Nos. 11-1158, 11-1419

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THEODORE NICKEL,
Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

UNITED STATES OF AMERICA,
Plaintiff–Appellant

v.

WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY;
THEODORE NICKEL, Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation;
AMBAC ASSURANCE CORPORATION,
Defendants–Appellees

APPEALS FROM THE ORDER (No. 3:10-cv-778-bbc) AND THE JUDGMENT (No. 3:11-cv-99-bbc) OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN (Judge Barbara B.Crabb)

BRIEF AND REQUIRED SHORT APPENDIX OF THE APPELLANT, UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States respectfully submit that oral argument should be heard in these appeals due to the legal complexity of the issues presented.

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BRIEF AND REQUIRED SHORT APPENDIX OF THE APPELLANT, UNITED STATES

STATEMENT OF JURISDICTION

These appeals are from decisions of the United States District Court for the Western District of Wisconsin (Judge Barbara B. Crabb). They relate to a rehabilitation proceeding for the Segregated Account of Ambac Assurance Corporation (Ambac) in the Wisconsin Circuit Court for Dane County (Wisconsin Court) (No. 10CV1576; Judge William D. Johnston).

A. Appeal no. 11-1158

On November 8, 2010, the Wisconsin Court filed an injunction order that, *inter alia*, prohibited the United States from recovering over $708 million in tentative federal tax refunds from Ambac and related entities. (App. 1–2, 7; A. 146–149.)[1] On December 8, 2010, within 30 days after service, the United States timely removed the case to the

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[1] "App." references are to the pages of the appendix bound with this brief (App. 1 through App. 33). "A." references are to the separately bound record appendix (A. 34 through A. 212). "Doc.([10-778 or 11-99])" references are to original documents in the records on appeal not included in the appendix. We sometimes refer to documents in the records of related proceeding in other courts of which this Court can take judicial notice. Fed. R. Evid. 201; *Deicher v. City of Evansville*, 545 F.3d 537, 541 (7th Cir. 2008); *Opoka v. INS*, 94 F.3d 392, 394–95 (7th Cir. 1996). The documents filed in the Wisconsin courts are available at http://ambacpolicyholders.com/court-filings, which organizes filings by date and description. "I.R.C." references are to the Internal Revenue Code of 1986 (26 U.S.C.). "Treas. Reg." references are to the Treasury Regulations (26 C.F.R.).

District Court (No. 3:10-cv-778-bbc). (A. 174–177.) 28 U.S.C. § 1446(b). Section 1442(a)(1) of 28 U.S.C. gives the district courts jurisdiction over removals by the United States of civil actions against it, and 28 U.S.C. § 1441(a) and (b) gives the district courts removal jurisdiction over civil actions falling within their original jurisdiction. Under 28 U.S.C. § 1331 (federal questions) and § 1340 (internal revenue), the District Court had original jurisdiction. In a January 14, 2011 opinion and order (782 F. Supp. 2d 743), the District Court held that the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) allowed certain Wisconsin insurance statutes to reverse preempt the federal removal statutes, and it remanded the case to the Wisconsin Court for lack of subject matter jurisdiction. (App. 1–2, 8, 15, 21.) For the reasons discussed in Argument II, *infra*, the District Court's rulings were incorrect.

On January 18, 2011, the United States timely filed a notice of appeal. (A. 178–179.) 28 U.S.C. § 2107(b). This Court has jurisdiction over the District Court's interlocutory order refusing to dissolve or modify the Wisconsin Court's injunction pursuant to 28 U.S.C. § 1292(a). *See also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–15 (1996) (immediate appeal of remand order proper when not subject to 28 U.S.C. § 1447(d)). Section 1447(d) of 28 U.S.C. states that

an order remanding a case to a state court is not reviewable on appeal or otherwise, but for the reasons discussed in Argument I, *infra*, this Court has jurisdiction over this appeal, § 1447(d) notwithstanding.

B. Appeal no. 11-1419

On February 9, 2011, the United States sought relief from the Wisconsin Court's injunction under the original jurisdiction granted the District Court by I.R.C. § 7402(a) (enforcing internal revenue laws), 28 U.S.C. §§ 1331 and 1340 (noted, *supra*), and 28 U.S.C. § 1345 (United States as plaintiff) (No. 3:11-cv-99-bbc). (A. 43, 196–210 (amended complaint).) The District Court held (767 F. Supp. 2d 980) that the McCarran-Ferguson Act allowed the Wisconsin insurance statutes to reverse preempt the federal original-jurisdiction statutes. (App. 22–32.) On February 18, 2011, the court entered a final judgment dismissing the complaint for lack of subject matter jurisdiction. (App. 33.) For the reasons discussed in Argument II, *infra*, the District Court's rulings were incorrect.

On February 22, 2011, the United States timely filed a notice of appeal. (A. 211–212.) 28 U.S.C. § 2107(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the prohibition on appeals of remand orders following removal set forth in 28 U.S.C. § 1447(d) is inapplicable in the circumstances of appeal no. 11-1158, where the United States removed the case under 28 U.S.C. § 1442(a).

2. Whether the District Court erred in holding that the McCarran-Ferguson Act allowed certain Wisconsin statutes to reverse preempt several federal statutes providing the court with jurisdiction and, alternatively, in declining to exercise jurisdiction based on *Burford* abstention.

3. Whether the United States is entitled to relief from the supplemental injunction issued by the Wisconsin Court because the injunction violates the United States' sovereign immunity and because it is barred by the Tax Anti-Injunction Act, I.R.C. § 7421(a).

STATEMENT OF THE CASE

The Statement of Jurisdiction, *supra*, contains all of the elements required in a Statement of the Case.

STATEMENT OF THE FACTS

A. The $708 million of tentative federal tax refunds

Ambac Financial Group, Inc. (AFGI) is the parent of a consolidated group that files consolidated federal income tax returns. (A. 51, 123, 130, 152, 154.) The members of the consolidated group are severally liable for the tax liabilities of the group. Treas. Reg. §§ 1.1502-6(a); 1.1502-78(b)(2). The AFGI group has a tax-sharing agreement to allocate liabilities and refunds within the group. (A. 123, 130, 154.) That intramural agreement, however, cannot alter each member's liability to the IRS for the group's taxes. *See* Treas. Reg. § 1.1502-6(c).

Ambac, a group member, is an insurance company incorporated in Wisconsin. (A. 50–51, 111, 152.) Ambac traditionally insured municipal bonds. (A. 51, 111, 152–153, 185.) It ran into financial difficulty after it began to write a significant number of policies insuring "structured" financial products, including the types of instruments that led to the subprime mortgage crisis of 2008. (A. 51–52, 111–112, 152–153, 156–157, 185.)

Internal Revenue Code Section 6411 provides a special procedure under which a taxpayer with a net operating loss can obtain a prompt

refund without the usual pre-refund audit. When a taxpayer applies for a "tentative carryback adjustment," the IRS must act on the application within 90 days, and it can conduct only a "limited examination" to discover omissions and computation errors. I.R.C. § 6411(a), (b). It is not until after the expedited, tentative refund is paid that the IRS conducts a full examination under its regular audit procedures. Michael I. Saltzman, *IRS Practice and Procedure*, ¶ 11.03 (Rev. 2nd Ed. 2005). If the IRS determines that all or part of a tentative refund was incorrectly obtained, it can assess the amount incorrectly obtained and levy upon the taxpayer without issuing a notice of deficiency. Treas. Reg. § 301.6213-1(b)(2).

AFGI invoked I.R.C. § 6411 to apply for tentative refunds attributable to carrybacks of losses allegedly incurred in 2007 and 2008. (A. 139–140, 154.) In September 2009 and February 2010, the IRS issued two tentative refunds to AFGI totaling approximately $708 million, nearly $700 million of which AFGI promptly transferred to Ambac under their tax-sharing agreement. (A. 123, 130, 139–140, 154–155.) Ambac, as a member of a consolidated group, remained severally liable for the full $708 million. Treas. Reg. §§ 1.1502-6(a); 1.1502-78(b)(2).

B. The initiation of a rehabilitation proceeding for a "segregated account" created by Ambac, and the first-day injunction

Meanwhile, the deterioration of Ambac's financial condition caused the Wisconsin insurance commissioner to increase his oversight. (A. 52–53, 111–112, 185.) By early 2010, it was evident that rehabilitation proceedings were necessary. (A. 53, 114.) The insurance commissioner opted for a rehabilitation using a "segregated account." *See* Wis. Stat. § 611.24. (A. 53–58, 115–116.) "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'." 2006 Comment Wis. Stat. § 611.24.

On March 24, 2010, with the approval of the insurance commissioner, Ambac created a segregated account "for the purpose of segregating certain segments of its liabilities, and consenting to the subsequent rehabilitation" of the account. (A. 68; *see also* A. 54, 57, 73, 117.) It allocated approximately 1,000 troubled policies (out of 15,000 total), as well as specified liabilities and certain limited liability interests, to the segregated account. (A. 54, 68–70, 113, 115, 118–120.) Ambac kept the underlying assets and continued normal operations

regarding the policies outside the segregated account. (*See* A. 59, 69–70, 82–83, 94, 116, 186.) Ambac's unallocated segments were known as the "general account." (A. 59, 70–72, 186.) The segregated account was to be funded by a "Secured Note" payable from Ambac,[2] a reinsurance agreement issued by Ambac to cover specified aggregate excess losses on the insurance policies, and possible surplus notes from Ambac to holders of policies allocated to the segregated account. (A. 57–59, 70–71, 73–89 (secured note), 117, 186–187, 189–190, 192–193.) Although the note payable had a face amount of $2 billion, Ambac had no liability on the note "to the extent that such payment would result in the surplus as regards policyholders of the Company's general account falling below $100 million (or such higher amount as determined by [the insurance commissioner] pursuant to a prescribed accounting practice)."[3] (A. 70, 73, 75, 117, 187, 191.)

The same day, the Wisconsin Court granted the insurance commissioner's petition for an order to rehabilitate the segregated

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[2] Although the note was described as "secured," the security was merely premiums, recoveries, and assets attributable to the troubled policies allocated to the segregated account. (A. 70–71, 75–76.)

[3] Because surplus represents the amount by which assets exceed liabilities, Ambac could have assets greater than $100 million, but no liability under the note.

account. (A. 50–64, 106–109, 119.) In his petition, the insurance commissioner explained that he was not asking the court to exercise jurisdiction over Ambac or any assets and liabilities that had not been allocated to the segregated account (A. 50; *see also* A. 106 (similar language in Wisconsin Court's rehabilitation order)):

> Pursuant to Wis. Stat. § 611.24(3)(e), the Segregated Account shall be a separate insurer while in this proceeding. The Commissioner is not asking the Court to exercise jurisdiction over Ambac Assurance Corporation ("Ambac" or its "General Account") or the policies, contracts, assets, equity ownership interests, and rights or liabilities remaining in Ambac's General Account.

The Wisconsin Court also granted the insurance commissioner's request for a temporary "first-day" injunction. (A. 90–105.) The introduction to the injunction order stated that "the injunctive relief granted below does not apply to policies or other contracts which remain in the Ambac General Account." (A. 90.) The injunction order, *inter alia*, prohibited collection actions or court proceedings not only against the segregated account, but also against Ambac regarding liabilities allocated to the segregated account. (A. 91–92.)

The events of March 24, 2010, did not specifically involve (or implicate) any potential IRS claim, and, to our knowledge, the United States was not served with the first-day injunction. Treasury

Regulation § 301.6331-1(a)(3) already restrained the IRS from levying on the segregated account. In addition, any liability to repay the $708 million tentative refunds had not been allocated to the segregated account, and Treas. Reg. § 301.6331-1(a)(3) further provides that "[a]ny assets which under applicable provisions of law are not under the control of the court may be levied upon."

C. The IRS's inquiry, the "allocation" of Ambac's federal tax liabilities to the segregated account, and the Wisconsin Court's *ex parte* injunction against the IRS

On October 28, 2010, the IRS requested information from AFGI regarding the accounting basis for the tentative refunds. (A. 139–140, 161.) The carryback losses generating the tentative refunds were premised on a change in the accounting treatment of credit default swaps. (A. 139, 154.) The IRS asked for documents showing that it had issued the required approval for the accounting change (*see* I.R.C. § 446(e); *Capital One Fin. Corp. v. Commissioner*, __ F.3d __, 2011 WL 5024216, at *4–*5 (4th Cir. 2011)), and, if not, for an explanation of the legal basis for the new accounting method. (A. 139.)

Eleven days later, on November 8, 2010, AFGI filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the

Southern District of New York (No. 1:10-bk-15973-scc).[4] (A. 150.) The automatic stay in bankruptcy prevented the IRS from making collection efforts against AFGI. *See* 11 U.S.C. § 362(a).

The automatic stay did not apply to Ambac, however, and, as explained above, under the consolidated return regulations Ambac was severally liable for the $708 million of tentative tax refunds, if incorrectly obtained. Wisconsin Statute § 611.24 allowed a segregated account only for a "part of its business," and the consolidated return regulations made Ambac severally liable for *all* of the income tax liabilities of the AFGI group.[5] Nevertheless, on November 7, 2010, Ambac (at the direction of the insurance commissioner) adopted an amendment to the segregated account's plan of operation that would "allocate" to the segregated account "any and all liabilities (including contingent liabilities) [Ambac] has or may have, now or in the future, to the IRS and/or the U.S. Treasury in regard to, or in respect of [federal taxes] for taxable periods ending on or prior to December 31, 2009."

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[4] In May 2011, after it was able to examine AFGI's tentative refunds, the IRS filed a proof of claim in excess of $800 million (including other income tax liabilities and interest). AFGI has contested the merits of the IRS's claim.

[5] Even if Ambac were not a part of a consolidated group, the tax still would be imposed on *all* (not a part) of its business income. *See* I.R.C. §§ 831–834.

(A. 142; *see also* A. 131, 163–164.) Although the amendment assigned the liability to the segregated account, Ambac retained the tentative refund money that AFGI had transferred to it. (*See* A. 142.) Also, the amendment did not allocate to the segregated account any outstanding or potential state tax liabilities of Ambac to Wisconsin for the same periods. (*See* A. 142.)

The same day, the insurance commissioner approved the amendment without contacting the IRS, finding (without explanation) that the allocation of Ambac's federal tax liabilities to the segregated account "is not contrary to the law." (A. 144–145.) The insurance commissioner did not address the tax-allocation's apparent violation of the consolidated return regulations, nor did he explain how the allocation of federal tax liabilities imposed on *all* of a company's income could be deemed a "part of [an insurance company's] business" under Wis. Stat. § 611.24, particularly when corresponding tax refund assets and parallel state tax liabilities were not "allocated." (A. 144–145.)[6]

[6] The District Court later concluded that "[i]n reality, [the rehabilitation proceeding] extends to the general account." (App. 13.) If this conclusion were correct, the rehabilitation plan would violate the priority scheme provided by the federal insolvency-priority statute, 31 U.S.C. § 3713(a), as construed by the Supreme Court in *United States Dep't of Treas. v. Fabe*, 508 U.S. 491 (1993). Under that scheme, the United States must be paid ahead of general creditors. As already

(continued...)

One day later, on November 8, 2010 (*i.e.*, the day that AFGI filed for bankruptcy), the insurance commissioner notified the Wisconsin Court of Ambac's tax-allocation amendment and obtained from the court an *ex parte* supplemental injunction substantially expanding the first-day injunction. (A. 121–128, 146–149.) The supplemental injunction named the IRS and prohibited it from taking any steps to collect (or possibly even assess) any liability for the tentative refunds not only from the segregated account under rehabilitation, but also from Ambac and related entities, which were not under rehabilitation. (A. 147–148.) The Wisconsin Court also purported to reserve to itself "exclusive jurisdiction" over suits regarding the tentative tax refunds.[7] (A. 146.)

Before the tax-allocation, on October 8, 2010, the insurance commissioner had proposed a rehabilitation plan for the segregated account. (*See* A. 172, 184.) In connection with that plan, on

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[6] (...continued)
noted, however, the rehabilitation plan allows general creditors of Ambac, whose debts are not placed in the segregated account, to be paid in the ordinary course of business, *i.e.*, ahead of the United States.

[7] Despite its assertion of "exclusive jurisdiction," the Wisconsin Court and the insurance commissioner have allowed the determination of the propriety and amount of the tentative refunds to be made in AFGI's bankruptcy.

October 20, 2010, the Wisconsin Court filed a scheduling order establishing November 8, 2010, as the deadline for filing written objections to the segregated-account rehabilitation plan, and making a written objection a prerequisite for participation in the plan-confirmation hearing to begin on November 15, 2010. (*See* A. 184.) Consistent with his representations in the petition for rehabilitation, *see* p. 10, *supra*, the insurance commissioner in the disclosure statement for the proposed rehabilitation plan represented that "neither [Ambac] nor its general account, nor any of the . . . assets . . . rights or liabilities in the general account, is in rehabilitation as part of the proceeding or otherwise." (Oct. 8, 2010 disclosure statement at 1 (capitalization normalized).) Accordingly, under the rehabilitation plan as originally proposed, Ambac's liability to repay the $708 million tentative refund was not affected by the plan.

The tax-allocation effectively amended the plan,[8] and it purported to relieve Ambac, an entity not in rehabilitation, of $708 million of

[8] The purported allocation was made in a document entitled "Amendment No. 1 to Plan of Operation for the Segregated Account of Ambac Assurance Corporation." (A. 142.) The rehabilitation plan (proposed on October 8, 2010) provides that it "pertains solely to the Segregated Account" (Plan Introduction) and defines the Segregated Account as "The Segregated Account of Ambac Assurance Corporation, established pursuant to the Plan of Operation in accordance with Wis. Stat. § 611.24(2)" (Plan ¶ 1.58).

potential federal tax liability by "allocating" the liability to the segregated account in rehabilitation. Neither Ambac nor the insurance commissioner notified the United States of the plan amendment purporting to allocate Ambac's federal tax liabilities to the segregated account before the November 8 deadline for plan objections. (A. 165–173.)

D. The United States' removal to federal court, its motion to dissolve the *ex parte* injunction, and the remand by the District Court

Under 28 U.S.C. § 1442(a), "[a] civil action . . . commenced in a State court against . . . [t]he United States or any agency thereof" may be removed to federal district court. On December 8, 2010, the United States filed a notice of removal, invoking the District Court's jurisdiction under 28 U.S.C. §1442 (and also under 28 U.S.C. § 1441). (A. 174–177.) The United States limited the removal by stating that it "[did] not intend to remove (and, to the extent it has removed has no objection to this Court remanding)" all issues unrelated to the IRS and the Wisconsin Court's November 8, 2010 order against it. (A. 175.) The United States moved to dissolve the supplemental injunction against the IRS. (A. 37.) Ambac and the insurance commissioner opposed the

dissolution and sought a remand, which the United States opposed. (A. 37–40.)

The District Court held that the McCarran-Ferguson Act allowed Wis. Stat. §§ 645.04 and 645.05 (granting the Wisconsin courts jurisdiction over insurance receiverships and permitting injunctions therein) to reverse preempt 28 U.S.C. §§ 1441 and 1442, the federal statutes that gave it removal jurisdiction. (App. 9–15.) The District Court also held that, even if the federal removal statutes had not been reverse preempted, it would nevertheless abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). (App. 16–21.) Because of its decision to remand to the Wisconsin Court, the District Court addressed neither the insurance commissioner's arguments regarding the procedural correctness of the removal, nor the merits of the United States' motion to dissolve the supplemental injunction. (App. 2, 8, 21.) Appeal no. 11-1158 followed.

E. The Wisconsin Court's confirmation of the segregated-account rehabilitation plan, making permanent its injunctions, and the United States' appeal in the Wisconsin courts

On January 21, 2011, one week after the District Court issued its remand opinion and two days after the return of the record to the Wisconsin Court, that court signed a final order confirming the plan of

rehabilitation for the segregated account. (A. 40–41, 180–195.) The plan provides first for the full cash payment of the administrative expenses of the segregated account, and then for claims on the policies allocated thereto at 25¢ on the dollar plus surplus notes from Ambac. (A. 189–190, 192–193.) Ambac, however, continues to operate outside the segregated account, and the rehabilitation plan does not forbid payments to general creditors, or even dividend distributions to its parent, without regard to the lower priority those payments would have in a full insolvency. (*See* A. 186–188; *see also* A. 82–83, 94, 116.)

Regarding Ambac's federal tax liability, the final order provided that "[t]he rest of the disputed tax allocations, which total approximately $700 million, are subject to the jurisdiction of this Court and the priority structure adopted by the Plan due to the timely, pre-bankruptcy allocation of those disputed liabilities by the Rehabilitator and OCI [Office of the Commissioner of Insurance] to the Segregated Account." (A. 188.) The final order noted that an IRS tax claim was "possible" and that the insurance commissioner "has assured the Court that it will take necessary steps to ensure the appropriate treatment of such claims under Wis. Stat. § 645.68 if and when such liabilities become less speculative." (A. 189.) The final order stated the

that the "prior orders" of the Wisconsin Court, which include the March 24, 2010 first-day injunction and the November 8, 2010 *ex parte* injunction, "shall remain in full force and effect throughout the period of administration of the Plan." (A. 194.)

By March 10, 2011, the United States and many private parties had timely filed notices of appeal in the Wisconsin Court.[9] Other than a copy of a notice of removal (required by 28 U.S.C. § 1446(d)), the notice of appeal was the first document filed by the United States in that court. The Wisconsin Court of Appeals for District IV combined the appeals under number 2011AP561. On May 3, 2011, however, the Wisconsin Court of Appeals granted the insurance commissioner's motion to dismiss the United States' appeal for lack of jurisdiction because the United States' notice of appeal had not been signed by a member of the Wisconsin bar. The United States petitioned the Wisconsin Supreme Court for review (No. 2011AP987), and that court granted the petition on August 31, 2011. Briefing should be completed

[9] In its Wisconsin notice of appeal, the United States maintained the consistent position that: (1) the federal courts had jurisdiction over this dispute; (2) the Wisconsin Court lacked jurisdiction to enjoin or to enter judgment against the United States; (3) the Wisconsin Court's orders violated the United States' sovereign immunity; (4) the United States was appealing to preserve its rights within the Wisconsin courts; and (5) the Wisconsin Court of Appeals should hold the appeal in abeyance pending the outcome of the federal appeals.

by November 3, 2011, and the case has been set for oral argument on December 2, 2011.[10]

F. The United States' action seeking injunctive and declaratory relief with respect to the Wisconsin Court's injunction restraining tax collection, and the District Court's dismissal of the action

On February 9, 2011, the United States filed in the District Court a complaint seeking declaratory and injunctive relief with respect to the Wisconsin Court's injunction orders. (A. 43, 196–210 (amended complaint).) The complaint invoked the District Court's original jurisdiction under I.R.C. § 7402(a) and 28 U.S.C. §§ 1331, 1340, and 1345. (A. 198.)

On February 18, 2011, the District Court dismissed the United States' case for lack of subject matter jurisdiction. (App. 22–33.) In its opinion and order, the District Court stated that "for reasons substantially similar to those stated in the remand order, these jurisdictional statutes are reverse preempted by the McCarran-Ferguson Act." (App. 28.) The court further stated (as it had done in the remand order) that even if it had jurisdiction it would abstain from exercising it under the Supreme Court's *Burford* opinion. (App. 29–31.)

[10] The Wisconsin Court of Appeals severed the United States' appeal from the other challenges before it, and briefing by the remaining parties in appeal no. 2011AP561 has gone forward.

The court again declined to address the merits of the United States' case because of its jurisdictional rulings. (App. 31.) Appeal no. 11-1419 followed.

SUMMARY OF ARGUMENT

The District Court erred in refusing to exercise jurisdiction over matters regarding federal law. A state court in a Wisconsin insurance rehabilitation proceeding issued an order enjoining the United States from taking any steps to collect taxes under the Internal Revenue Code from entities that were not in rehabilitation. The United States challenged the injunction in federal court first by invoking its right of removal and later by filing a separate suit for injunctive and declaratory relief. This Court should grant the United States relief from the state-court injunction.

1. To begin with, we submit that this Court has jurisdiction over appeal no. 11-1158. This Court has jurisdiction because, when the United States removes a case under 28 U.S.C. § 1442(a), a district court cannot thereafter lack jurisdiction as that term is applied in 28 U.S.C. § 1447(d), rendering inapplicable the appeal prohibition in that section. Under § 1447(d), remand orders are "not reviewable on appeal or otherwise." The Supreme Court has limited § 1447(d) to the grounds

listed in § 1447(c), which include subject matter jurisdiction. Apparent statutory prohibitions, however, do not necessarily render courts powerless when lower courts exceed their lawful authority. In *Osborn v. Haley*, 549 U.S. 225 (2007), for example, the Supreme Court held that the appeal prohibition of § 1447(d) did not apply when another statute deprived a district court of authority to remand a case to state court.

This appeal involves a removal by the United States under 28 U.S.C. § 1442(a), which, as amended in 1996, allows the United States to remove a civil action commenced against it in state court. Because the Constitution extends the judicial power of the federal courts to controversies to which the United States is a party, § 1442(a) gives the United States an absolute right to remove any case brought against it. Both Congress in amending § 1442(a), and the courts in interpreting that statute (and its predecessors), have stated that questions concerning inherently federal issues (*e.g.*, federal-state conflicts and sovereign immunity) should be adjudicated in the federal courts. Preemption and sovereign immunity are precisely the issues the United States sought to bring before the District Court.

Because § 1442(a) gives the United States an absolute right to remove, a district court cannot "lack jurisdiction" over a case removed by the United States as that term is used in § 1447(d). Thus, the District Court lacked authority to remand for lack of jurisdiction, and this Court has appellate jurisdiction to correct that error. Indeed, if in *Osborn*, *supra*, a certification by the Attorney General imbued a federal employee with enough of the sovereignty of the United States that he was "categorically" entitled to the protection of the federal courts, then the United States itself is likewise "categorically" entitled to a federal forum when it removes an action under § 1442(a). Consequently, this Court has jurisdiction over appeal no. 11-1158.

2.a. The District Court also erred in concluding that the McCarran-Ferguson Act allowed the Wisconsin insurance statutes to reverse preempt the federal removal and original-jurisdiction statutes. Under McCarran-Ferguson, a state statute can reverse preempt a federal statute only if: (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) the federal statute invalidates, impairs, or supersedes the state statute. "Business of insurance" is a term of art referring to the underwriting and

spreading of risk through the contractual policy relationship between the insurer and the insured.

The Wisconsin insurance statutes fail the second McCarran-Ferguson requirement to the extent that they purport to override federal statutes granting the district courts federal-question jurisdiction. Providing the federal courts with jurisdiction to answer federal questions only remotely affects the performance of insurance contracts (if at all), and blocking such attenuated effects is insufficient to qualify as regulating the business of insurance. Although federal courts have concluded that McCarran-Ferguson might permit a state insurance statute to reverse preempt a federal remedy, they consistently have exercised their federal-question jurisdiction to answer the federal question of reverse preemption.

The Wisconsin insurance statutes also fail the third requirement. The federal jurisdictional statutes allowing the federal courts to answer federal questions, including federal preemption questions, do not invalidate, supersede, or impair the operation of the Wisconsin statutes.

b. In the alternative, if "business of insurance" is read broadly enough to encompass federal-question jurisdiction, then the first

McCarran-Ferguson requirement is not satisfied because I.R.C. § 7402 (a jurisdictional statute in the Internal Revenue Code) would qualify as a federal statute that specifically relates to the business of insurance. Sections 801–848 of the Code (entitled "Insurance Companies") specifically tax the income of insurance companies. The Code also defines "taxpayer" as any "person" subject to any internal revenue tax, defines "person" to include "corporation," and defines "corporation" to include "insurance companies." Tax-enforcement provisions like I.R.C. § 7402 are integral parts of the Code because, without them, tax compliance would essentially become voluntary.

3. The District Court compounded its error by holding, in the alternative, that it would abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), from exercising jurisdiction. *Burford* allows abstention if a case presents difficult and important questions of state law. This case involves only federal issues, however. *Burford* also allows abstention if there is a state forum with special oversight responsibilities over a matter of substantial public concern, and if federal adjudication would disrupt state efforts to establish a coherent policy regarding that matter. There is no such Wisconsin court, and federal adjudication of the preemption and other federal issues

presented here will facilitate, rather than undermine, the establishment of coherent policy on federal court review and the resolution of federal issues in insurance receiverships. In particular, federal adjudication will resolve the federal-state conflict that the Wisconsin entities created when they (1) purported to extinguish federal tax liabilities through an "allocation" of the liabilities to a "segregated account" while retaining the corresponding federal tax refunds; (2) enjoined the United States from collecting those liabilities; and (3) argued that the United States could not challenge their actions in federal court.

It is also questionable whether the *ad hoc* collection of liabilities that constitute the segregated account is a proper *res*. In any event, the Wisconsin Court's *in rem* jurisdiction over that account did not deprive the District Court of jurisdiction over Ambac, whose property (including the refund money) was not in the Wisconsin Court's custody.

4. In the District Court, the United States sought relief from the Wisconsin Court's injunction barring tax collection based on: (1) the lack of any waiver of the United States' sovereign immunity and (2) the Anti-Injunction Act, I.R.C. § 7421(a).

The United States is immune from suit unless Congress waives that immunity by express statutory language. No statute waives immunity to allow state courts to enjoin the assessment or collection of federal taxes. Because it applies only to acts of Congress, McCarran-Ferguson cannot override sovereign immunity. Sovereign immunity is an inherent prerogative of the United States. A statute directed at congressional acts cannot breach it.

The Anti-Injunction Act, I.R.C. § 7421(a), forbids any suit to restrain the assessment or collection of any tax, but the Wisconsin Court's injunction purports to do just that. Section 7421, moreover, is not reverse preempted under the McCarran-Feguson Act. Erasing a federal tax liability has nothing to do with the business of insurance, but if it did, the Internal Revenue Code provisions dealing with the taxation of insurance companies would take precedence because they then would specifically relate to the business of insurance.

The Court should reverse the District Court's remand in appeal no. 11-1158 and its dismissal in appeal no. 11-1419. It should then either dissolve the Wisconsin injunction (in the removed action) or remand (in the original action) with instructions that the District Court declare the Wisconsin injunction void and bar its enforcement.

ARGUMENT

I

This Court has jurisdiction over appeal no. 11-1158 because a district court cannot lack jurisdiction over an action that the United States has removed under 28 U.S.C. § 1442(a), rendering inapplicable the appeal prohibition of 28 U.S.C. § 1447(d)

Standard of review

Because the issue of appellate jurisdiction cannot be raised in the District Court, this Court must decide it *de novo* on appeal.

A. Introduction

On January 20, 2011, the Court ordered the United States to file a memorandum on the issue whether 28 U.S.C. § 1447(d) deprives the Court of appellate jurisdiction over appeal no. 11-1158. On August 22, 2011, after considering the parties' submissions, the Court ordered the parties to "fully address the issue of appellate jurisdiction over Appeal No. 11-1158 in their respective briefs." Pursuant to the Court's order, we address that issue.

There is no question that this Court has appellate jurisdiction over appeal no. 11-1419 (the injunction action), which presents largely the same merits issues as appeal no. 11-1158, *viz.*, whether the McCarran-Ferguson Act reverse preempts federal jurisdictional

statutes and, alternatively, whether the District Court erred in declining to exercise jurisdiction based on *Burford* abstention. Because the injunctive relief sought in that appeal encompasses the relief sought in the removal action, it may not be necessary to resolve the question of appellate jurisdiction in appeal no. 11-1158 if this Court decides to grant the injunctive relief requested in appeal no. 11-1419. In any event, for the reasons discussed below, we submit that this Court has jurisdiction over appeal no. 11-1158.

B. The scope of 28 U.S.C. § 1447(d)

Section 1447(d) of 28 U.S.C. states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."[11] The Supreme Court has limited the broad statutory language of § 1447(d) by holding that it must be read *in para materia* with 28 U.S.C. § 1447(c). *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976). Section 1447(c) states, in pertinent part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall

[11] The only exception articulated in § 1447(d) allows review of civil-rights cases removed under 28 U.S.C. § 1443.

be remanded."[12] Thus, "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Thermtron*, 423 U.S. at 346. *See also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (remand for *Burford* abstention reviewable on appeal).

The Supreme Court has reserved the question whether a district court's mere invocation of want of subject matter jurisdiction should be given controlling significance. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 233 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.9 (2006). The Court has held, however, that appellate review is appropriate only to the extent of confirming that the district court's invocation of lack of jurisdiction was colorable, and it has cautioned against appellate disputes over whether an arguably jurisdictional ground is, in fact, jurisdictional. *Powerex*, 551 U.S. at 234. *See also Holmstrom v. Peterson*, 492 F.3d 833, 839–40 (7th Cir. 2007) (rejecting argument that district court had not interpreted 28 U.S.C. § 1441, but had judicially crafted reviewable exception thereto).

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[12] Section 1447(c) also allows up to 30 days after removal for remand motions based on procedural defects. Although the insurance commissioner alleged such defects in the United States' removal, the District Court did not base its decision thereon. (App. 8.)

In *Osborn v. Haley*, 549 U.S. 225, 244 (2007), the Supreme Court provided further guidance regarding the "anitshuttling command[ ]" in § 1447(d). There, the Court held that § 1447(d) did not apply when another antishuttling command of Congress established that the district court was "without authority" to send the removed case back to state court. *Id.* at 243. In *Osborn*, a tort case had been removed from state court to federal court on the basis of the Attorney General's certification under the Westfall Act (*see* 28 U.S.C. § 2679(d)(2))[13] that the defendant federal employee had been acting within the scope of his office or employment. *Id.* at 232–34. The district court rejected the Westfall Act certification and remanded the case to state court. *Id.* at

[13] Section 2679(d)(2) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

234–35. On appeal, the Sixth Circuit ruled that the certification was proper and vacated the remand order. *Id.* at 236–37. Thereafter, certiorari was granted on the question "[w]hether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d)." 547 U.S. 1126 (2006).

The Supreme Court acknowledged the "antishuttling command[ ]" in § 1447(d), but held that it did not control in the situation presented. 549 U.S. at 244. Rather, after noting that, in *Thermtron*, it had "held that § 1447(d) must be read together with § 1447(c)," the Court ruled that "[t]here is stronger cause, we conclude, to hold that § 1447(c) and (d) must be read together with the later enacted § 2679(d)(2)." *Id.* at 243. The Court explained that "Section 2679(d)(2) is operative when the Attorney General certifies scope of employment, triggering removal of the case to a federal forum. At that point, § 2679(d)(2) renders the federal court exclusively competent and categorically precludes a remand to the state court." *Ibid.* Thus, the Supreme Court concluded that § 2679(d)(2)'s remand preclusion trumped § 1447(d)'s appeal prohibition and that the district court was "without authority" to send the case back to state court. *Ibid.* Accordingly, § 1447(d) did not

deprive the Sixth Circuit of jurisdiction to correct the district court's erroneous remand order.

Prior to *Osborn*, the Fourth Circuit, in *Shives v. CSX Transp. Inc.*, 151 F.3d 164 (4th Cir. 1998), found that appellate jurisdiction existed to review another type of remand order. At issue was which federal liability law governed the claim of an injured dockyard worker. The worker filed a tort action in state court under the Federal Employers' Liability Act (FELA), and also a protective claim under the Longshore and Harbor Workers Compensation Act (LHWCA). *Id.* at 166. The LHWCA was his only remedy if he was engaged in maritime employment when injured, but if he was not so engaged, the non-removal provisions of 28 U.S.C. § 1445(a) would require the remand of his FELA suit. *Ibid.* Finding that the worker was not engaged in maritime employment, the district court remanded, and CSX appealed. *Ibid.*

Despite the apparent bar of 28 U.S.C. § 1447(d), the Fourth Circuit (albeit with "some delicacy") concluded that it had jurisdiction over the remand order. *Shives*, 151 F.3d at 166–68. Before it could remand, the district court first had to decide whether the FELA or the LHWCA applied to the worker. The Fourth Circuit thus considered

that choice-of-law question to be a "conceptual antecedent" to the remand question. *Id.* at 167; *see also City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934) (separate order doctrine). The Fourth Circuit then stated that the question "whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Shives*, 151 F.3d at 167. To dismiss the appeal would leave in place a remand order committing to the state court "the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." *Ibid.*

It could be argued that the district court in *Shives* based its remand on the choice-of-forum provisions of 28 U.S.C. § 1445(a) (not on 28 U.S.C. § 1447(c)), and that the preemption decision in the instant case was not so clearly a "conceptual antecedent" to the District Court's remand. *See In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 586–92 (4th Cir. 2006) (interpreting *Shives*). But the Third Circuit

squarely faced and rejected similar concerns in *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838–48 (3d Cir. 1991).

The district court in *TMI* acknowledged that a federal statute gave it jurisdiction, but it held the statute unconstitutional. *TMI*, 940 F.2d at 835–36. Staying its remand order, it certified the question for appeal. *Ibid.* The Third Circuit accepted jurisdiction, despite recognizing that the constitutional and jurisdictional analyses were inseparable, and that the remand order required consideration of 28 U.S.C. § 1447(d). *Id.* at 838, 843–44. The Third Circuit concluded that the district court's constitutional ruling, despite its jurisdictional component, was "not the type of determination routinely and regularly made pursuant to section 1447(c)." *Id.* at 844. It was not a routine "threshold question[ ]," like diversity, that typically could be resolved by reference to a well-established body of law. *Id.* at 844. Instead, the district court had made the consequential ruling that Congress had exceeded its authority in enacting a removal statute. *Id.* at 844–45. The Third Circuit was "confident that the jurisdictional determination of the district court, resting as it did upon the conclusion that the entire statutory scheme authorizing removal is unconstitutional, was not the type of federal subject matter jurisdictional decision intended to be

governed by the terms of or the policy underlying section 1447(c)." *Id.* at 845. "Such constitutional determinations could not have been intended by Congress to fall within the category of routine subject matter jurisdiction determinations contemplated by section 1447(c) and, consequently, are not immune from review under section 1447(d)." *Id.* at 848.

The above-discussed appeals could have been dismissed summarily based on 28 U.S.C. § 1447(d). Instead, the courts at least addressed the issue of appellate jurisdiction. A theme running through many of those decisions is that when a lower court exceeds its lawful authority in remanding, § 1447(d) does not deprive a higher court of its power to correct that error. For example, the Supreme Court did not dismiss summarily the appeal in *Thermtron*, but rather held that crowded federal dockets were not a legitimate ground for a remand. 423 U.S. at 339–52. And in *In re Continental Cas. Co.*, 29 F.3d 292, 294–95 (7th Cir. 1994), this Court directed a district court to recall its remand because it lacked the authority to remand *sua sponte* for a procedural defect in the removal. *See also*, *e.g.*, *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–8 (1962) (judicial exception to unambiguous text of I.R.C. § 7421(a) (Anti-Injunction Act); requirement

that it be "clear that under no circumstances could the Government ultimately prevail" insures exaction at issue would be "merely in the guise of a tax" placing exaction outside scope of genuine federal taxes protected by Act (internal quotation marks omitted)); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224–28 (1957) (private party could not invoke 28 U.S.C. § 2283, prohibiting federal courts from enjoining state courts, to deprive United States of sovereign right to defend title to property in federal court, even though § 2283 lacked exception for injunctions sought by United States).

In the instant case, the District Court held that the McCarran-Ferguson Act preempted the federal removal statute (28 U.S.C. § 1442(a)), thereby making the United States' removal improper and depriving it of subject matter jurisdiction. (App. 2, 8, 15, 21.) As we shall discuss, § 1442(a) is a statute that directs the "intercourt shuttle" to travel in only one direction with respect to cases brought against the United States and its agencies and, consistent with the foregoing judicial authority, this Court has jurisdiction to review the District Court's remand order.[14]

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[14] We are not arguing that the District Court's remand order is reviewable because it is wrong or because it has adverse consequences. *Powerex*, 551 U.S. at 237–39; *Kircher*, 547 U.S. at 642; *Thermtron*, 423

(continued...)

C. Congress has provided removal jurisdiction under 28 U.S.C. § 1442(a) as a matter of sovereign right, and the District Court was therefore without authority to remand the case

The Constitution extends the judicial power of the United States, *inter alia*, "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and also "to Controversies to which the United States shall be a Party." U.S. Const. Art. III, § 2, cl. 1. Because those are independent extensions of the judicial power, Congress can grant jurisdiction to the district courts to resolve any controversy to which the United States is a party, regardless of the nature of the controversy. In accordance with its constitutional power, Congress has given the district courts original jurisdiction "of all civil actions, suits or proceedings commenced by the United States" (except as otherwise provided by federal statute) (28 U.S.C. § 1345), and over a wide variety of cases where the United States is a defendant (28 U.S.C. § 1346). Nor is this power restrained by the fact that the outcome of the suit might turn on state law. For example, Congress has granted

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[14] (...continued)
U.S. at 351. Instead, we maintain that this Court has appellate jurisdiction to hold that the District Court lacked the authority to remand this case for lack of jurisdiction.

both original and removal jurisdiction over quiet-title suits against the United States, even though such suits might turn exclusively on state law (28 U.S.C. §§ 1444, 2410(a)).

"The cardinal concern of the United States is that all cases in which the interests of the government are involved may be tried in federal fora." *Hood v. United States*, 256 F.2d 522, 525 (9th Cir. 1958). Starting in 1815, various federal statutes have given the federal courts jurisdiction over actions removed by defendant federal officers. *Mesa v. California*, 489 U.S. 121, 125–26 (1989); *Willingham v. Morgan*, 395 U.S. 402, 405–06 (1969). Those statutes provided an independent basis for district-court jurisdiction not reliant on the averments in the plaintiff's complaint, but they nevertheless required the assertion of a federal question as part of the removal in satisfaction of the "arising under" clause of the Constitution, *supra*. *Mesa*, 489 U.S. at 136–37; *Florida v. Cohen*, 887 F.2d 1451, 1453–54 (11th Cir. 1989).

In 1991, the Supreme Court held that the then-current version of the federal-officer removal statute (28 U.S.C. § 1442(a)) granted only federal officers (not federal agencies) a right of removal, leaving the United States without a general right to remove cases in which it was a defendant. *International Primate Prot. League v. Tulane*, 500 U.S. 72

(1991). In 1996, Congress overruled that result by amending § 1442(a) into its current form, which allows the United States, or any agency or officer thereof, to remove a civil action against it in state court. The amended § 1442(a) is the statutory manifestation of "Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S. Rep. No. 104-366, at 30–31 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 4202, 4210. The Senate report explained that a federal forum is important in cases against federal agencies and officers because "state court actions against Federal agencies and officers often involve complex Federal issues and Federal-State conflicts." *Ibid.* The House Report contains similar language and adds that "[t]he result of these decisions has been that federal agencies have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity." H.R. Rep. No. 104-798 at 19–20 (1996). Preemption and sovereign immunity are precisely the issues the United States sought to bring before the District Court, and we submit that the 1996 amendments to § 1442(a) provide a basis for appellate review of the District Court's remand order.

Because "Controversies to which the United States shall be a Party" is a separate constitutional extension of the judicial power of the United States, the amended 28 U.S.C. § 1442(a) provides a basis for district-court jurisdiction over removals by the United States not reliant on anything other than the presence of the United States as a party. *Groesbeck Invs., Inc. v. Smith*, 224 F. Supp. 2d 1144, 1151 (E.D. Mich. 2002); *see also Hood*, 256 F.2d at 525–26 (construing § 1444). The above-quoted committee reports further indicate that Congress amended § 1442(a) specifically to provide the United States with access to federal fora in which to defend suits against it. *See also Willingham*, 395 U.S. at 406–407 (pre-amendment, official-immunity case; right of removal absolute; "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum"); *Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir. 1996) ("The [pre-amendment] removal law, 28 U.S.C. §§ 1441 and 1442, gives [federal-officer] defendants an absolute right to remove the case to the appropriate federal district court"); *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 106 (1st Cir. 2007) (case involving 28 U.S.C. § 1444; "Congress has conferred upon the federal sovereign a virtually absolute

right to litigate claims brought either by or against it in the federal, rather than the state, courts").

It follows that when the United States removes an action to a district court, the district court cannot thereafter "lack jurisdiction" within the meaning of 28 U.S.C. § 1447(c). If, as a matter of law, the district court has jurisdiction within the meaning of § 1447(c), then it cannot remand under § 1447(c) for lack of jurisdiction, making 28 U.S.C. § 1447(d) inapplicable.

This conclusion finds considerable support in the Supreme Court's decision in *Osborn*. As discussed above, the Court in that case held that 28 U.S.C. § 2679(d)(2)'s remand preclusion trumped 28 U.S.C. § 1447(d)'s appeal prohibition, and that § 1447(d) did not deprive the Sixth Circuit of jurisdiction to correct the district court's erroneous remand. It logically follows that if the certification of the Attorney General imbues a federal employee with enough of the sovereignty of the United States that he is "categorically" entitled to the protection of the federal courts, then the United States itself is likewise "categorically" entitled to a federal forum when it is exercising the removal power granted by 28 U.S.C. § 1442(a). As discussed above, in amending § 1442, Congress made it plain that questions concerning the

scope of federal sovereign immunity were to be adjudicated in federal court. And in this case, the United States is, *inter alia*, invoking its sovereign immunity to invalidate a state court injunction against it.

It is of no moment that 28 U.S.C. § 1442 does not contain a statement regarding the reviewability of remand orders. As Justice Scalia (joined by Justice Thomas) pointed out in his dissent in *Osborn* (549 U.S. at 264–66), the Westfall Act there at issue contains no such express statement. It was enough that Congress in 28 U.S.C. § 2679(d)(2) provided that the Attorney General's certification was conclusive for purposes of removal and that cases in which the certification was made shall be removed to federal court. Similarly, Congress made it unmistakably clear in amending § 1442 that the United States is to have access to a federal forum in cases brought against it or its agencies. As in *Osborn*, the District Court was simply without authority to remand the action against the United States once the case was removed under § 1442.

The 28 U.S.C. § 1442 removal issue presented by the instant case is also akin to the removal issues presented in *Shives* and *TMI*, *supra*, where the Fourth and Third Circuits found particular remand orders to be reviewable. Like those cases, the instant case does not involve the

garden-variety jurisdictional inquiry normally faced under 28 U.S.C. § 1447(c). Like those cases, the instant case involves a conflict of federal laws, *viz.*, the significant, and inherently federal, question whether the McCarran-Ferguson Act renders inapplicable the jurisdictional provisions of 28 U.S.C. as they relate to the United States — an issue analogous to *TMI* where a jurisdictional statute was held unconstitutional. Furthermore, the District Court's remand, if permitted to stand, would compel the United States to litigate fundamentally federal matters — like sovereign immunity and the collection of federal tax — in a state court.

At bottom, this case appears to be unique — we have been unable to find any case in which the sovereign rights of the United States were so squarely affected.[15] The analogous authority discussed above nevertheless provides ample basis for finding that 28 U.S.C. § 1447(d) does not abrogate the clear congressional command in 28 U.S.C. § 1442 that actions against the United States and its agencies that are

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[15] The three cases cited in the Court's January 20, 2011 Order all involve private parties. *Rubel v. Pfizer, Inc.*, 361 F.3d 1016 (7th Cir. 2004) (diversity removal); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir. 2000) (diversity removal); *In re Continental Cas. Co.*, 29 F.3d at 293 (remand procedure). The Court's recent opinion in *Townsquare Media, Inc. v. Brill*, 652 F.3d 767 (7th Cir. 2011), likewise involved a private dispute.

removed to federal court must be litigated in the federal forum. Consequently, the District Court lacked the authority to remand for lack of jurisdiction, and this Court should accept jurisdiction over appeal no. 11-1158.

II

The District Court erred in declining to exercise jurisdiction based on reverse preemption under the McCarran-Ferguson Act and, alternatively, on *Burford* abstention

Standard of review

This Court reviews *de novo* the legal issues of subject matter jurisdiction, preemption, removal from state to federal court, and the dismissal of a complaint. *Franciscan Skemp Healthcare, Inc. v. Central States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594, 596 (7th Cir. 2008); *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000), *aff'd*, 536 U.S. 355 (2002); *Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1039 (7th Cir. 1998). The issue whether the McCarran-Ferguson Act allows the Wisconsin insurance receivership statutes to reverse preempt the federal jurisdictional statutes was raised (A. 198; Doc.(10-778) 13 at 2, 9–21; Doc.(10-778) 15 at 26–36; Doc.(11-99) 28 at 7–8; Doc.(11-99) 31 at 19–23), and it was ruled upon by the District Court (App. 9–15, 25–29).

This Court reviews *de novo* the legal questions involved in a district court's decision to abstain from exercising jurisdiction (including whether a case meets the abstention requirements), but it reviews the abstention decision itself for abuse of discretion. *Property & Cas. Ins., Ltd. v. Central Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 321 (7th Cir. 1991). Abstention was raised (Doc.(10-778) 15 at 36–41; Doc.(11-99) 28 at 9–10; Doc.(11-99) 31 at 39–40), and it was ruled upon by the District Court (App. 16–21, 29–31).

A. The District Court erred in concluding that the McCarran-Ferguson Act allowed the Wisconsin insurance receivership statutes to reverse preempt the federal jurisdictional statutes invoked by the United States

1. Introduction: the three-part McCarran-Ferguson Act test

The McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) protects state laws regulating the business of insurance from inadvertent preemption by federal statutes of general applicability. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996). Congress passed the Act after the Supreme Court held in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that the Commerce Clause authorized Congress to regulate alleged antitrust violations by an insurance company with interstate business, thereby

causing concern that the states would lose the ability to regulate insurance companies. *See* Act of Mar. 9, 1945, ch. 20, 59 Stat. 33–34; *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538–39 (1978).

The McCarran-Ferguson Act states that continued state regulation of the business of insurance is in the public interest and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The "anti-preemption" or "reverse preemption" provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), consists of two clauses. This appeal concerns the first clause, which states:

> 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

That provision "remov[es] obstructions which might be thought to flow from [Congress's] own power . . . except as otherwise expressly provided in the Act itself or in future legislation." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429–30 (1946).

This Court has held that a "three-part inquiry is the appropriate test for [reverse-preemption] questions involving [15 U.S.C. § 1012(b)]."

Autry, 144 F.3d at 1041. Under the test, three requirements must be satisfied before there can be reverse preemption: (1) "the federal statute at issue [must not] 'specifically relate to the business of insurance'"; (2) "the state statute [must have been] 'enacted . . . for the purpose of regulating the business of insurance'"; and (3) "application of the federal statute [must] 'invalidate, impair or supersede' the state law." *Id.* at 1042.

Here, the District Court concluded that each one of the three requirements was satisfied with respect to six federal statutes providing jurisdiction to the District Court and that the statutes therefore were reverse preempted.[16] (App. 11–15, 25–29.) Below, we shall demonstrate that the District Court committed reversible error in concluding that the second and third requirements of McCarran-Ferguson were satisfied with respect to those statutes. Moreover, we shall also demonstrate that if this Court were to conclude that the term "business of insurance" is broad enough that applying state statutes to eliminate federal-question jurisdiction is "regulating the business of insurance," then I.R.C. § 7402 "specifically relates to the business of

[16] The statutes are the removal statutes, 28 U.S.C. §§ 1441 and 1442; three original jurisdictional statutes in Title 28, 28 U.S.C. §§ 1331, 1340, and 1345; and an original jurisdictional statute in the Internal Revenue Code, I.R.C. § 7402.

insurance." In that event, the first McCarran-Ferguson requirement would *not* be satisfied with respect to I.R.C. § 7402, and that statute would provide jurisdiction for the second District Court action.

2. The second requirement of McCarran-Ferguson was not satisfied because the Wisconsin insurance receivership statutes were not enacted for the purpose of regulating the business of insurance to the extent that they purport to override federal statutes granting the district courts jurisdiction to decide federal questions

a. The "business of insurance"

As noted, the second McCarran-Ferguson requirement asks whether the state statute was enacted for "the purpose of regulating the business of insurance." If it was not, then the requirement is not satisfied and the federal statute must prevail under the ordinary preemption rules.

The Supreme Court distinguishes the "business of insurance" from the "business of insurance companies."[17] *Union Labor Life Ins.*

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[17] The term "business of insurance" appears in three different clauses of the McCarran-Ferguson Act. While all the words of a particular clause must be taken into account in determining whether a requirement of that clause is satisfied (*see Fabe*, 508 U.S. at 504), it is nevertheless appropriate to consider the judicial guidance regarding the meaning of the term "business of insurance" in any of the three clauses in interpreting the term in a particular setting. *See American Deposit Corp. v. Schacht*, 84 F.3d 834, 840 (7th Cir. 1996); *see also*

(continued...)

Co. v. Pireno, 458 U.S. 119, 129 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210–11, 216–17 (1979); *SEC v. National Sec., Inc.*, 393 U.S. 453, 459–60 (1969). The core of the business of insurance is the underwriting and spreading of risk, along with the contractual relationship between the insurer and the insured through which that occurs, including the type of policy that can be issued, its reliability, interpretation, and enforcement. *Royal Drug*, 440 U.S. at 220–21; *National Sec.*, 393 U.S. at 460. Whether a particular practice falls within the "business of insurance" is determined by whether the practice: (1) has the effect of transferring, spreading, or underwriting a policyholder's risk; (2) is an integral part of the policy relationship between the insurer and the insured; and (3) is limited to entities in the insurance industry.[18] *Pireno*, 458 U.S. at 127–33; *Royal Drug*, 440 U.S. at 211–12, 215, 220–21. Although every business decision made by an insurance company could affect its claims-paying ability, relying on such reasoning to define the "business of insurance" would

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[17] (...continued)
Fabe, 508 U.S. at 501–05, 508–09; *National Sec.*, 393 U.S. at 459–61.

[18] The limited-to-insurance-industry test arose out of the antitrust provisions in the second clause of 15 U.S.C. § 1012(b) and the recognition that insurance companies must cooperate in setting rates (a practice otherwise forbidden by the antitrust laws) to achieve actuarial accuracy. *Pireno*, 458 U.S. at 129; *Royal Drug*, 440 U.S. at 221–22.

impermissibly make the business of insurance coextensive with the business of insurance companies. *Pireno*, 458 U.S. at 128–29; *Royal Drug*, 440 U.S. at 216–17.

The fixing of insurance rates, the advertising and selling of policies, and the licensing of insurance companies and their agents are included in the business of insurance. *National Sec.*, 393 U.S. at 460. The protection of policyholders during insurance mergers involves the business of insurance, but the protection of stockholders does not. *Id.* at 461–63. A variable annuity that is so variable that the insurance company does not underwrite any mortality risk is not an insurance contract to which reverse preemption can apply. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68, 71–73 (1959). Neither a review board to aid in the evaluation of chiropractic treatments (*Pireno*, 458 U.S. at 122–23, 129–34) nor a prescription reimbursement arrangement offered to pharmacies (*Royal Drug*, 440 U.S. at 207–09, 232–33) is the business of insurance. Thus, the receipt by policyholders of their benefits is the business of insurance; the behind-the-scenes arrangements between insurance companies and service providers are not.

b. The Supreme Court's guidance in *Fabe*

The Supreme Court in *United States Dep't of Treas. v. Fabe*, 508 U.S. 491 (1993), provided significant guidance regarding the second McCarran-Ferguson test (*viz.*, whether the state statute was enacted for the purpose of regulating the business of insurance) in the context of insurance insolvencies. *Fabe* was a declaratory judgment action brought in federal district court by the Ohio insurance superintendent (acting as the liquidator of an insolvent insurance company) to resolve the issue whether the claim-priority structure of the Ohio insurance insolvency statute or of the general federal insolvency statute would prevail. *Id.* at 495–99. Under federal law, the United States' claims came first. Under the Ohio statute, those claims were fifth behind (1) administrative expenses, (2) certain wage claims, (3) policyholder claims, and (4) general-creditor claims. *Id.* at 495. The Court ruled that the priorities granted by the Ohio statute for administrative expenses and policyholder claims satisfied the second McCarran-Ferguson requirement, but that the other two priorities (for wage claims and general creditors) did not and, thus, could not reverse preempt the federal priority statute. *Id.* at 508–09.

The Court explained that the McCarran-Ferguson Act allowed the Ohio statute to reverse preempt the federal statute to the extent that the Ohio statute gave priority to administrative expenses and policyholder claims. *Id.* at 508–09. The Court stated that "regulating the business of insurance" encompassed "the actual performance of an insurance contract" by ensuring the payment of policyholder claims. *Id.* at 503–04. An insolvency's administrative expenses also were reasonably necessary to protect policyholders because a workout could not occur absent payment of those expenses. *Id.* at 509.

As to the Ohio statute's preferences for employees and general creditors, the Court explained that "a state statute regulating the liquidation of insolvent insurance companies need not be treated as a package which stands or falls in its entirety." *Id.* at 509 n.8. In this regard, the Court pointed out "the narrowness of [its] actual holding." *Ibid.* Thus, "the Ohio priority statute, to the extent that it *regulates policyholders*, is a law enacted for the purpose of regulating the business of insurance," but "[t]o the extent that it is designed to further the interests of *other creditors*, . . . it is not a law enacted for the purpose of regulating the business of insurance." *Id.* at 508 (emphasis added). The argument that "every preference accorded to the creditors

of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company . . . goes too far." *Ibid.* "[S]uch indirect effects are [in]sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." *Id.* at 508–09. The Court thus rejected the argument that "any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance." *Id.* at 509 n.8. *See also Autry*, 144 F.3d at 1044 (Construing *Fabe* together with the Supreme Court's earlier decision in *National Securities*, this Court held that "a statute is 'enacted . . . for the purpose of regulating the business of insurance' if it possesses the end, intention, or aim of adjusting, managing, or controlling the relationship between the insurance company and the policyholder, directly or indirectly" (footnote omitted)).

c. To the extent that they purport to override federal statutes granting the district courts jurisdiction to decide federal questions, the Wisconsin statutes upon which the District Court relied were not enacted for the purpose of regulating the business of insurance

As discussed above, the Supreme Court held in *Fabe* that, in applying the second McCarran-Ferguson requirement, "a state statute regulating the liquidation of insolvent insurance companies need not be

treated as a package which stands or falls in its entirety." 508 U.S. at 509 n.8. Thus, the mere fact that the Ohio statute at issue in *Fabe* was one that regulated the rehabilitation and liquidation of insurance companies was insufficient to satisfy the second McCarran-Feguson requirement. Rather, the relevant inquiry was whether each particular provision of the state statute at issue was "'aimed at protecting or regulating' the performance of an insurance contract" (508 U.S. at 505) or was "reasonably necessary to further the goal of protecting policyholders" (*id.* at 509).[19]

Here, the District Court cited two Wisconsin statutes as ones that "relate specifically to regulating the business of insurance"[20] to avoid reaching the issue whether the Wisconsin Court's allocation and injunction orders were proper, *viz.*, (1) Wis. Stat. § 645.04, which the

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[19] *Fabe* also establishes that the injunction orders of the Wisconsin Court were invalid. The end result of the Wisconsin Court's orders here achieves the same result that was rejected by the Supreme Court in *Fabe*. By creating a segregated account, allocating the United States' claims to that account, and enjoining collection from Ambac, the Wisconsin Court treated the United States' claims against Ambac worse than the claims of Ambac's general creditors that were not allocated to the segregated account.

[20] The District Court's statement confuses the matter by conflating the first and second McCarran-Ferguson requirements. The federal statute wins if it "specifically relates" to the business of insurance, and the state statute loses if it was not enacted "for the purpose of regulating the business of insurance."

court described as a statute "vest[ing] jurisdiction in the state rehabilitation court over matters related to the rehabilitation of an insurer" and (2) Wis. Stat. § 645.05, which the court described as a statute providing the Wisconsin Court with "authority to enjoin any action that may interfere with the proceedings or 'lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding.'" (App. 12.) The court did not explain how those broad statutes affected the performance of an insurance contract or demonstrate that they were "reasonably necessary" to protect policyholders. Rather, the court apparently based its conclusion that the second McCarran-Ferguson requirement was satisfied on the mere fact that the Wisconsin statutes relate to the rehabilitation of insurance companies, which, as discussed above, is insufficient under *Fabe* to satisfy the second requirement.

An examination of the District Court's conclusions regarding the Wisconsin statutes' purposes illustrates that the statutes, as applied, are neither aimed at protecting or regulating the performance of an insurance contract nor reasonably necessary to further the goal of protecting policyholders. According to the court, the Wisconsin statutes (by virtue of the McCarran Ferguson Act) "restrict[ed] the United

States' right to remove this case to federal court" under 28 U.S.C §§ 1441 and 1442 (App. 15), and deprived a federal district court of the jurisdiction that was granted to it under I.R.C. § 7402 and various original jurisdiction provisions of 28 U.S.C. (App. 28). But unlike the federal and state priority statutes in *Fabe*, the federal jurisdictional statutes would not affect whether a policyholder would receive a payment or some other remedy. Accordingly, the Wisconsin statutes that purport to override federal jurisdictional statutes are not protecting policyholder interests.

Further, the case law recognizes a distinction between federal statutes giving the federal courts jurisdiction to resolve reverse-preemption disputes, and federal statutes granting affirmative relief. Upon determining that a state statute was enacted for the purpose of regulating the business of insurance, federal courts have allowed the reverse preemption of conflicting federal *remedies* (unless the federal remedial statute specifically related to the business of insurance or did not impair the state statute). But the choice of forum in which the limits of reverse preemption are to be adjudicated is far afield from managing insurance contracts and protecting policyholders. Even assuming that litigation were an integral part of the policy

relationship, the choice of adjudicative forum is not integral because it does not affect the substantive rights of the litigants. *International Ins. Co. v. Duryee*, 96 F.3d 837, 840 (6th Cir. 1996).

As explained in Argument I, *supra*, there is, at a minimum, a presumption that cases involving the United States and the interpretation of federal statutes should be heard in the federal courts. Because "state court actions against Federal agencies and officers often involve complex Federal issues and Federal-State conflicts" and because "federal agencies have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity," Congress amended 28 U.S.C. § 1442(a) to give the United States and its agencies a right of removal, thereby "fulfill[ing] Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." H.R. Rep. No. 104-798 at 19–20 (1996); S. Rep. No. 104-366, at 30–31 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 4202, 4210. No concern of protecting policyholders is undermined by this presumption.[21] It follows, at a minimum, that there is no reverse

[21] Although the McCarran-Ferguson inquiry does not focus on preserving insurer resources, we note that there is little concern that adjudicating federal issues in the federal courts will unduly consume

(continued...)

preemption of statutes giving the district courts jurisdiction over suits involving federal questions posed by the United States.

Furthermore, the case law demonstrates that regulating the business of insurance does not include forcing McCarran-Ferguson disputes into state courts. Examples of federal courts exercising jurisdiction over such disputes include: *Fabe*, 508 U.S. 493, 508–09; *Autry*, 144 F.3d at 1038, 1044–45 (Truth In Lending Act not reverse preempted as applied to premium financing); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (Declaratory Judgment Act not reverse preempted; assets of liquidating insurance companies "up for grabs" only in attenuated fashion); *Ruthardt v. United States*, 303 F.3d 375, 384–86 (1st Cir. 2002) (federal priority statute not reverse preempted by Massachusetts statute giving preference to timely claims); *Garcia*, 4 F.3d at 58, 60–62 (same; Puerto Rico statute); *see also Greene v. United States*, 440 F.3d 1304, 1315 (Fed. Cir. 2006) (retroactive application of Arizona priority statutes "simply fails to constitute regulation of the business of insurance").

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[21] (...continued)
such resources. *See Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 62 (1st Cir. 1993) (increased administrative difficulty insufficient for reverse preemption so long as "liquidation would still prove manageable").

The circuits have disagreed when a party has sought a federal remedy in the form of the adjudication of the merits of a *state-law* dispute outside the confines of a state court insurance receivership proceeding. Some circuits have held against reverse preemption, so long as the resolution is handed over to the state court to be paid like other claims in the same class. *Gross v. Weingarten*, 217 F.3d 208, 220–22 (4th Cir. 2000) (questioning whether Virginia statute regulated business of insurance, but rejecting reverse preemption of diversity jurisdiction because no impairment); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 701–03 (10th Cir. 1988) (state laws do not divest federal courts of their "right to apply state law regarding the regulation of insurers in appropriate diversity proceedings"); *see also Duryee*, 96 F.3d at 837–40 (Ohio statute requiring revocation of license of foreign insurers removing actions by Ohio citizens did not reverse preempt federal removal and diversity statutes because enacted "for the parochial purpose of regulating a foreign insurer's choice of forum"). Others have held that state insurance statutes designating exclusive receivership courts or restricting arbitration reverse preempted relief under the Federal Arbitration Act. *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1280–82 (10th Cir. 1998); *Munich Am.*

Reinsurance Co. v. Crawford, 141 F.3d 585, 590–94 (5th Cir. 1998); *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 43–46 (2d Cir. 1995).

All of those courts, however, decided the federal question whether the federal statutory remedy was reverse preempted under the McCarran-Ferguson Act. They did not force the litigation of the reverse-preemption issue itself into the state receivership court. "We surely are not saying that a State has the power to enjoin a party generally from pursuing federal remedies in federal court. Nor are we saying that Oklahoma law divested the district court of its diversity jurisdiction." *Munich*, 141 F.3d at 595. "What we are saying is that [the McCarran-Ferguson Act allows] state laws regulating the business of insurance [to] suspend federal *remedies* based on conflicting federal statutes — here, the [Federal Arbitration Act]." *Id.* at 595–96 (emphasis added). As the Court of Appeals of Wisconsin has explained:

> No federal decision concerning state court injunctions issued under insurance regulation laws has held that a state court may enjoin either a federal court or a party from pursuing federal remedies. Rather, the focus of these decisions was the application of McCarran-Ferguson and its impact on the federal remedy. If McCarran-Ferguson preempted an otherwise available federal remedy, the federal court was without power to grant relief pursuant to that remedy and dismissal of the federal action was appropriate. *Significantly, however, in each instance the federal court determined whether a federal remedy was available.*

Appleton Papers, Inc. v. Home Indem. Co., 612 N.W.2d 760,766–67 (Wis. App. 2000) (footnote omitted, emphasis added).

Ultimately at issue here is whether the McCarran-Ferguson Act allows Wisconsin statutes to prevent a federal agency (the IRS) from using remedies granted it by a federal statute (the Internal Revenue Code) to recover $708 million in tentative refunds from entities that are not in rehabilitation. The forum in which that determination is to be made is too far removed from protecting policyholders to treat mandating a state forum for that determination as regulating the business of insurance. To the contrary, that quintessentially federal issue belongs in the federal courts.

3. The third requirement of McCarran-Ferguson was not satisfied because the federal jurisdictional statutes do not invalidate, supersede, or impair the Wisconsin insurance receivership statutes

a. The third requirement

Under the third requirement, a federal statute is not reverse preempted if its application would not invalidate, supersede, or impair the state insurance statute at issue. 15 U.S.C. § 1012(b); *Autry*, 144 F.3d at 1042. The Supreme Court has defined "invalidate" as rendering ineffective without providing a substitute, and "supersede" as rendering

ineffective by displacement while providing a substitute. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). Regarding "impair," the Supreme Court has rejected definitions that either would block a federal statute when it covered the same territory as the state statute or would allow the operation of a federal statute so long as it "does not collide head on with state regulation." *Humana*, 525 U.S. at 309. Instead, the Supreme Court has defined "impair" as weakening, making worse, lessening in power, diminishing, relaxing, or injuring. *Id.* at 309–10. A federal statute can be applied when doing so "would not frustrate any declared state policy or interfere with a State's administrative regime." *Id.* at 310. "Finally, when assessing whether a general federal statute that creates a cause of action 'impairs' the operation of a state law, the proper inquiry is whether the particular suit being brought would impair state law." *AmSouth Bank*, 386 F.3d at 781 (citing *Humana*, 525 U.S. at 313).

b. Because the Wisconsin statutes do not establish the Dane County Circuit Court as the exclusive forum for all disputes in an insurance receivership, the federal jurisdictional statutes do not invalidate, supersede, or impair the operation of those statutes

Receivership proceedings against Wisconsin insurers (which include rehabilitation and liquidation proceedings (Wis. Stat. § 645.03(1)(b))) are governed by the Insurers Rehabilitation and Liquidation Act. Wis. Stat. Ch. 645. Chapter 645 allows both summary and formal proceedings. In summary proceedings (Wis. Stat. §§ 645.21–645.24), the insurance commissioner can petition "any circuit court in this state" for an *ex parte* seizure order (Wis. Stat. § 645.22(1)), or he can issue a seizure order himself, subject to the insurer seeking judicial review in "the circuit court for Dane County or for the county in which the insurer's principal office is located" (Wis. Stat. § 645.23). Formal proceedings (Wis. Stat. §§ 645.31–645.77) begin when the insurance commissioner petitions "the circuit court for Dane County or for the county in which the principal office of the insurer is located" for an order directing the rehabilitation or liquidation of an insurer. Wis. Stat. §§ 645.31 & 645.41. There is no requirement that formal proceedings be held in the same court as any summary proceedings

that might have preceded them. *See* Wis. Stat. § 645.22(2). Moreover, Wis. Stat. § 645.45 allows the insurance commissioner to petition for a federal receivership and to accept appointment as receiver from the federal court. *See also* Wis. Stat. § 645.82(4).

The District Court focused on Wis. Stat. §§ 645.04 and 645.05. (App. 12.) Section 645.04 makes the insurance commissioner the primary person to commence receivership proceedings, and it states that no Wisconsin court can entertain insolvency or ancillary proceedings other than in accordance with Chapter 645. Although § 645.04 initially places venue for such proceedings in the circuit court in which the receivership proceedings began, it does not specify any particular circuit court, and it allows for changes in venue. Section 645.05 provides that any receiver appointed under Chapter 645 may apply for, and "any court of general jurisdiction in the state may grant," restraining orders and injunctions. Further, § 645.05 implies that an application for an injunction would be a separate case from the receivership proceeding. Thus, the rehabilitation court does not have exclusive jurisdiction over all disputes involving the insurance company.

Although the District Court spoke of "the state rehabilitation court" (App. 12), there is no single court that serves that function in Wisconsin. Chapter 645's authorization of receivership proceedings in the Dane Count Circuit Court, or in the circuit court for the county of the insurer's principal office, or in a federal district court — with the possibility of injunction applications in any Wisconsin court of general jurisdiction or even in a court outside the state — shows that the Wisconsin legislature neither designated a single court to develop specialized expertise in insurance receivership proceedings, nor limited all proceedings related to a particular insolvency to the circuit court with primary responsibility.

When faced with similar statutory regimes, district courts have not remanded state-law diversity actions removed by private defendants sued by state insurance commissioners. *Michigan Ins. Comm'r v. DMB Kyoto Shopping Ctr.*, 42 F. Supp. 2d 726, 733–34 (W.D. Mich. 1998); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 274–75 (D. Vt. 1993). This is in contrast to the cases cited by the District Court (App. 11–12), all of which involved state statutes that limited insurance-insolvency jurisdiction to a single court.[22] Thus, the District

[22] Those cases were *Covington v. Sun Life of Canada (U.S.)* (continued...)

Court proceedings did not invalidate, supersede, or impair any statutory regime intended to confine all insurance-receivership matters to a single, statutorily designated, insurance-receivership court.

Consideration of the nature of the District Court proceedings reinforces that conclusion. All of the cases cited by the District Court involved private parties asking federal courts to resolve state-law issues under the courts' diversity-removal or supplemental jurisdiction. 28 U.S.C. §§ 1332, 1367, 1441. Two of those cases were decided by the Southern District of Ohio, the court where the seminal Supreme Court case, *Fabe*, began when the Ohio insurance superintendent (in the midst of a liquidation) sought a declaratory judgment involving the interpretation of the federal and Ohio priority statutes in light of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 494–97. Similar to *Fabe*, the United States here is seeking relief based upon the interaction of federal sovereign immunity and the Internal Revenue Code with the Wisconsin rehabilitation statute, which raises McCarran-Ferguson Act issues. In other words, the federal sovereign invoked the jurisdiction of

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[22] (...continued)
Holdings, Inc., 2000 WL 33964592 (S.D. Ohio 2000); *Hudson v. Supreme Enters., Inc.*, 2007 WL 2323380 (S.D. Ohio 2007); *In re Amwest Sur. Ins. Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002); *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993).

the federal courts to resolve issues arising under federal law, which would do nothing more than establish the limits of the authority ceded to Wisconsin by the McCarran-Ferguson Act. *See Variable Annuity Life Ins. Co.*, 359 U.S. at 69 (meaning of "insurance" and "annuity" under federal securities laws is federal question). *Cf. Modern Life & Accident Ins. Co. v. Commissioner*, 420 F.2d 36, 37–38 (7th Cir. 1969) (insurance company can be classified differently for purposes of state regulation and federal taxation). Thus, the District Court proceedings did not invalidate, supersede, or impair the operation of Chapter 645.

4. Assuming, *arguendo*, that this Court were to give the term "business of insurance" a broad reading and conclude that the second requirement of McCarran-Ferguson was satisfied, then, in appeal no. 11-1419, the first requirement is not satisfied because § 7402, a provision of the Internal Revenue Code, would qualify as a statute that "specifically relates to the business of insurance"

If the term "business of insurance" is given such a broad reading that overriding federal jurisdictional statutes constitutes the regulation of that business, then the Internal Revenue Code should be treated as specifically relating to the business of insurance. Consequently, the first McCarran-Ferguson requirement would prevent a state statute from reverse preempting a provision of the Internal Revenue Code.

Accordingly, under such a broad reading of the term "business of insurance," I.R.C. § 7402 is not reversed preempted and provides jurisdiction in the second District Court action, *i.e.*, the suit seeking injunctive and declaratory relief.

At the outset, it should be noted that the "specifically relates" preface to the term "business of insurance" in McCarran-Ferguson's first requirement does not present a significant hurdle. As the Supreme Court observed in *Barnett Bank*, 517 U.S. at 38 (emphasis in original), "[t]he word 'relates' is highly general" and the word "specifically" "contrast[s] a *specific* reference with an *implicit* reference." These observations track the congressional explanation of McCarran-Ferguson's first requirement. Senator Ferguson explained that "if we merely enact a law relating to interstate commerce . . . it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." 91 Cong. Rec. 1487 (1945). Thereafter, Senator O'Mahoney confirmed that the intent was that existing and future federal laws not "be applied to the business of insurance" "by mere implication." *Ibid.* As the Supreme Court held in *Barnett Bank*, "a statute may specifically relate to more than one thing," as "[n]either

the McCarran-Ferguson Act's language, nor its purpose, requires the Federal Statute to relate *predominantly* to insurance." 517 U.S. at 41 (emphasis in original).

Turning to the Internal Revenue Code itself, there can be no question that it specifically relates to the "business of insurance" if that term is broadly construed. The Code contains Subchapter L (I.R.C. §§ 801–848) entitled "Insurance Companies," and it taxes the income of both life insurance companies (*see* § 801, *et seq*.) and non-life companies, such as Ambac (*see* § 831, *et seq*.), including the income derived from conducting the business of insurance. Congress thus acted specifically with reference to the business income of insurance companies in enacting those provisions of the Internal Revenue Code. *See Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211, 1218 (1st Cir. 1979) ("I.R.C. § 832 'specifically relates to the business of insurance' — it deals exclusively with taxation of insurance companies — and, therefore, the McCarran-Ferguson Act is inapplicable by its own terms"). *Cf. Industrial Life Ins. Co. v. United States*, 481 F.2d 609, 610 (4th Cir. 1973) (in the McCarran-Ferguson Act, "the power of the federal government to tax was not delegated to the states"). Congress also emphasized that the Code specifically relates to insurance

companies in I.R.C. § 7701(a), which provides definitions to be used throughout the Code. Section 7701(a)(14) defines "taxpayer" as any "person" subject to any internal revenue tax; § 7701(a)(1) defines "person" to include a "corporation"; and § 7701(a)(3) defines "corporation" to include "insurance companies."

Moreover, I.R.C. § 7402, the jurisdictional provision pertinent for present purposes, is an integral part of the Internal Revenue Code. It allows the United States to invoke the jurisdiction of the district court to obtain court orders that are "necessary or appropriate for the enforcement of the internal revenue laws." I.R.C. § 7402(a). Section 831, which taxes the business income of insurance companies, such as Ambac, is one of those internal revenue laws. *See also* Treas. Reg. § 1.831-3(b) ("All provisions of the [Internal Revenue] Code . . . not inconsistent with the specific provisions of section 831 are applicable to the assessment and collection of the tax imposed by section 831(a)"). *Cf. UNUM Corp. v. United States*, 130 F.3d 501, 508 (1st Cir. 1997) ("the existence of Subchapter L does not exempt insurance companies from the application of the rest of the Code"). Indeed, without I.R.C. § 7402(a) and the Internal Revenue Code's other tax-enforcement provisions, payment of the taxes imposed by Subchapter L (and the

Code's other tax-determination provisions) would essentially become voluntary.

In short, if the Wisconsin statutes are deemed to be regulating the "business of insurance" when applied against the general jurisdictional statutes of 28 U.S.C., then I.R.C. § 7402, under this broad approach, should similarly be construed as specifically relating to the "business of insurance." Because the first McCarran-Ferguson requirement then would not be satisfied, the Wisconsin statutes could not reverse preempt I.R.C. § 7402.

B. The District Court erred in holding, in the alternative, that it would abstain under *Burford* from exercising jurisdiction

As established above, the District Court had jurisdiction. Federal courts have a strict, virtually unflagging, duty to exercise the jurisdiction that Congress granted them. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (*NOPSI*). That duty, however, does not eliminate the ability to abstain from granting discretionary relief in exceptional circumstances in order to serve important countervailing interests, like proper regard for the independence of state governments in carrying out their domestic

policy. *Quackenbush*, 517 U.S. at 716; *NOPSI*, 491 U.S. at 359; *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943).

The District Court held that, even if it had jurisdiction, it would abstain from exercising that jurisdiction under the Supreme Court's decision in *Burford*, *supra*. (App. 16–21, 29–31.) *Burford* abstention allows a federal court to abstain from granting discretionary relief (including equitable relief) only: (1) if a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case at bar; or (2) if federal adjudication of that case and of similar cases would disrupt state efforts to establish a coherent policy regarding a matter of substantial public concern. *Quackenbush*, 517 U.S. at 726–27, 730–31; *NOPSI*, 491 U.S. at 361. *Burford* abstention allows flexibility so that state courts can address state problems, thereby reducing delay, misunderstanding of state law, and needless conflicts in federal-state relations, without Congress having to restrict federal jurisdiction. *Quackenbush*, 517 U.S. at 717–18; *Burford*, 319 U.S. at 327–29, 332–33.

A federal court must carefully balance federal and state interests. It should abstain only on concluding that state interests are paramount

and that a dispute should be adjudicated in a state forum so as not to intrude unduly on state processes or to undermine state ability to maintain uniformity. *Quackenbush*, 517 U.S. at 728. Abstention is most appropriate where federal courts can make only small contributions to a well-organized state system. *Burford*, 319 U.S. at 327. The presence of federal issues, however, weighs heavily against abstention. *Quackenbush*, 517 U.S. at 729. The balance rarely favors *Burford* abstention, making it an extraordinary, narrow exception to the duty of district courts to adjudicate cases within their jurisdiction. *Quackenbush*, 517 U.S. at 728.

The first type of *Burford* abstention is inapplicable here because these proceedings present federal issues, undisputed facts, and no difficult questions of Wisconsin law. At issue is whether the McCarran-Ferguson Act (a federal statute) allows the Wisconsin Court to override the Internal Revenue Code (another federal statute), federal sovereign immunity, and Ambac's obligation to repay tentative federal tax refunds. Although state law is part of a preemption analysis, the Supreme Court treats preemption as a federal issue to be retained by the federal courts. *See NOPSI*, 491 U.S. at 361–63 (also disfavoring abstention in factually simple cases).

The second type of *Burford* abstention is inapplicable because federal adjudication will not disrupt Wisconsin efforts to establish a coherent policy regarding insurance receiverships. A prerequisite to this type of *Burford* abstention is the existence of a state forum that has a special relationship of oversight or review in a state program. *International Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 363–65 (7th Cir. 1998); *Property & Casualty Ins., Ltd.*, 936 F.2d at 323. Although the District Court calls the Wisconsin Court the "rehabilitation court" (App. 12), we have already established, in Part II.A.3.b, *supra*, that the Wisconsin statutes do not designate any particular court to adjudicate, and acquire specialized expertise regarding, insurance receiverships.

Even if there were a specialized Wisconsin court, the second type of *Burford* abstention is still inapplicable. *Burford* abstention does not apply any time there is a complex state program, nor any time the answer to a federal question might overturn a state policy. *NOPSI*, 491 U.S. at 362–63. In contrast to claims that a state court misapplied its lawful authority or erred under state law, federal adjudication of preemption issues establishes the limits of that lawful authority and

does not disrupt legitimate state efforts to treat local problems uniformly. *Quackenbush*, 517 U.S. at 727; *NOPSI*, 491 U.S. at 362.

Ambac and the insurance commissioner (with the approval of the Wisconsin Court) created a federal-state conflict when they purported to allocate any liability for the tentative refunds to the segregated account in violation of the consolidated return regulations and to enjoin collection from an entity that was not in receivership. (A. 121, 142–149.) They deepened the conflict by arguing that the United States could not resort to the federal courts, by removal or original jurisdiction, to challenge the injunctions that the Wisconsin Court had imposed. (*See* App. 8, 25–31.)

The District Court erroneously focused on the practical inconvenience of these proceedings and overlooked the federal preemption issue, *viz.*, whether the purported allocation and injunction were legally effective against the United States. (App. 17–21, 30–31.) The answer to that *federal* question will not disrupt Wisconsin insurance policy, but instead will ensure that the policy is coherent, legal, and within the boundaries of the realm that Congress ceded to the states when it passed the McCarran-Ferguson Act.

The issues presented are unique to the United States, a sovereign entity with the power to tax. There is no risk of repeated suits disrupting the formulation of Wisconsin insurance policy. Instead, like *Fabe*, this case will facilitate the development of state policy by resolving a federal-state conflict that the Wisconsin entities created when they purported to extinguish tax liabilities imposed under federal law against a taxpayer through an "allocation" of the liabilities to a special "account" and thereafter enjoined the United States from collecting those liabilities from the taxpayer whose assets were not *in custodia legis*.

The District Court is not assisted by its citation of this Court's abstention decision in *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990). (App. 16.) There, a rehabilitation proceeding was instituted against an insolvent reinsurance company in Illinois. *Id.* at 421. An insurance company (Hartford) with a claim against the insolvent reinsurer sued the reinsurer's parent and subsidiaries in federal district court for their role in the reinsurer's demise. *Ibid.* In deciding that abstention was warranted, this Court emphasized that the federal district court and the state rehabilitation court would need to make the same rulings, *viz.*, the correct interpretation of reinsurance

treaties and the dividend that the reinsurer's creditors were entitled to receive. *Id.* at 426. Significantly, this Court stated that once the state court had ruled on these matters, Hartford could "come back to federal court with its lawsuit." *Id.* at 427.

In the case at bar, all of the outstanding issues are federal. The Wisconsin Court has determined that the federal tax liabilities of Ambac should be decided by a federal bankruptcy court in New York, the assets of Ambac are not in the custody of the Wisconsin Court, and the United States, as yet, has not filed a claim against the segregated account. The issues that the United States raises are based upon its sovereign immunity and its rights under the Internal Revenue Code and are unique to it. Accordingly, there is nothing to be decided by the Wisconsin Court that would justify the kind of temporary abstention that this Court approved in *Hartford*.[23] *Cf. Quackenbush*, 517 U.S. at

[23] This Court in *Hartford* observed that four factors, "[w]hile not the sole means of analysis," provided "useful guidance" "within in the context of the insurance industry." The factors are whether: (1) the cause of action is exclusively federal; (2) the suit requires ruling on issues directly relevant to state insurance regulation; (3) special state forums exist for insurance insolvencies; and (4) there are difficult issues of state law. 913 F.2d at 425. Subsequently, this Court in *Property & Casualty Ins., Ltd.*, 936 F.2d at 323, clarified that "[t]he ability to point to a specialized proceeding is a prerequisite of, not a factor in, the second type of *Burford* abstention." For the reasons discussed in Part II.A.3.b, *supra*, this threshold requirement is not satisfied. At all

(continued...)

730–31 (noting that, under *Burford*, the resolution of a disputed question of state law "might support a federal court's decision to postpone adjudication of a damages action").

Finally, the principal question presented by these cases is the federal question whether the McCarran-Ferguson Act authorizes reverse preemption. The District Court's *Burford* abstention ruling is merely an alternative one. If the Court holds that McCarran-Ferguson reverse preemption does not apply to the statutes granting federal-question jurisdiction to the federal courts, it would make little sense for the District Court to defer to the Wisconsin Court to answer the federal questions posed by the United States. *See Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 497 (7th Cir. 2011) ("Abstention doctrines are not intended . . . to alter policy choices that Congress itself considered and addressed"); *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) ("a district court has no authority to abstain from the exercise of [§ 1442 removal] jurisdiction on any ground other than the two specified in

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[23] (...continued)
events, the other factors also do not warrant abstention. The cause of action, which is based on the United States' sovereign immunity and the Internal Revenue Code, is exclusively federal and does not require rulings on issues directly relevant to state insurance regulation. Further, there are no difficult issues of state law. *Hartford*, thus, is inapposite for these additional reasons.

1447(c)"); *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571, 575 (4th Cir. 1989) ("discretionary abstention in the context of § 1442(a)(1) removal is therefore not available").

C. The existence of the segregated account does not deprive the District Court of jurisdiction over the issues raised by the United States

Citing cases such as *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), and *United States v. $79,123.49*, 830 F.2d 94 (7th Cir. 1987), the District Court held that the United States could be required to litigate all issues relating to "taxes owed by Ambac" (App. 19) in the Wisconsin Court (App. 14, 18–20). According to the District Court, "[a]llowing the United States to proceed against Ambac or any of the affiliates and subsidiaries would amount to pulling out the linchpin that secures the entire enterprise." (App. 14.) Thus, the District Court treated the segregated account like a typical *res* and apparently believed that the doctrine of prior, exclusive *in rem* jurisdiction was applicable.

When both a state and a federal court seek to adjudicate an *in rem* action, the court first obtaining custody over the property generally has exclusive jurisdiction, but when an action is *in personam*, both courts have concurrent jurisdiction (subject only to the possibility of *res*

judicata attaching to the first judgment rendered). *Donovan v. City of Dallas*, 377 U.S. 408, 412–13 (1964); *Bank of New York & Trust Co.*, 296 U.S. at 477–81; *$79,123.49*, 830 F.2d at 96–97. Even when jurisdiction is *in rem*, it is exclusive only insofar as is necessary for "enabl[ing] the court to exercise it appropriately and to avoid unseemly conflicts," and another court "does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property." *Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 198 (1935).

Assuming, *arguendo*, that the segregated account were a typical *res*, the District Court erred as a matter of law in declining to exercise jurisdiction over the preemption issues raised by the United States. For a long time, the Supreme Court has construed the rule precluding a state court's prior *in rem* jurisdiction from being disturbed by the federal courts as "excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and the laws of the United States." *Moran v. Sturges*, 154 U.S. 256, 275 (1894); *Covell v. Heyman*, 111 U.S. 176, 179–80 (1884). Even in cases not involving the United States, a federal court cannot dispose of property in the custody of a state court, but it can adjudicate

"matters outside those confines and otherwise within federal jurisdiction," including "rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." *Marshall v. Marshall*, 547 U.S. 293, 310–12 (2006); *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 554–55 (1942); *Dragstrem v. Obermeyer*, 549 F.2d 20, 27 (7th Cir. 1977) (*in rem* jurisdiction "does not preclude other courts from deciding any question that might eventually affect the property involved"). Finally, if the legality of the placement of an asset in a *res* is itself at issue, then the court holding the *res* would not have exclusive jurisdiction over that issue.[24] *$79,123.49*, 830 F.2d at 98 (citation omitted) ("Possession obtained through an invalid seizure neither strips the first court of jurisdiction nor vests it in the second.

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[24] *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154 (7th Cir.1976), cited by the District Court (App. 19), is distinguishable. In *Blackhawk*, this Court held that a federal district court lacked jurisdiction over a turnover action brought by the assignee of an insurer to obtain a reinsurer's assets properly under the control of a state receivership court. The Court's conclusion that an "ordinary assignee" had to file a claim in the receivership court and accept its place in line (*id.* at 158–59) does not speak to the instant case, which involves the legality of attempting to erase a federal tax liability by purporting to allocate it to a state-law segregated account.

To hold otherwise would substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine."); *In re First Assured Warranty Corp.*, 383 B.R. 502, 542 (Bankr. D. Colo. 2008) ("The McCarran-Ferguson Act is not so broad as to allow state insurance liquidators to strip non-insurance entities of their protections under the Bankruptcy Code by simply seizing their assets and wrapping them beneath the cloak of an insurance liquidation.").

The segregated account, however, does not hold a typical *res*. It is essentially an *ad hoc* collection of liabilities that Ambac and the insurance commissioner want to sequester. (A. 68–70, 73, 115, 117–120, 142.) Its *res* consists of notes payable from, and a reinsurance policy issued by, Ambac. (A. 70–71, 73–89, 186–187, 189–190.) Ambac holds the refund money, is severally liable under the Treasury Regulations, and is not under the control of the Wisconsin Court. (A. 50, 90, 106, 142; Oct. 8, 2010 disclosure statement at 1.) In other words, the *res* of the segregated account is claims against Ambac. When a *res* includes a debt, only the debt is part of the *res*, not the property of the debtor. *See Citizens Bank v. Strumpf*, 516 U.S. 16, 20–21 (1995) (regarding a federal bankruptcy estate). Courts with *in rem* jurisdiction cannot bar *in personam* actions regarding property

outside the *res*. *See*, *e.g.*, *Central States v. Old Security Life Ins. Co.*, 600 F.2d 671, 676–77 (7th Cir. 1979) (state insurance insolvency cannot preclude ERISA action over which Congress gave federal courts exclusive jurisdiction); *In re Johns-Manville Corp.*, 600 F.3d 135, 152–53 (2d Cir.) (bankruptcy court had *in rem* jurisdiction to enjoin claims against policies in bankruptcy estate, but not claims against insurers as separate defendants), *cert. denied*, 131 S. Ct. 644 (2010); *In re Lewis*, 512 F. Supp. 1146, 1149 (S.D.N.Y. 1981) (state insurance regulator could not block federal decertification of HMO by portraying restraining order as ancillary to *in rem* insolvency); *In re All-Star Ins. Corp.*, 484 F. Supp. 623, 624 (E.D. Wis. 1980) (debt-collection action to augment *res* is *in personam* and need not be brought in insurance insolvency court); *Appleton Papers*, 612 N.W.2d at 762, 764–65 (Wisconsin insurance receivership court cannot bar *in personam* action seeking federal remedy from federal court). Thus the District Court had jurisdiction to decide whether the IRS could employ its statutory collection rights to recover the refund money held by Ambac outside the segregated account.

In sum, the District Court erred in refusing to exercise jurisdiction in these cases. The McCarran-Ferguson Act does not

authorize reverse preemption of the federal jurisdictional statutes, and *Burford* abstention does not apply. In addition, the *in rem* jurisdiction of the Wisconsin Court does not deprive the District Court of jurisdiction to decide matters relating to entities not in rehabilitation and property not within the custody of the Wisconsin Court.

III

The United States is entitled to relief from the supplemental injunction issued by the Wisconsin Court because the injunction violates the United States' sovereign immunity and because it is barred by the Tax Anti-Injunction Act, I.R.C. § 7421(a)

Standard of review

After it filed its notice of removal, the United States filed a motion to dissolve the supplemental injunction entered by the Wisconsin Court against it. (Doc.(10-778) 10; Doc.(10-778) 13.) In its second action, the United States sought to enjoin the enforcement of the supplemental injunction and, alternatively, sought a declaratory judgment that the injunction was void. (A. 196–210.) The District Court declined to exercise jurisdiction over both cases, and, therefore, declined to rule on the merits of the United States' request for relief. (App. 21, 31.) Although the Court may remand the questions presented for consideration by the District Court in the first instance, we submit

that, because the relief requested presents legal issues on undisputed facts, a ruling by this Court would be appropriate.

A. Introduction

As noted above, in the two district court actions, the United States sought relief from a Wisconsin court injunction barring tax collection. The United States relied on two legal bases: (1) it had not waived its sovereign immunity to allow the injunction; and (2) the Anti-Injunction Act, I.R.C. § 7421(a), barred the injunction. If the Court concludes that there was jurisdiction over the removed action, in which the United States sought the *dissolution* of the supplemental injunction, there is no need to consider the traditional factors applied in *issuing* an injunction.[25] As we demonstrate below, the injunctions were barred as a matter of law by the United States' sovereign immunity and, alternatively, by the Anti-Injunction Act. Accordingly the supplemental injunction should be dissolved.

If the Court concludes that jurisdiction over the first appeal (remanding the removal) is lacking, but that the District Court had jurisdiction over the second case, the Court still does not need to conduct a full-fledged analysis of the traditional equitable principles in

[25] *See Sierra Club v. Franklin County Power of Ill., LLC*, 546 F.3d 918, 935 (7th Cir. 2008) (setting forth factors).

considering the United States' request for an injunction against the Wisconsin Court. The United States sought the injunction under I.R.C. § 7402, which is a specific statute mandating relief when "necessary or appropriate for the enforcement of the internal revenue laws." As such, the only showing the United States must make is that the state court injunction purports to restrain the assessment and collection of federal taxes and otherwise interferes with the administration of the federal tax system in violation of the Internal Revenue Code. *See Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 842–43 & n.1 (7th Cir. 2005) (if "statute clearly mandates injunctive relief for a particular set of circumstances," traditional equitable considerations do not apply); *United States v. Thompson*, 395 F. Supp. 2d 941, 945–46 (E.D. Cal. 2005) (applying the rule cited in *Bedrossian* to I.R.C. § 7402); *United States v. Stoll*, 2005 WL 1763617 at *8 (W.D. Wash. 2005) (same); *see also In re Dow Corning Corp.*, 280 F.3d 648, 657–58 (6th Cir. 2002) (in holding that power to grant injunctions in 11 U.S.C. § 105(a) is not "confined to traditional equity jurisprudence," Sixth Circuit relied on fact that I.R.C. § 7402(a) is also such a statute); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since Section

7408 [of the Internal Revenue Code] expressly authorizes the issuance of an injunction").

Alternatively, if the United States establishes that its sovereign immunity was violated, the injunction should issue for this reason alone. A state court order that violates the United States' sovereign immunity, if undisturbed, does violence to the Supremacy Clause of the United States Constitution and therefore inflicts irreparable harm. *See Connecticut Dept. of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231 (2nd Cir. 2004). *Cf. EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (violation of Indian Tribe's sovereign immunity constitutes irreparable injury). Accordingly, if the United States establishes that its sovereign immunity was violated by the Wisconsin Court's order, it has established both that it will succeed on the merits and that it has suffered irreparable injury. This showing, in turn, warrants an injunction. *See Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009) (holding that success on the merits and irreparable injury "are the most critical" factors).[26]

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[26] While establishing the most critical factors of irreparable injury and success on the merits should be sufficient to obtain an injunction, we also maintain that the other equitable factors favor the United States. There would be no hardship for the segregated account because Treas. Reg. § 301.6331-1(a)(3) already restrains the IRS from levying

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Thus, whether the United States is entitled to relief from the Wisconsin Court's injunction ultimately turns on whether the United States' sovereign immunity or the Tax Anti-Injunction Act barred the injunction, which, as we show below, they both plainly did.

B. The United States has not waived its sovereign immunity to allow the Wisconsin Court to enjoin it from collecting taxes, and the McCarran-Ferguson Act, which only authorizes the reverse preemption of statutes, is irrelevant

It is well established that the United States, as sovereign, may not be sued without its consent, that sovereign immunity can be waived only by express statutory language, and that waiver statutes are strictly construed in favor of the sovereign. *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. King*, 395 U.S. 1, 4 (1969); *United*

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[26] (...continued)
on that account. On the other hand, the supplemental injunction jeopardizes the IRS's ability to recover $708 million in tentative refunds from Ambac, which is *not* in rehabilitation, and, if not overturned, invites states other than Wisconsin to enact insurance statutes that can be used to restrain federal tax collection from entities that are not under receivership. Further, the public interest is also served by the relief requested by the United States. The purported "allocation" of Ambac's federal tax liabilities to the segregated account is, at bottom, an unprecedented (and entirely unwarranted) attempt to eliminate Ambac's federal tax liabilities. It has long been recognized that the IRS "in effect represents the interests of all other taxpayers who must bear what the particular taxpayer unjustly escapes." *Alamo Nat'l Bank v. Commissioner*, 95 F.2d 622, 623 (5th Cir. 1938).

States v. Sherwood, 312 U.S. 584, 586–88 (1941). A suit is against the sovereign, and sovereign immunity is implicated, whenever the relief sought would expend itself on the public treasury, interfere with public administration, or compel or "restrain the Government from acting." *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 433 (7th Cir. 1991). The *ex parte* injunction granted by the Wisconsin Court plainly implicates sovereign immunity because it prevents the United States from collecting taxes, thereby restraining it from acting to protect the federal fisc.

Moreover, there is no statute waiving the United States' sovereign immunity to allow an injunction preventing it from assessing or collecting Ambac's federal tax liabilities that are the subject of the Wisconsin Court's supplemental injunction. The courts did not identify one,[27] and the only statute cited by the insurance commissioner in the proceedings below as a waiver of sovereign immunity was 28 U.S.C.

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[27] The Wisconsin Court issued its supplemental injunction in a short, *ex parte* order that did not discuss sovereign immunity. (A. 146–149.) In the removal suit seeking the dissolution of that injunction, the District Court did not address sovereign immunity because it declined to exercise jurisdiction and therefore did not consider the United States' motion to dissolve. (App. 21.) In the later original-jurisdiction suit seeking injunctive and declaratory relief, the District Court again concluded (erroneously we submit) that it lacked jurisdiction because the McCarran-Ferguson Act authorized reverse preemption of the statutes that gave it jurisdiction. (App. 28–29, 31.)

§ 2410. (Doc.(10-778) 21 at 29–32.) That statute, however, is a limited waiver of sovereign immunity for quiet title actions and applies only where "the United States has or claims a mortgage or other lien" against property. To date, the United States does not have or claim a lien, and the statute, therefore, is irrelevant. Section 2410 simply does not apply in the situation presented in the instant case — *viz.*, the seeking of injunctive relief based on speculation that the IRS might seize property in the future. *SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127, 138–39 (2d Cir. 2002) (§ 2410 inapplicable to receiver's concern about a future tax assessment); *Watson v. Chessman*, 362 F. Supp. 2d 1190, 1197–98 (S.D. Cal. 2005) ("speculation that the IRS may seek a lien against the property, some time in the future" is not grounds for an action under § 2410).

The McCarran-Ferguson Act cannot override sovereign immunity. The Act applies, by its own terms, only to "Act[s] of Congress." 15 U.S.C. § 1012(b). *See Safety Nat'l Cas. Corp. v. Certain Underwriters At Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009) (McCarran-Ferguson inapplicable to treaty provisions effective without implementing legislation), *cert. denied*, 131 S. Ct. 65 (2010). Sovereign immunity, however, is an inherent prerogative of the United States as

sovereign. It was not created by an act of Congress, and a statute directed at acts of Congress cannot breach that prerogative. *See United States v. Thompson*, 98 U.S. 486, 489–90 (1878) (sovereign immunity was ancient, common-law Crown prerogative imparted to federal government). For example, in *In re Lewis*, 512 F. Supp. at 1149–50, the district court dissolved a temporary restraining order by a state insurance insolvency court against a federal agency because the McCarran-Ferguson Act did not override sovereign immunity. The court observed that: "The federal official has been enjoined from performing his regulatory duty. It is an action against the United States and its officer. No waiver or consent has been identified which overcomes sovereign immunity or permits the suit." *Id.* at 1149. The court thus concluded that "[t]he Supremacy Clause alone seems sufficient support for the proposition that a federal regulator may not be enjoined from performing his regulatory duties solely by reason of a state rehabilitator's hopes to achieve a successful rehabilitation." *Id.* at 1150.

C. The Anti-Injunction Act also barred the Wisconsin Court's supplemental injunction, and the statute was not reverse preempted by the McCarran-Ferguson Act

The Anti-Injunction Act, I.R.C. § 7421(a), provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The Act has been read broadly to encompass not only the assessment and collection of taxes, but also activities which are intended to, or may culminate in, assessment or collection. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 738–39 (1974); *Smith v. Rich*, 667 F.2d 1228, 1230 (5th Cir. 1982). The supplemental injunction at issue here does not come within any of the exceptions specified in the statute, and it enjoins the United States and its agency, the IRS, from (among other things) "taking any prejudgment or other *steps to* transfer, foreclose, sell, assign, garnish, *levy*, *encumber*, attach, dispose of, or exercise purported rights *in or against any property or assets of* the Segregated Account, *Ambac*, the Allocated Subsidiaries, or the Ambac subsidiaries in respect of" Ambac's federal tax liabilities. (A. 148 (emphasis added).) Accordingly,

there is no question that the injunction restrains the collection of tax and therefore violates the Anti-Injunction Act.

The Anti-Injunction Act is not reverse preempted by the Wisconsin receivership statutes under the McCarran-Ferguson Act. As previously discussed, pp. 53–54, *supra*, if a particular provision of the state statute was not enacted for the purpose of regulating the business of insurance, then McCarran-Ferguson reverse preemption does not apply to that provision. Here, the Wisconsin statute was applied in an attempt to "allocate" an insurance company's federal tax liabilities to a "segregated account," and thereafter to preclude the United States from collecting those tax liabilities from the company itself. Such an application is not "'aimed at protecting or regulating' the performance of an insurance contract" (*Fabe*, 508 U.S. at 505), nor is it "reasonably necessary to further the goal of protecting policyholders" (*id.* at 509). While this strategem may generate revenue to finance the bailout of an improvident insurance company, it is not the regulation of the business of insurance.

Furthermore, if such an application of a Wisconsin statute can be deemed to have a purpose of regulating the business of insurance, then the first McCarran-Ferguson requirement is not satisfied. As was the

case with I.R.C. § 7402, pp. 68–72, *supra*, if insulating Ambac from any liability to return incorrectly claimed tentative refunds of federal tax previously paid on insurance-business income constitutes "regulating the business of insurance," then the Internal Revenue Code — which contains a subchapter explicitly addressing the taxation of insurance companies and which also includes I.R.C. § 7421(a) — "specifically relates to the business of insurance."[28] The Anti-Injunction Act, after all, is a provision assuring that assessment and collection of the tax imposed on income from the conduct of the insurance business is not improperly frustrated.

In conclusion, the Wisconsin Court's supplemental injunction violates the United States' sovereign immunity, and is barred by the Anti-Injunction Act. If this Court determines that it has jurisdiction over the removal action (appeal no. 11-1158), it should dissolve the Wisconsin Court's injunction. If the Court determines that it has jurisdiction only over the second action (appeal no. 11-1419), this Court should remand with instructions that the District Court issue, pursuant to I.R.C. § 7402(a), an order declaring to be void the

[28] Indeed, the tentative refunds at issue stem from claimed losses due to a change in the method of accounting for income associated with the insurance business. (A. 139–140, 154.)

Wisconsin Court's supplemental injunction and the rehabilitation order to the extent that it made permanent that injunction, and barring their enforcement.

CONCLUSION

The Court should reverse the District Court's remand in appeal no. 11-1158 and its dismissal in appeal no. 11-1419. It should then either dissolve the Wisconsin Court's injunction against the collection of Ambac's tax liabilities under 28 U.S.C. § 1292(a), or remand with instructions that the District Court declare the Wisconsin Court's injunction void and enjoin any attempt to enforce that injunction.

Respectfully submitted,

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Case Nos. 11-1158, 11-1419

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(s) /s/ Anthony T. Sheehan

Attorney for United States of America

Dated: October 28, 2011

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It is hereby certified that, on this 28th day of October, 2011, this brief and required short appendix was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen (15) paper copies were sent to the Clerk by First Class Mail. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed two copies of the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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CIRCUIT RULE 30(d) CERTIFICATION

All of the materials required by Seventh Circuit Rule 30(a) are included in this appendix. All of the materials required by Seventh Circuit Rule 30(b) are included in the separately bound appendix filed herewith.

/s/ Anthony T. Sheehan
Attorney

Required short appendix bound with the brief:

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IN THE MATTER OF THE
REHABILITATION OF SEGREGATED
ACCOUNT OF AMBAC ASSURANCE
CORPORATION

____

THEODORE K. NICKEL, COMMISSIONER
OF INSURANCE OF THE STATE OF
WISCONSIN,[1]

OPINION and ORDER

Petitioner,

10-cv-778-bbc

v.

UNITED STATES OF AMERICA,

Respondent.

- -

This proceeding was removed to this court from the Circuit Court for Dane County, Wisconsin, by the United States. It is before the court on two motions: the Commissioner of Insurance's motion for remand and the United States' motion to dissolve the order entered in the state court enjoining the United States from taking certain actions related to

[1] Theodore K. Nickel replaced Sean Dilweg as Commissioner of Insurance for the State of Wisconsin on January 3, 2011.

the potential tax liability of Ambac Assurance Corporation. A hearing was held on both motions on January 12, 2011.

This order addresses only the first motion, in which I conclude that the case was removed improperly from the state court. In particular, I conclude that the United States' removal of the state court injunction matter is preempted under the McCarran-Ferguson Act, which leaves to the states the business of insurance. Also, I am persuaded that the principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943), require abstention in this case. I will not discuss the United State's motion to dissolve the state court injunction because removal was improper and jurisdiction does not exist to entertain it.

From the record and from the facts adduced at the hearing, I find the following facts solely for the purpose of deciding the pending motions.

FACTS

Ambac is a Wisconsin insurance corporation with headquarters in New York. For most of the past 30 years, it has been one of the two largest insurers of financial guarantees. It is a "monoline" insurer, providing financial guaranty insurance on financial products such as residential mortgage-backed securities, credit default swaps, commercial asset-backed securities and other substantial financial transactions.

Ambac is a wholly-owned subsidiary of Ambac Financial Group Inc., a holding company headquartered in New York City. Throughout the relevant time period, Ambac Financial filed consolidated federal income tax returns for itself and its subsidiaries, including Ambac.

Ambac's financial condition began to deteriorate in late 2007, when many of the transactions it had insured proved to be worth less than they had been held out to be. As the company saw the increase of actual and estimated future losses growing over the following two years and the resulting damage to its credit rating, it stopped writing new policies and began a functional run-off of its policies in force.

Concurrently, the Wisconsin Office of the Commissioner of Insurance began increasing its oversight of Ambac and retained advisers with experience in the specialized complex financial transactions of companies. By early 2010, the office had decided that formal regulatory action was necessary. Accordingly, it implemented the provisions of Wis. Stat. ch. 645, which applies to the rehabilitation and liquidation of insurance companies operating in Wisconsin.

In light of the complexity of the insured transactions and his concern for minimizing the risks to policyholders, the Commissioner of Insurance decided not to undertake a full rehabilitation of the company, which he feared would cause unnecessary and avoidable losses to policyholders and possibly to the economy. If, for example, a transaction that was not at

risk was included in the rehabilitation process, the lenders behind the risk-free notes might have the right to withhold financing for the payment of the notes, thereby giving the counterparties on the notes the right to accelerate and declare default. In those instances, the issuers might not be able to make the accelerated damages payments and would turn to Ambac to cover the payments.

To avoid unnecessary risk, the Commissioner took advantage of Wis. Stat. § 611.24(2), which permits an insurer to establish a segregated account for any part of its business, with the Commissioner's approval. To carry out the segregation, the Commissioner reviewed Ambac's business to evaluate its exposure under its policies. His staff determined that about 1,000 out of Ambac's 15,000 policies had material projected losses, structural problems with the underlying transactions and contractual triggers that could not be avoided except by court action. He assigned these to a "segregated account," while keeping the remainder in Ambac's general account, where they would not be subject to acceleration, early termination or other triggers. All policies with material anticipated losses and all other known, potentially material non-policy liabilities of Ambac's general account are allocated to the segregated account, including the general account's obligations under certain reinsurance contracts and disputed contingent liabilities related to two office leases. The segregated account has no claim-paying assets of its own, but is capitalized by a two-billion dollar secured note issued by Ambac to the account and an aggregate excess of loss

reinsurance agreement provided by Ambac. Plan of Operation, dkt. #13-3, at 3. Under the terms of the secured note, dkt. #31-1, and reinsurance agreement, dkt. #23-3, the segregated account may call upon the general account to pay claims allocated to the segregated account, as long as payment of the segregated account claims would not cause Ambac's assets to fall below $100 million, which is less than 2 % of Ambac's claim-paying assets. In other words, the segregated account has access to 98 % of Ambac's current assets with which to pay claims. In addition, Ambac may not enter into any transaction involving more than $5 million without the segregated account's prior written consent, with the exception of certain investments and policy claims made in the ordinary course of business. On March 24, 2010, the Commissioner asked the Circuit Court for Dane County, Wisconsin, to rehabilitate the segregated account. For the purpose of the rehabilitation, the segregated account is considered a separate insurer from Ambac. On the same day, as part of the rehabilitation, the Commissioner moved ex parte under Wis. Stat. § 645.05 to obtain "first-day injunctive relief" that barred all persons and entities from commencing or prosecuting any actions against the general account "in respect of the segregated account or policies, contracts, or liabilities allocated to the segregated account." First-Day Injunction, Dkt. #14, Exh. D, ¶ 1. Once the injunction was in place, petitioner provided court-approved notice of the rehabilitation and the First-Day Injunction by mail, publication and a posting on a court-approved website, http://ambacpolicyholders.com. Respondent United States had no

advance knowledge of the rehabilitation proceeding or its scope.

The United States' interest in the proceeding grows out of a "tentative" federal tax refund it paid to Ambac Financial from 2008 through 2010, in the amount of approximately $700 million. Ambac Financial allocated the $700 million refund to Ambac. The refund was paid under 26 U.S.C. § 6411, which requires the Internal Revenue Service to provide such refunds within 90 days of an application by a corporate taxpayer asserting that it has overpaid tax because of a net operating loss carryback. The refund is termed tentative, because the IRS retains the right to conduct a more thorough audit of the taxpayer's application later and recapture any funds it has paid erroneously.

On October 28, 2010, the IRS sent Ambac Financial an information document request seeking information related to the basis for the refunds, asking, among other things, whether Ambac Financial had received advance permission from the IRS before changing its accounting method. Within ten days, Ambac Financial filed for Chapter 11 bankruptcy protection in the Southern District of New York and filed an adversary proceeding in the bankruptcy court to determine its tax liability. (Ambac Financial is not in the business of insurance and therefore not entitled to the protections of the rehabilitation proceeding.) The action is pending. On November 7, 2010, Ambac allocated to its segregated account any liabilities it has or may ever have arising from its federal taxes through December 2009 and specifically any liabilities it may have with respect to the tax refund.

The Commissioner approved the allocation, filed a "notice" with the Dane County court and served the notice on the United States on or about November 8, 2010, the same day that Ambac Financial filed for bankruptcy. On the same day, the Commissioner obtained an injunction from the Dane County court enjoining the United States from initiating any type of lawsuit in regard to Ambac's potential federal tax liabilities in any court, administrative body or other tribunal against the segregated account or any subsidiary of Ambac whose stock or other form of ownership interest were allocated to the segregated account, to Ambac, to any subsidiary of Ambac or the rehabilitator. The order enjoined the United States from taking any prejudgment or other steps to transfer, foreclose or exercise purported rights in or against any property or assets of the segregated account, Ambac or Ambac subsidiaries in relation to any potential future federal tax liabilities of Ambac. The Commissioner served the United States a copy of the injunction, his motion seeking the injunction and a "Notice of Amendment to Plan of Operation for the Segregated Account."

The United States removed the state court action to this court on December 8, 2010. In its notice of removal, dkt. #1, it specified that it was not removing "issues and/or claims in this rehabilitation action that are unrelated to the Internal Revenue Service, and the Notice, Motion and Order filed on November 8, 2010."

OPINION

The threshold question is whether the United States can remove all or part of the rehabilitation proceeding to this court. If the removal is improper, this court lacks jurisdiction to hear any of the government's challenges to the order entered in the proceeding.

The Commissioner has raised the question by moving for remand. He contends first that the United States is legally incapable of removing the case because it is not a party to the action and the rehabilitation proceeding is not a "civil action" under the applicable removal statute, 28 U.S.C. § 1442. Second, he argues that the McCarran-Ferguson Act "reverse-preempts" federal jurisdictional statutes such as § 1442 that were not enacted specifically to govern or relate to the business of insurance. In other words, the Act is the mirror image of federal laws that preempt state action, effecting preemption with respect to federal laws and actions that bear on state laws governing the business of insurance. Finally, the Commissioner relies on Burford v. Sun Oil Co., 319 U.S. 315 (1943), to support his argument that federal courts should abstain from interfering with specialized, ongoing state regulatory schemes. Because I find the Commissioner's second and third arguments to be persuasive, I need not address the question whether the United States can satisfy the specific requirements of the federal removal statutes.

A. The McCarran-Ferguson Act

It is well established that the business of insurance is left to the states. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, passed in 1945, Congress made it clear that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The Act provided that "[n]o 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012. In United States Department of the Treasury v. Fabe, 508 U.S. 491 (1993), the Supreme Court ruled that the "business of insurance" extended to proceedings to liquidate or rehabilitate an insurance company.

The Commissioner argues that even if this proceeding had been removed properly, the court would have to remand it because neither the federal removal statutes nor the federal laws authorizing the levying and collection of federal taxes can override state law as it relates to the rehabilitation of an insurance company. The United States disputes this proposition, but not convincingly. It argues that federal tax powers trump state law as it relates to insurance because the power of the Internal Revenue Service to levy and collect taxes derives directly from Art. I, § 8 of the Constitution. In fact, those powers belong to the Congress; the IRS derives its authority from Congress.

Contrary to the United States' argument, the McCarran-Ferguson Act does not exempt federal tax laws from its prohibition. It is true that under the Anti-Injunction Act, 26 U.S.C. § 7421(a), no *state* law or *state* court can restrict the assessment or collection of taxes. Id. ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"). However, it does not follow that *federal* law in the form of the McCarran-Ferguson Act cannot override this statute and any others insofar as they threaten to impede or impair the state's regulation of the business of insurance.

As the Court of Appeals for the Seventh Circuit has recognized, the McCarran-Ferguson Act overturns the ordinary preemptions rules by imposing a rule that state laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless the federal statute specifically provides otherwise. American Deposit Corp. v. Schacht, 84 F.3d 834, 837-38 (7th Cir. 1996) (citing United States Department of Treasury v. Fabe, 508 U.S. 491, 507 (1993)). In American Deposit, the conflict arose out of the desire of national banks to sell Retirement CDs as permitted under the National Bank Act but not allowed by the Illinois director of insurance. Siding with the director, the court of appeals found that the McCarran-Ferguson Act governed the matter.

The United States cites a number of cases in which federal courts have ruled in its favor on questions involving taxation, but these do little to advance its argument. In Security Industrial Insurance Co. v. United States, 702 F.2d 1234 (5th Cir. 1983); Allied

Fidelity Corp. v. Commissioner, 572 F.2d 1190, 1192 (7th Cir. 1978); and Modern Life & Accident Insurance Co. v. Commissioner, 420 F.2d 36 (7th Cir. 1969), the issue was the proper classification for federal tax purposes of an insurance corporation or its subsidiary or the legitimacy of the way in which it had organized itself. None of these cases implicated the policy behind the McCarran-Ferguson Act because the basis on which the federal government taxes an insurance company did not "impair" or otherwise interfere with state regulations categorizing insurance companies for different purposes. The United States is correct that in these cases the Act does not constrain the federal government's right to assess and collect federal taxes from insurance companies, but its point is irrelevant. The Commissioner is not arguing that the United States cannot collect taxes from insurance companies in general or from Ambac in particular or that it can never pursue return of the refund if it determines it was improper; he argues only that under the McCarran-Ferguson Act, the United States must conform its efforts to the restrictions necessary to the effectiveness of the state's rehabilitation proceedings.

Similarly, the McCarran-Ferguson Act can restrict the right of removal to federal court in cases in which a state statute governing insurance sets up a comprehensive framework for state rehabilitation proceedings to be conducted in state court and removal would impair that framework. E.g., Hudson v. Supreme Enterprises, Inc., 2007 WL 2323380, *6-7 (S.D. Ohio Aug. 9, 2007); In re Amwest Surety Insurance Co., 245 F. Supp. 2d 1038, 1044-45 (D.

Neb. 2002); Covington v. Sun Life of Canada (U.S.) Holdings, Inc., 2000 WL 33964592, *9-10 (S.D. Ohio May 17, 2000); United States Financial Corp. v. Warfield, 839 F. Supp. 684, 688-90 (D. Ariz. 1993). In this case, Wis. Stat. ch. 645 vests jurisdiction in the state rehabilitation court over matters related to the rehabilitation of an insurer. Wis. Stat. § 645.04. The state court has authority to enjoin any action that may interfere with the proceedings or "lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding." Wis. Stat. § 645.05. These sections of chapter 645 relate specifically to regulating the business of insurance. Application of the federal removal statutes would impair the operation of chapter 645 by depriving the state rehabilitation court of jurisdiction, disrupting the goal of a comprehensive rehabilitation structure and interfering with the orders issued by the state court for the purpose of protecting assets payable to claimants. In sum, the federal removal statutes would "invalidate[], impair[], or supersede[] the state laws at issue in this case." Hudson, 2007 WL 2323380, at *7; see also Munich American Reinsurance Co. v. Crawford, 141 F.3d 585, 595 (5th Cir. 1998) ("Congress has evinced a strong federal policy in favor of deferring to state regulation of insolvent insurance companies as reflected in the McCarran-Ferguson Act and the express exclusion of insurance companies from the federal Bankruptcy Code. These laws symbolize the public interest in having the States continue to serve their traditional roles as the preeminent regulators of insurance in our federal system

and indicates the special status of insurance in the realm of state sovereignty.") (citations omitted).

The United States contends that even if removal may be restricted in some cases, the principles of preemption should not apply here because it is challenging the injunction only as it affects property that is not controlled by the rehabilitation court or rehabilitation statutes. However, the United States takes a narrow view of the rehabilitation proceeding, focusing on the fact that the only *res* technically subject to the rehabilitation court's jurisdiction is the segregated account, which contains all of Ambac's questionable assets. It overlooks the lengths to which the Commissioner has gone to control the material risks to the claims-paying resources of Ambac and to treat them in the same way it would treat those risks in a full rehabilitation.

Technically, the rehabilitation proceeding extends only to the segregated account to which certain of the Ambac's liabilities are allocated. In reality, it extends to the general account and to Ambac's affiliates and subsidiaries to the extent that these entities are lenders or insurers of the segregated account. Although the segregated account is deemed to be a separate insurer for purpose of rehabilitation, it is not actually a separate corporation from Ambac. Indeed, the whole point of the rehabilitation is to rehabilitate Ambac Assurance Corporation. The Commissioner and the presiding judge have made the decision that treating the assets and liabilities as they have is best calculated to lead to a successful

rehabilitation. The judge held a five-day hearing on the scope and nature of the proceeding and determined that the relationship between the general account and segregated account is fair and equitable. Thus, the plan to rehabilitate the segregated account depends in large part on the assets of the general account being protected by the first-day and supplemental injunctions. Allowing the United States to proceed against Ambac or any of the affiliates and subsidiaries would amount to pulling out the linchpin that secures the entire enterprise. Cf. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477-78 (1936) (in dispute over right to funds belonging to Russian insurance companies that were being held in state court in connection with liquidation and distribution, United States was not entitled to maintain suit in federal court for accounting of funds; such suit was not merely to establish debt or right to share in property but rather, sought control of property and could not be litigated without disturbing control of *res* by state court); Metropolitan Life Insurance Co. v. Board of Directors of Wisconsin Insurance Security Fund, 572 F. Supp. 460, 471 (W.D. Wis. 1983) (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. . . .").

Finally, the United States contends that even if the McCarran-Ferguson Act reverse-preempts removal statutes in some situations, the Act has no effect when the party

attempting removal is a government agency asserting a federal claim. The United States cites Granite Reinsurance Co. v. Frohman, 2009 WL 2601105 (D. Neb. 2009), in which a creditor filed an action against the Federal Crop Insurance Corporation (FCIC) and the liquidated insurance company seeking to collect unpaid premiums on reinsurance policies. The FCIC removed the matter to federal court pursuant to § 1442(a) and the liquidator filed a motion to remand that the federal court denied. However, the court did not hold that federal agencies possess an unrestricted right to remove, as the United States suggests; rather, the court noted specifically that the FCIC was a "federal agency charged with implementing a federal insurance program." Id. at *5. Thus, actions by the FCIC fell into the exception to McCarran-Ferguson for federal statutes relating specifically to insurance. The IRS is not an agency directed specifically to implement an insurance program and thus, Granite Reinsurance does not help it.

In sum, I conclude the McCarran-Ferguson Act restricts the United States' right to remove this case to federal court, even though the taxing authority of the Internal Revenue service may be implicated by the state rehabilitation court's supplemental injunction. Even if the United States' right to remove was not preempted, I would remand this case to the state court on the basis of the principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943).

B. Abstention

In Burford, the United States Supreme Court held that federal courts should abstain from interfering with specialized, ongoing state regulatory schemes. Abstention under Burford is appropriate in two situations: "First, federal courts should abstain from deciding difficult questions of state law bearing on policy problems of substantial import. . . ." International College of Surgeons v. City of Chicago, 153 F.3d 356, 362 (7th Cir. 1998) (internal quotations omitted). Second, courts "should also abstain from the exercise of federal review that would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Id. The Court of Appeals for the Seventh Circuit has applied the second type of Burford abstention in cases involving state insurance rehabilitation proceedings, noting that states have assumed primary responsibility for regulating the insurance industry. E.g., Hartford Casualty Insurance Co. v. Borg-Warner Corp., 913 F.2d 419, 425-27 (7th Cir. 1990) (finding Burford abstention appropriate where Illinois had implemented state-court rehabilitation proceeding that would resolve plaintiff's claims); see also Mountain Funding, Inc. v. Frontier Insurance Co., 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004) (abstention appropriate where insurance liquidation proceeding was adjudicating all claims against defendant in detailed and uniform manner); Metropolitan Life Insurance Co., 572 F. Supp. 460 (in case involving challenge to Wisconsin statutes governing operation of Wisconsin Insurance Security Fund, abstention was required under Burford and

Colorado River Water Conservation District v. Untied States, 424 U.S. 800, 814 (1976), to avoid conflicts with state's ongoing rehabilitation-liquidation proceeding of insurer). However, abstention is proper under Burford only if the state "offer[s] some forum in which claims may be litigated," and that forum "stand[s] in a special relationship of technical oversight or concentrated review to the evaluation of those claims." Property & Casualty Insurance Ltd. v. Central National Insurance Co. of Omaha, 936 F.2d 319, 323 (7th Cir. 1991).

The United States asserts several reasons why abstention would be inappropriate in this case, including the absence of any unsettled questions of state law, the uniqueness of the circumstances and the unlikelihood of any disruption to Wisconsin's insurance regulatory scheme and the presence of important federal tax issues. In addition, it contends that dissolution of the supplemental injunction would have little affect on the rehabilitation proceedings because the assets covered by the injunction are not covered by the rehabilitation case. None of these arguments are persuasive.

Wisconsin has a great interest in maintaining a uniform insurance rehabilitation process that provides strong protection to policyholders. Property & Casualty Insurance Ltd., 936 F.2d at 323. To accomplish this, the state has assumed primary responsibility for regulating the insurance industry. In re All-Star Insurance, 484 F. Supp. 623, 626 (W.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.") (citations omitted). The Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court, which has the authority both to enjoin actions that threaten the success of the rehabilitation and to address challenges to the structure of the rehabilitation. The statutes allow the rehabilitator to segregate accounts in order to achieve greater protection for policyholders. Ultimately, claims against the segregated account will be collected in the rehabilitation court and paid according to Wisconsin's priority statutes.

Federal court review of the United States' claims would be disruptive of the state's rehabilitation goals and procedures. The rehabilitation proceeding has been in state court for roughly ten months and includes nearly 1,000 financial guaranty insurance policies insuring approximately $60 billion of financial obligations. Removal of this case to federal court has taken the proceedings out of state court and stalled confirmation of the rehabilitation plan. In addition, it has deprived the state court of the ability to address a direct challenge to the lawfulness of the rehabilitation structure and account allocation and has created the potential for conflicting rulings.

Also, the removal has the potential of interfering with the state's priority statutes and

the Commissioner's final rehabilitation plan. Although the United States removed the case for the purpose of seeking dissolution of the supplemental injunction, it has requested that this court retain jurisdiction over any future issues that might arise related to the Internal Revenue Service's attempts to collect taxes owed by Ambac. The United States admits that such issues may include whether the IRS may assert priority over other claimants to assets that would otherwise be used to pay claims on the segregated account. Thus, this case has the potential for disrupting any rehabilitation plan developed by the Commissioner and approved by the state court. Courts have recognized that under such circumstances, policyholders are best served by avoiding competing actions in federal court. Blackhawk Heating & Plumbing Co. v. Geeslin, 530 F.2d 154, 159-60 (7th Cir. 1976) ("The liquidation . . . 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 issues confronting another court in pending proceedings."); Metropolitan Life, 572 F. Supp. at 471. Under such circumstances, abstention is appropriate.

The United States has not argued that its claims cannot be heard in the rehabilitation proceeding. The state rehabilitation court has allowed entities with an interest in the rehabilitation an ongoing right to be heard and apply for relief. In fact, the state court has heard challenges to the lawfulness of the account allocation and structure and the first-day injunction. As other claimants have done, the United States may present its challenges to

the state court, argue its position on the merits and if the result is unsatisfactory, appeal to the Wisconsin Court of Appeals. Cf. Bank of New York & Trust, 296 U.S. at 481 ("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."); United States v. $79,123.49 in United States Cash and Currency, 830 F.2d at 99 ("[T]he United States "is in no position to claim that its interests . . . could not be preserved by a Wisconsin court.").

In many respects, the state rehabilitation proceedings and the supplemental injunction are similar to federal bankruptcy proceedings and the automatic stay that goes into effect in bankruptcy. Insurance companies are barred from using bankruptcy to reorganize; their only remedy is a state court rehabilitation proceeding. As in bankruptcy, the efficacy of a rehabilitation proceeding is dependent upon the court's ability to stay actions by creditors that will interfere with the court's ability to manage the proceeding. When a claimant is affected by the stay, the claimant challenges the effect in the bankruptcy court and if the result is unfavorable, it appeals. The claimant does not file a separate proceeding in a separate court to determine whether the stay should apply, as the United States has done in this case.

Finally, the state rehabilitation court is uniquely qualified to hear these claims. It has the most familiarity with the rehabilitation proceeding and the applicable state statutes.

Thus, the principles of Burford require abstention in this case to permit resolution of the United States' claims through the available mechanisms in the state rehabilitation proceedings.

For the foregoing reasons, I will grant petitioner's motion to remand this case to the Circuit Court for Dane County. Because I conclude that removal was improper, I will not address the United States' motion for dissolution of the supplemental injunction.

ORDER

IT IS ORDERED that petitioner Theodore K. Nickel's motion to remand, dkt. #12, is GRANTED and this case is REMANDED to the Circuit Court of Dane County for lack of subject matter jurisdiction. The clerk of court is directed to transmit the file to the Circuit Court of Dane County.

Entered this 14th day of January, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION and ORDER

Plaintiff,

11-cv-99-bbc

v.

WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY; THEODORE K. NICKEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation; and AMBAC ASSURANCE CORPORATION,

Defendants.

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On January 18, 2011, I concluded that this court lacked jurisdiction to consider the legality of a state court's order made in the context of an insurance rehabilitation proceeding that enjoined the United States from taking certain actions against the claims-paying assets of the segregated account of Ambac Assurance Corporation. Nickel v. United States, 10-cv-778-bbc, dkt. #36. Less than one month later, the United States commenced this collateral attack against the Circuit Court of Dane County (the state rehabilitation court), the Commissioner of Insurance of the State of Wisconsin and Ambac Assurance Corporation,

seeking to enjoin the state court from enforcing its rehabilitation plan or any injunction insofar as it affects the United States. The United States has also moved for a preliminary injunction, contending that exigent circumstances require emergency relief in this matter.

Although the United States attempts to distinguish this case from the previously remanded proceedings by arguing that the propriety and legality of removal is no longer an issue, this distinction does not change my earlier conclusions regarding jurisdiction. Because I conclude that this court lacks jurisdiction over the United States' claims for injunctive relief, I will dismiss this case.

BACKGROUND

On December 8, 2010, the United States removed a state court rehabilitation proceeding involving Ambac Assurance Corporation to this court, contending that the state court issued an unlawful injunction against the Internal Revenue Service. Nickel v. United States, 10-cv-778-bbc. On January 14, 2011, I remanded that proceeding to the state rehabilitation court, after concluding that the United States' removal of the rehabilitation proceeding was preempted under the McCarran-Ferguson Act and that the principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943), required abstention. Once I had determined that jurisdiction did not exist to hear the case, I did not consider the United States' motion to dissolve the state court injunction, advising the

United States to "present its challenges to the state court." Op. & Order, dkt. #36, at 19-20, in 10-cv-778-bbc. The details regarding the insurance rehabilitation proceeding are set out in the order remanding the proceeding to state court and will not be repeated here. Id. at 2-7.

On January 18, 2011, the United States appealed the remand order to the Court of Appeals for the Seventh Circuit, which issued an order directing the United States to file a memorandum explaining why the appeal should not be dismissed for lack of jurisdiction in light of the rule that "an order remanding a case to state court based on a lack of subject matter jurisdiction . . . is *not* reviewable on appeal." Nickel v. United States, appeal no. 11-1158, dkt. #2, at 1 (Jan. 20, 2011) (emphasis in original). The United States filed a responsive memorandum on February 3, 2011, to which the commissioner responded on February 8. A decision on the jurisdictional question is pending.

On January 24, 2011, after the rehabilitation proceeding was transferred back to state court, the rehabilitation court entered an order confirming the rehabilitation plan that had been proposed by the commissioner before removal. The rehabilitation court scheduled a hearing for February 23, 2011 to discuss the United States' motion to dissolve the injunction order that had been filed in this court.

The United States filed the present case, accompanied by a motion for a preliminary injunction, on February 9, 2011, seeking to enjoin the state court from (1) holding the

February 23 hearing on the United States' motion to dissolve the injunction; (2) enforcing the injunction issued on November 8, 2010 restraining the Internal Revenue Service from initiating tax collection proceedings against Ambac; (3) enforcing the rehabilitation plan insofar as it purports to make the November 8 injunction permanent, asserts exclusive state jurisdiction over certain federal tax liabilities of Ambac and otherwise purports to bind the United States; and (4) conducting any proceedings that would violate the Anti-Injunction Act, 26 U.SC. § 7421 and the sovereign immunity of the United States. In light of the United States' filing of the motion in this court, the state rehabilitation court adjourned the February 23 hearing.

In addition to the state rehabilitation proceeding, the appellate proceeding considering the United States' appeal of the remand order and the present case, there is a related bankruptcy case pending in the United States Bankruptcy Court for the Southern District of New York, in which Ambac's parent company has filed for bankruptcy. The issue of Ambac's potential $700 million tax liability is being litigated in the bankruptcy proceedings.

OPINION

As in the previous removal case, the threshold question is whether this court has jurisdiction over the United States' claims for injunctive relief. If the answer is no, the court

may not consider the United States' motion for a preliminary injunction and must dismiss the case. No motion to dismiss has been filed and plaintiffs have not had any opportunity to show cause why the case should not be dismissed for lack of jurisdiction. However, a court may dismiss a case for lack of jurisdiction on its own if it determines that jurisdiction is lacking. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); Buchel-Ruegsegger v. Buchel, 576 F.3d 451, 453 (7th Cir. 2009) (courts are required to evaluate their own jurisdiction and dismiss case if jurisdiction is lacking). I note that the United States does not wish to file additional briefing or hold a hearing on the jurisdictional question. In its motion for a preliminary injunction, the United States asks that, if the court finds the issues in this case to be indistinguishable from the issues addressed in the remanded case, the court "in the interests of judicial economy [should] summarily deny this motion without the necessity of a hearing or further briefing, in order to permit any appeal from than denial to proceed without delay, and to be consolidated with the pending appeal from the remand order. . . ." Plf.'s Br., dkt. #7, at 3.) In any event, additional briefing is unnecessary because I conclude that subject matter jurisdiction is lacking for the same reason it was absent when the United States removed the rehabilitation proceeding from state court.

Specifically, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, reverse-preempts the exercise of federal jurisdiction to enjoin the rehabilitation court from performing its work.

In that Act, Congress provided that "[n]o 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012. In United States Department of the Treasury v. Fabe, 508 U.S. 491 (1993), the Supreme Court ruled that the "business of insurance" extended to proceedings to liquidate or rehabilitate an insurance company. See also Munich American Reinsurance Co. v. Crawford, 141 F.3d 585, 592-93 (5th Cir. 1998) ("[T]he specific provisions of the statute at issue here—vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court and authorizing the court to enjoin any action interfering with the delinquency proceedings—are laws enacted clearly for the purpose of regulating the business of insurance.")

In the remand order, I concluded that the federal removal statutes could not override certain state laws that set up a comprehensive framework for state insurance rehabilitation proceedings. Specifically, I stated that

> Wis. Stat. ch. 645 vests jurisdiction in the state rehabilitation court over matters related to the rehabilitation of an insurer. Wis. Stat. § 645.04. The state court has authority to enjoin any action that may interfere with the proceedings or "lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding." Wis. Stat. § 645.05. These sections of chapter 645 relate specifically to regulating the business of insurance. Application of the federal removal statutes would impair the operation of chapter 645 by depriving the state rehabilitation court of jurisdiction, disrupting the goal of a

> comprehensive rehabilitation structure and interfering with the orders issued by the state court for the purpose of protecting assets payable to claimants. In sum, the federal removal statutes would 'invalidate[], impair[], or supersede[] the state laws at issue in this case.'

Op. & Order, dkt. #36, at 12, 10-cv-778-bbc (citations omitted).

In the present case, the United States cites 26 U.S.C. § 7402 (authorizing injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws"), 28 U.S.C. §§ 1331 (federal question) and 1340 (federal tax issues), as the basis for federal subject matter jurisdiction. Cpt., dkt. #1, at 3. Like the federal removal statutes, these are all statutes of general application and do not relate specifically to the business of insurance. In addition, their application would "invalidate, impair or supersede" the state statutes concerning rehabilitation and the state court's orders issued pursuant to those statutes. In particular, the United States asserts that § 7402 provides a vehicle for this court to enjoin the state rehabilitation court from enforcing the supplemental injunction and order confirming the rehabilitation plan. Such an injunction by this court would clearly "impair" or "supersede" the state laws that authorized the state court to issue those orders. Thus, for reasons substantially similar to those stated in the remand order, these jurisdictional statutes are reverse-preempted by the McCarran-Ferguson Act.

The United States attempts to avoid this result by invoking sovereign immunity and arguing that the McCarran-Ferguson Act cannot preempt sovereign immunity. However,

sovereign immunity does not provide an independent basis for jurisdiction and would not nullify the McCarran-Ferguson's reverse-preemption of the federal jurisdictional statutes unless "sovereign immunity prevents [the United States] from intervening in the state court action." United States v. Rural Electric Convenience Cooperative Co., 922 F.2d 429, 433 (7th Cir. 1991). As the Supreme Court explained in United States v. Bank of New York & Trust Co., 296 U.S. 463, 480-81 (1936), the United States may participate as a creditor in a state rehabilitation proceeding without raising sovereign immunity concerns. Id. ("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."); see also Fabe, 508 U.S. at 509-10. Here, even if I assume that the state court would not permit the United States to officially "intervene" in the rehabilitation proceeding (the United States has not suggested that it has attempted to do so), the United States does not deny that it will have an opportunity to pursue the return of any money owed it within the context of the state rehabilitation proceeding.

Even if the jurisdictional statutes were not reverse-preempted, I would abstain from exercising jurisdiction on the basis of principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943). In Burford, the United States Supreme Court held that federal courts should abstain from interfering with specialized, ongoing state regulatory schemes. In the remand order, I concluded that abstention was appropriate for reasons that

apply with equal force to the present case:

> Wisconsin has a great interest in maintaining a uniform insurance rehabilitation process that provides strong protection to policyholders. . . The Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court, which has the authority both to enjoin actions that threaten the success of the rehabilitation and to address challenges to the structure of the rehabilitation. . . Ultimately, claims . . . will be collected in the rehabilitation court and paid according to Wisconsin's priority statutes. Federal court review of the United States' claims would be disruptive of the state's rehabilitation goals and procedures.

Op. & Order, dkt. #36, at 17-18, 10-cv-778-bbc (citations omitted).

Despite the court's substantial discussion regarding abstention in the remand order, the United States does not explain why the court's analysis of the doctrine would be any different in this case. This is likely because the United States' decision to file this lawsuit shows that it disregarded the following discussion in the remand order:

> As other claimants have done, the United States may present its challenges to the state court, argue its position on the merits and if the result is unsatisfactory, appeal to the Wisconsin Court of Appeals. In many respects, the state rehabilitation proceedings and the supplemental injunction are similar to federal bankruptcy proceedings and the automatic stay that goes into effect in bankruptcy. Insurance companies are barred from using bankruptcy to reorganize; their only remedy is a state court rehabilitation proceeding. As in bankruptcy, the efficacy of a rehabilitation proceeding is dependent upon the court's ability to stay actions by creditors that will interfere with the court's ability to manage the proceeding. When a claimant is affected by the stay, the claimant challenges the effect in the bankruptcy court and if the result is unfavorable, it appeals. *The claimant does not file a separate proceeding in a separate court to determine whether the stay should apply, as the United States has done in this case*. . . .Thus, the principles of Burford require abstention in this case to permit resolution of the United States' claims

through the available mechanisms in the state rehabilitation proceedings.

Id. at 19-20 (emphasis added). By filing a collateral attack against orders issued in the state rehabilitation proceeding, the United States has once again disrupted the proceeding and deprived the state court of the opportunity to address issues that are similar to those raised by other creditors and have the potential to impair the rehabilitation plan.

With the commencement of this case, there are at least four court proceedings related directly to the rehabilitation of Ambac Assurance Corporation in which the issue of Ambac's potential tax liability to the IRS has been raised: the rehabilitation proceeding itself; the bankruptcy proceeding in the Southern District of New York; the United States' appeal of this court's remand order; and the present case. It may be that the court of appeals will conclude that the United States' objections to the state court's rulings should be heard in this court rather than the state court or the bankruptcy court. However, unless the court of appeals makes such a determination, this court will abstain from resolving the merits of the United States' claims.

For the foregoing reasons, I am dismissing this case for lack of jurisdiction. Because I conclude that this court lacks jurisdiction over this case, I will not address the United States' motion for a preliminary injunction.

ORDER

IT IS ORDERED that this case is DISMISSED for lack of subject matter jurisdiction.

Entered this 17th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY; THEODORE NICKEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation; and AMBAC ASSURANCE CORPORATION,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 11-cv-99-bbc

This action came for consideration before the court with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered dismissing this case for lack of subject matter jurisdiction.

Peter Oppeneer

Peter Oppeneer, Clerk of Court

2/18/11

Date