the insurance company that could be apportioned to them.").

state court[10]—is disruptive of Wisconsin efforts to establish a coherent policy in rehabilitating insurers and violates the rationale for abstention. *See Quackenbush*, 517 U.S. at 723 ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."). *See also Hartford Casualty*, 913 F.2d at 426 (commenting on the risk of inconsistent state and federal rulings and noting that allowing suits pertaining to an insurance delinquency to proceed in federal court "would lead to a system where the states would not control the ultimate distribution to creditors of insolvent insurers," contrary to the McCarran-Ferguson Act); *Blackhawk Heating*, 530 F.2d at 159-60 ("The interests of the company's owners, policyholders, and creditors, as well as the public, are best served and protected by an orderly and efficient process of liquidation. The liquidation of [the insurer] is best left to a proceeding which will settle all of its affairs and dispose of all of its property. Federal courts should refrain from deciding select issues confronting another court in pending proceedings."); *Mountain Funding*, 329 F. Supp. 2d at 999 ("The possibility of inconsistent decisions between this Court and the New York rehabilitation proceeding could lead to confusion. Furthermore, allowing this case to proceed would lead to a system where the state of New York would not control the ultimate distribution to [the insurer's] creditors. This type of federal usurpation would be inconsistent with the McCarran-Ferguson Act and general notions of comity.") (internal citation omitted); *Metropolitan Life*, 572 F. Supp. at 473 ("[T]he very exercise of federal jurisdiction will interrupt the state's efforts to effect its policy respecting the liquidation and rehabilitation of Wisconsin insurance companies and the concomitant protection of policyholders. Indeed, the potential for conflict in the results of federal and state court adjudication could bring to a halt the state's efforts in this respect. *In re Matter of All-Star Ins.*

[10] *See* IRS Opp'n at 19.

*Corp.*, 484 F. Supp. 623, 626 (E.D. Wis. 1980) ("The regulation and liquidation of state domestic insurance companies is a matter of substantial public concern, . . . and Ch. 645, Wis. Stats., is a comprehensive state effort to deal with that area of state concern. . . . Thus, . . . the strong state interest in orderly liquidation dictates the exercise by the court of its discretionary abstention.").

*Finally*, the IRS contends that:

> (a) it has not challenged the First-Day Injunction as to the policyholders or creditors of the Segregated Account; and
>
> (b) because the IRS has raised arguments that "apply to no other litigant[,] . . . this case will not set a precedent for other litigants or encourage them to remove a claim to federal court."

(IRS Opp'n at 24.)

With respect to point (a), as previously explained, the Supplemental Injunction and the First-Day Injunction have the same effect and were entered for the same purpose: to protect against "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, . . . or the administration of the proceeding." Wis. Stat. § 645.05(1)(k). To grant the IRS relief from either injunction would necessarily impair state statutes expressly authorizing the injunctive relief entered by the State Rehabilitation Court, with the resulting subversion of Wisconsin's priority statute by permitting the IRS to levy or otherwise claim against the $708 million in tax refunds outside the framework of a Plan of Rehabilitation. That action would cause unfairness to all policyholders and impede the implementation of a Plan that is based on orderly and equitable distributions over time, in accordance with the statutory priorities that place tax and other government claims behind policyholder loss claims.

With respect to point (b), the IRS's position—that it can remove any federal question under 28 U.S.C. § 1441(b), irrespective of the fact that no civil action has been convened against it—has broad application. A number of claimants in the Rehabilitation Proceeding have raised federal constitutional challenges to the Commissioner's actions, and some of these challenges are currently on appeal to the Wisconsin Court of Appeals.[11] Thus, if this Court were to decline to apply *Burford* abstention, then the IRS's position will encourage others—among the hundreds or thousands of policyholders, trustees, policy beneficiaries, creditors and others with an interest in the policies and liabilities allocated to the Segregated Account—to follow suit and attempt to remove their specific challenges to federal court under one of the several statutory bases for removal. Such a result would create chaos and eviscerate Chapter 645, which contemplates an orderly, expeditious and uniform state rehabilitation procedure in a single forum. *See Mountain Funding*, 329 F. Supp. 2d at 999 ("[The claimant] *should not be able to jump ahead of* [the insurer's] other creditors because this litigation is outside the New York rehabilitation proceeding and *must not be able to set a precedent for other claimants to do the same*.") (emphasis added).

**3. The IRS's Discussion Of The Caselaw Is Unpersuasive**

In its opposition, the IRS does not even mention the Seventh Circuit's decision in *Hartford Casualty*,[12] the district court decisions in *Mountain Funding*, 329 F. Supp. 2d at 999,

[11] *See* Van Sicklen Decl., Exs. H, J, & M (notices of appeal from orders addressing constitutional challenges). *See also* http://ambacpolicyholders.com/court-filings, filings dated Sep. 13, Nov. 18, Nov. 29, Dec. 10, and Dec. 20, 2010, and filing dated Jan. 6, 2011 (briefs relating to constitutional and other challenges currently pending before the Court of Appeals).

[12] In *Hartford Casualty*, an Illinois court placed an insurer into rehabilitation and also issued an order enjoining all actions against the insurer, its directors, officers, or stockholders, except for claims that were filed in a specialized proceeding whose purpose was to marshal asserts and liabilities and determine how much the creditors would receive. 913 F.2d at 421. When the rehabilitation court later modified its injunction to allow outside actions against the insurer's directors, officers or stockholders, Hartford filed an action in federal court against the insurer's parent and the parent's other subsidiaries for their role in the insurer's decline. *Id*. The
*(footnote continued on following page)*

and *All-Star Insurance*, 484 F. Supp. at 626, or the numerous other cases from other jurisdictions that have applied abstention in the context of insurance delinquency proceedings. (*See*, *e.g*., Comm'r Br. at 37.)

Moreover, the IRS's treatment of other cases cited by the Commissioner is unpersuasive. For example, the IRS argues that, unlike the plaintiffs in *Metropolitan Life*, "the United States is not seeking to enjoin the Commissioner from collecting state-assessed fees for a state-created fund." (IRS Opp'n at 22.) This misses the point of *Metropolitan Life*. The reason this Court applied *Burford* (and *Colorado River*) abstention in that case was because of federalism and comity concerns—namely, the need to avoid conflicts that would arise if the federal court were to issue rulings that reduced the funding available to pay claims in the delinquency proceeding, and to ensure that the state proceeding was carried out in an orderly and efficient manner. 572 F. Supp. at 471-73. Those same concerns require abstention here.

The IRS also argues that *Metropolitan Life* is distinguishable because *Colorado River* abstention "requires simultaneously pending federal and state suits." (IRS Opp'n at 23.) However, the IRS itself is urging the remand of all non-IRS-related issues to state court, which would create simultaneously pending federal and state suits, with the resulting risk of inconsistent rulings. (*Id*. at 19.) Moreover, even now, appeals from rulings by the State Rehabilitation Court are moving forward in the Wisconsin Court of Appeals, unaffected by the IRS's removal of this action. (*See* Comm'r Br. at 15-16; *see also* discussion in Section III.B.2, *supra*.)

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Seventh Circuit affirmed the district court's decision to abstain because Illinois had a paramount interest in developing a uniform insurance rehabilitation process. *Id*. at 424, 426.

Finally, the IRS asserts that "[c]ourts frequently decline to abstain from asserting federal jurisdiction in the face of an insurance insolvency proceeding," but in fact, the opposite is true. (IRS Opp'n at 20.) As noted in one of the cases cited by the IRS:

> Insurance regulation has long been recognized as an area of traditional state concern, so "there are a *large number of cases* where federal courts have abstained lest they upset ongoing state insolvency proceedings." *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990). *See also Lac D'Amiante du Quebec, Ltee. v. American Home Assurance Co*., 864 F.2d 1033, 1048 (3d Cir. 1988) (collecting such cases).

*Gross v. Weingarten*, 217 F.3d 208, 223 (4th Cir. 2000) (emphasis added).

Moreover, the four cases the IRS string cites—without discussion—are distinguishable. (IRS Opp'n at 20.) In the first cited case, *Quackenbush*, the Supreme Court ruled:

> [F]ederal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine.

517 U.S. at 731.

Applying this limitation, courts have declined to apply *Burford* in cases seeking legal relief in the form of money damages. *See Gross*, 217 F.3d at 223 (applying *Quackenbush*); *Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 701-05 (5th Cir. 1999) (same); *see also Riley v. Simmons*, 45 F.3d 764, 772, 777 (3d Cir. 1995) (pre-*Quackenbush* case, where federal claim sought damages, and abstention was denied because there was no opportunity for timely and adequate state court review of issue); *see id.* (Nygaard, C.J., concurring) (noting that "*Burford* abstention is simply not available when legal, rather than equitable or declaratory, relief is sought."). By contrast, the Commissioner is not suing the IRS for damages; his interest is to ensure that any potential IRS claim is handled in accordance with the Supreme Court's holding in *Fabe* and Wisconsin insurance statutory claim priorities.

In sum, because each of the elements of the second type of *Burford* abstention are met, and in view of the significant body of caselaw—from the Seventh Circuit, this Court and other jurisdictions—supporting abstention in similar circumstances, this Court should remand this action in its entirety to the State Rehabilitation Court.

## IV. THE IRS'S ALLEGED "CONSTITUTIONAL PREROGATIVE" TO TAX DOES NOT AFFECT THE APPLICABILITY OF THE McCARRAN-FERGUSON ACT

The IRS also makes an argument that does not relate to the merits of its removal, but rather to the merits of the Supplemental Injunction entered against it. (*See generally* IRS Opp'n at 2-8.) Specifically, the IRS contends that "[n]o state court can enjoin the United States from exercising its Constitutional prerogative to collect federal taxes." (*Id.* at 1.) Although this argument has no relevance to the remand issue, the Commissioner will nevertheless consider it as a supplement to the IRS's motion to dissolve the injunction and address it here.

The IRS's argument is twofold. *First*, it attempts to elevate its authority above federal statutory law by contending that it has a "constitutional mandate" and "sovereign prerogative" to lay and collect taxes. (*Id.* at 2, 7.) *Second*, it attempts to narrow the reach of the McCarran-Ferguson Act to exempt its activities, arguing that the Act cannot "preempt any part of the Internal Revenue Code" because that Act extends only to laws enacted pursuant to congressional authority to regulate interstate commerce under the Commerce Power, while the Internal Revenue Code was enacted under the Taxing Power. (*Id.* at 7-8.) As discussed below, each of these arguments lacks merit.

### A. The Constitution Is Not Self-Executing; Acts of Congress Are Required To Carry Out The Powers Enumerated In The Constitution

The fact that the IRS's collection powers derive from the Constitution does not render the statutes establishing those powers immune from the reach of the McCarran-Ferguson Act. All federal governmental activities—from the IRS seeking to impose a levy here, to the Treasury Department seeking to obtain priority payment of its claims in *Fabe*—derive in some fashion from the Constitution. But constitutional authorization alone is insufficient; the plain text of the Constitution requires legislative enablement of such powers through acts of Congress. *See* U.S. Const. art. I, § 8 ("*The Congress* shall have the power to lay and collect taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States[.]") (emphasis added); U.S. Const. amend. XVI ("*The Congress* shall have power to lay and collect taxes on incomes, from whatever source derived . . . .") (emphases added); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.").

The IRS nevertheless suggests the existence of a "Constitutional prerogative" that transcends the laws of Congress generally and the McCarran-Ferguson Act specifically. (IRS Opp'n at 8.) This is not the case. Unlike the executive branch foreign affairs power at issue in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the establishment of which did not involve an act of Congress,[13] the Constitution by its terms is not self-executing with respect to the exercise of the federal revenue collection powers at issue here and in *Fabe*. An act

[13] The President's powers over foreign affairs are inherent and need not derive from an act of Congress or an express constitutional delegation. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315-16 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.").

of Congress must establish and authorize the implementation of those powers by federal authorities, U.S. Const. art. I, § 8, and the McCarran-Ferguson Act, by its terms, applies to all acts of Congress not specifically related to the business of insurance, 15 U.S.C. § 1012(b).

**B. Contrary To The IRS's Assertion, The Internal Revenue Code Is Not Exempt From The McCarran-Ferguson Act**

The IRS's second assertion—that there is a commerce clause limitation to the McCarran-Ferguson Act, and therefore the Internal Revenue Code is exempt from reverse-preemption based on the McCarran-Ferguson Act—is unfounded.

The McCarran-Ferguson Act provides, in relevant part: "*No Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b) (emphasis added). Thus, on its face, McCarran-Ferguson applies to *all* acts of Congress, and there is no statutory exemption or exclusion for general Internal Revenue Code statutes (such as the ones the IRS seeks to invoke in this case), which do not "specifically relate[] to the business of insurance." *Id*. Nothing in the Act requires an analysis of the constitutional source (or sources) for each statute that arguably conflicts with state insurance law.

Furthermore, *Fabe* itself shows that the Supreme Court has not imposed the artificial limitation suggested by the IRS. 508 U.S. at 493. The reverse-preempted statute at issue in *Fabe* was the federal debt priority statute, 31 U.S.C. § 3713, a law that was not passed under the commerce clause but rather from the constitutional authority "to secure an adequate revenue to sustain the public bur[d]ens and discharge the public debts." *United States v. Moore*, 423 U.S. 77, 81 (1975) (quotation omitted). Tax claims are "public debts," and the lien, levy, attachment and other statutes enacted to secure the collection of these debts arise from the same general congressional authority to raise revenue and secure debts.[14] Thus, *Fabe* concerned a statute passed under the same "Constitutional prerogative" that the IRS now claims to be outside the reach of McCarran-Ferguson.

The Seventh Circuit also has declined to adopt the IRS's proposed commerce clause limitation of the McCarran-Ferguson Act. In *American Deposit*, 84 F.3d at 837-38, the Seventh Circuit considered whether the McCarran-Ferguson Act reverse-preempted certain provisions of the National Bank Act, 12 U.S.C. § 21 *et seq.*, which was passed pursuant to the constitutional power over currency (rather than the power to regulate interstate commerce). 12 U.S.C. § 38. The Court found it unnecessary to engage in any detailed examination of the constitutional origin of the federal statutes at issue to ascertain the applicability of the McCarran-Ferguson Act: "we believe that the Bank Act, *just like any other federal law*, is within the reach of the McCarran-Ferguson Act." *Id*. at 844 (emphasis added).

Finally, the IRS contends that even if the McCarran-Ferguson Act extends beyond federal statutes that derive from the commerce clause, tax-related statutes avoid reverse-preemption. (IRS Opp'n at 8.) In support, the IRS cites *Modern Life & Accident Insurance Co. v. Commissioner of Internal Revenue*, 420 F.2d 36 (7th Cir. 1969), a pre-*Fabe* case concerning an insurer's challenge to its characterization as a mutual insurance company under federal tax statutes. *Modern Life* is inapposite here because it concerned statutes that specifically related to the business of insurance—namely, whether an insurance company fell within the definition of a

[14] *See Massachusetts v. United States*, 333 U.S. 611, 625 (1948) (noting that a "long line of decisions has held that taxes due the Government are 'debts' within the meaning of" the federal debt priority statute); *see Michigan v. United States*, 317 U.S. 338, 340 (1943) ("The establishment of a tax lien *by Congress* is an exercise of its constitutional power 'to lay and collect taxes'.") (emphasis added); *Phillips v. Commissioner*, 283 U.S. 589, 595, 601 (1931) (administrative collection tools of IRS arise out of "[t]he power of Congress to provide" remedies to "secure prompt performance of pecuniary obligations to the government").

non-mutual insurer as set forth in the Internal Revenue Code. *Id.* at 37. Moreover, the taxpayer in *Modern Life* could not show how "its being classified as a mutual under the internal revenue code will interfere with the choice made by Illinois to place it in a class distinct from other mutuals for the purpose of regulation." *Id.*

Here, by contrast, none of the federal statutes at issue specifically relate to the business of insurance; the statutes relate to collection mechanisms generally applicable to all regulated entities or persons. Unlike *Modern Life* (but very much like *Fabe*), the Commissioner has demonstrated at length how the application of any of these general statutes interferes with Wisconsin law regulating the business of insurance, specifically insurer delinquency proceedings. (*See generally* Comm'r Br. at 17-19, 30-33; Comm'r Opp'n at 14-20.) Under such circumstances, the analysis employed by the Seventh Circuit calls for reverse preemption of those generalized statutes. *See Am. Deposit*, 84 F.3d at 843-44 (holding that a proper McCarran-Ferguson analysis looks to "the provisions of the [federal statutory scheme] at issue" rather than those that are not immediately relevant, determines whether the relevant provisions specifically address insurance or whether they instead employ "broad general terms," and, if the latter, finds the relevant federal statutes reverse-preempted to the extent they impair or supersede state insurance law).

**CONCLUSION**

For the reasons stated above, this action should be remanded to the State Rehabilitation Court.

Dated this 7th day of January, 2011.

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