UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IN THE MATTER OF THE REHABILITATION OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION	Case No. 13-cv-325 (Removed From Dane Court Circuit Court – No. 10 CV 1576)

BRIEF IN SUPPORT OF MOTION TO REMAND BY THE WISCONSIN COMMISSIONER OF INSURANCE, AS COURT-APPOINTED REHABILITATOR OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

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INTRODUCTION

The Notice of Removal filed by OneWest Bank, FSB ("OneWest") is not the first time an entity has sought to invoke the jurisdiction of this Court to circumvent the ongoing insurer rehabilitation of the Segregated Account of Ambac Assurance Corporation. *See Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.* ("IRS Remand Order"), 782 F. Supp. 2d 743 (W.D. Wis. 2011); *United States v. Wis. Circuit Ct. for Dane Cty.* ("IRS Dismissal Order"), 767 F. Supp. 2d 980 (W.D. Wis. 2011).[1] Previously, this Court remanded the attempted removal of specific issues by the United States Internal Revenue Service (the "IRS"), for two reasons.

First, this Court held that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), restricts the operation of federal jurisdictional statutes to the extent they would otherwise permit jurisdiction "over matters related to the rehabilitation of an insurer," because Wisconsin establishes a "comprehensive rehabilitation structure" in which disputes relating to the management of the rehabilitation are committed to the state circuit court overseeing the rehabilitation (the "State Rehabilitation Court"). IRS Remand Order, 782 F. Supp. 2d at 749. *Second*, this Court found that even if it had jurisdiction to resolve such disputes, it would abstain from doing so under the abstention doctrine set forth in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). IRS Remand Order, 782 F. Supp. 2d at 751-52. In emphasizing the broad,

[1] On May 9, 2013, the IRS filed a motion with the Seventh Circuit to dismiss its appeals with prejudice and vacate those orders. By the terms of the settlement agreement with the IRS, the Wisconsin Commissioner of Insurance, as court-appointed Rehabilitator of the Segregated Account (the "Commissioner") was contractually bound to support that motion. As of the time of writing, the Seventh Circuit has not ruled on the motion to vacate, and has ordered the IRS to raise the issue with this Court in accordance with Circuit Rule 57. (Declaration of Matthew R. Lynch ("Lynch Dec.") at 6 (¶ 17) & Ex. 13.) Even if the IRS's procedural request to vacate is ultimately granted, it would not alter the factual and legal analyses set forth in those orders, which the Commissioner believes remain sound and applicable here.

comprehensive nature of the State Rehabilitation Court's exclusive jurisdiction, this Court noted that "Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court," that federal review would disrupt that state objective, and therefore the IRS must pursue resolution of its grievances "through the available mechanisms in the state rehabilitation proceedings." *Id.*

Seeking to obtain a federal forum through different means, the IRS then filed a federal complaint against the State Rehabilitation Court and the Commissioner. *See generally* IRS Dismissal Order. In doing so, the IRS attempted to distinguish the Remand Order, but did so on the basis of collateral issues while disregarding the core holdings of that order. This Court rejected that effort and repeated its core holdings in the Dismissal Order. IRS Dismissal Order, 767 F. Supp. 2d at 983-85.

It appears necessary to repeat those core holdings again. Like the IRS before it, OneWest has ignored the clear law underlying this Court's prior decisions about the nature of the State Rehabilitation Court's jurisdiction, and now attempts to remove specific issues under consideration by the State Rehabilitation Court. Its removal petition cites none of the cases relied upon by this Court in concluding that the McCarran-Ferguson Act prevents the exercise of federal jurisdiction over matters within the jurisdiction of the State Rehabilitation Court, and fails to address the twice-stated holdings of this Court in concluding that federal jurisdiction was inappropriate on both McCarran-Ferguson and *Burford* abstention grounds. Instead, OneWest argues that the IRS decisions do not apply because OneWest's issues purportedly are different than those raised by the IRS—namely, that they involve less money and the application of different substantive laws than the IRS's issues. (*See generally* Notice of Removal at 9-14 (¶¶ 25-33).)

Neither of OneWest's grounds offer a principled basis for distinguishing the IRS decisions. In reality, OneWest stands in a weaker position regarding removal than the IRS, which had two arguments available to it that are not available to OneWest: (1) that the IRS was seeking the return of refunds issued to Ambac's General Account, which is not "technically subject to the rehabilitation court's jurisdiction," IRS Remand Order, 782 F. Supp. 2d at 749; and (2) that the IRS is a federal agency with a particularly strong interest in litigating in federal court. OneWest's issues relate solely to the Segregated Account, and it seeks removal on the run-of-the-mill basis of diversity. While the IRS argued that its unique attributes as a federal agency meant that removal of its issues would not open the floodgates to issue-by-issue, serial removals by others with an interest in the rehabilitation, OneWest cannot offer such assurances. Many motions in the rehabilitation relate to specific entities, policies, or issues, many involve entities with diverse citizenship, and most concern financial matters in excess of the jurisdictional limit.

Finally, in addition to ignoring this Court's prior holdings in the IRS cases, OneWest's removal petition ignores the removal statutes. Even if, *arguendo*, OneWest were correct in claiming that the Commissioner's motion to terminate and transfer servicing on certain deals insured by the Segregated Account can be surgically removed from the ongoing jurisdiction of the State Rehabilitation Court without running afoul of McCarran-Ferguson and *Burford* principles, the Commissioner's motion to terminate and transfer servicing is not a controversy independent from the rehabilitation. Rather, it is a motion pertaining to the central task of the rehabilitation process: the management of the insurer's business for the purpose of reducing avoidable losses. Further, the Commissioner's motion asked the State Rehabilitation Court for specific relief against two entities: OneWest *and* Deutsche Bank National Trust

Company ("Deutsche"), both of whom were served with notice of the motion.[2] Deutsche did not sign the removal petition, and therefore that petition is fundamentally deficient under 28 U.S.C. § 1446(b)(2)(A).

Segregated Account policyholders and other claimants should not bear the disruption and costs of OneWest's improper removal attempt. This case should be remanded to the State Rehabilitation Court, after which this Court should enter a separate order requiring OneWest to reimburse the legal expenses of the Commissioner in moving for remand. 28 U.S.C. § 1447(c).

BACKGROUND

I. The Commencement of Rehabilitation and the Injunction

Ambac Assurance Corporation ("Ambac") is a Wisconsin-domiciled insurer that provides financial guaranty insurance on a variety of financial products, including municipal bonds, residential mortgage-backed securities ("RMBS"), credit default swaps, and other complex transactions. IRS Remand Order, 782 F. Supp. 2d at 745. As a subset of those transactions began incurring substantial losses in 2007, Ambac's financial condition deteriorated. *Id*. In March 2010, the Commissioner approved the establishment of the Segregated Account, which consisted of approximately 1,000 policies with material projected losses, structural problems with the transactions, and/or contractual triggers that could cause greater harm if not enjoined, and petitioned the State Rehabilitation Court for the rehabilitation of the Segregated Account. *Id*.

[2] Indeed, as discussed in Part IV of the Background section of this brief, the relief sought in the motion by the Rehabilitator is primarily directed at Deutsche.

That same day, the State Rehabilitation Court entered an order pursuant to Wis. Stat. § 645.05 (the "Injunction") to govern the rehabilitation proceeding and prevent those with an interest in the Segregated Account or the transactions it insures from "[i]nterfer[ing] with the receiver or with the proceedings" or taking "other threatened or contemplated action[s] that might 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(1)(a); Lynch Dec. Ex. 1. Consistent with those purposes, paragraph 1 of the Injunction bars all persons and entities "from commencing or prosecuting any . . . formal legal proceedings" pertaining to the Segregated Account outside the State Rehabilitation Court, which "has exclusive jurisdiction over any such actions, claims, or lawsuits." (Lynch Dec. Ex. 1 ¶ 1.) (*Id.*)

In addition, the Injunction authorized the Commissioner to exercise contractual rights possessed by Ambac that related to Segregated Account policies, and enjoined parties from interfering or refusing the exercise of those rights. (Lynch Dec. Ex. 1 ¶ 6.) With regard to RMBS-related policies allocated to the Segregated Account, the Injunction was more specific, enjoining all parties to the transactional documents associated with the RMBS deals from willfully failing to take any actions "directed by the Rehabilitator as 'controlling party' or term with similar effect, . . . including without limitation directions in connection with the transfer of servicing." (*Id.* ¶ 9(b)(2).)

The Commissioner immediately provided court-approved notice to all known entities with an interest in the Segregated Account, in three ways: by mail; by publication of notices in the *Wall Street Journal* and *USA Today*; and by posting all substantive filings and other information on the court-approved website for the rehabilitation, http://ambacpolicyholders.com. IRS Remand Order, 782 F. Supp. 2d at 746.

II. OneWest's Interest in the Rehabilitation

OneWest was one of those known entities with an interest in the Segregated Account, because it acted as servicer for mortgage loans held by two trusts (together, the "IndyMac Trusts"[3]) that issued bonds insured by Ambac. (Notice of Removal Ex. A (Dkt. 1-2) at 3 (¶ 1).) Deutsche is the trustee for the IndyMac Trusts. (*Id.* at 10 (¶ 15).) The Pooling and Servicing Agreements for the IndyMac Trusts, which are between OneWest and Deutsche, grant third-party beneficiary status to Ambac and give Ambac the right to direct Deutsche to terminate OneWest as a servicer and appoint a replacement servicer under certain conditions. (*Id.* at 5 (¶ 5).)

Because the Injunction's provisions regarding control rights and jurisdiction (among other issues) related directly to the rights of trustees such as Deutsche and servicers such as OneWest, the Commissioner mailed notice of the rehabilitation and the Injunction to both OneWest and Deutsche immediately after the rehabilitation commenced, pursuant to the order of the State Rehabilitation Court regarding service. (Lynch Dec. at 2 (¶¶ 3-4) & Exs. 2-4.) Both the notice and the Injunction invited any persons or entities with an interest in the proceeding to raise any objections with the State Rehabilitation Court within 90 days. (Lynch Dec. Ex. 1 (¶ 12), Ex. 3 (¶ 5).)

Numerous entities, including Deutsche, accepted that invitation by appearing and challenging various parts of the Injunction. (Lynch Dec. at 3 (¶ 5).) Their objections included challenges to the jurisdictional restrictions imposed by the Injunction to ensure the

[3] The IndyMac Trusts consist of the IndyMac Certificate Trust 2004-2 and the IndyMac Residential Asset-Backed Trust, Series 2004-LH1. (Notice of Removal at 2 (¶ 1).)

comprehensiveness of the rehabilitation proceedings. (*Id.*) OneWest opted not to raise any objections to the Injunction or the rehabilitation generally. (*Id.*)

The State Rehabilitation Court addressed those objections in several orders issued in 2010, and the Commissioner proceeded to file his Plan of Rehabilitation for the Segregated Account in October 2010. (Lynch Dec. at 3 (¶¶ 5-6).) Among numerous other provisions, the Plan proposed to make the jurisdictional provisions of the Injunction permanent. (*Id.* at 3 (¶ 6) & Ex. 5.) The Plan, like all substantive filings and orders in the rehabilitation, was made available on the website for the rehabilitation, and the State Rehabilitation Court issued a scheduling order inviting "any person" to file objections to the Plan and participate in evidentiary hearings regarding the merits of the Plan. (*Id.* Ex 6.) OneWest filed no objections to making the Injunction permanent or any other aspect of the Plan, and did not participate in the hearings. (*Id.* at 4 (¶ 8).)

III. The IRS Removal

Shortly before the evidentiary hearings were scheduled to commence respecting confirmation of the Plan, Ambac received a document request from the IRS relating to the accounting behind certain tax refunds. IRS Remand Order, 782 F. Supp. 2d at 746. After learning of this new, potentially material claim against Ambac, the Commissioner approved the allocation of Ambac's potential liability for the refunds to the Segregated Account, and obtained a temporary, supplemental injunction to prevent the IRS from exercising its federal statutory powers to levy against Ambac's claims-paying resources. *Id.* at 746-47. The IRS, which unlike OneWest had not been identified as a party-in-interest and had not received prior notice of the rehabilitation, was served with the notice and supplemental injunction and invited to raise any objections with the State Rehabilitation Court. *Id.* at 746.

On December 8, 2010—after the evidentiary hearings concluded—the IRS filed a notice of removal to this Court. (Lynch Dec. Ex. 7.) The IRS asserted that the Commissioner, Ambac's parent company, and the United States were the only parties to the supplemental injunction, and that it did "not intend to remove (and, to the extent it has removed has no objection to this Court remanding) all issues and/or claims in this rehabilitation action that are unrelated to the Internal Revenue Service, and the [supplemental injunction]." (*Id.* Ex. 7 at 2 (¶ 3).)

The Commissioner immediately moved to remand the case, arguing among other things that: (1) the federal removal statutes impaired state law regulating the business of insurance, in particular the state goal of consolidating all matters relating to the rehabilitation of an insurer in the State Rehabilitation Court, and were therefore reverse-preempted under the McCarran-Ferguson Act; and (2) even if they were not reverse-preempted, this Court should abstain from exercising jurisdiction over the dispute under the *Burford* doctrine.

The IRS raised several arguments in opposition to remand, which fell into three general categories. *First*, the IRS argued that the McCarran-Ferguson Act could not reverse-preempt the removal statutes because "no state law can preempt the right to remove." (Lynch Dec. Ex. 8 at 12-15.) According to the IRS, this was especially true with regard to disputes involving a federal agency exercising its right to removal under 28 U.S.C. § 1442, in part because "the limitations on removal under § 1441 are not applicable to removal under § 1442." (*Id.* at 10-12 (quotation omitted).) Though the IRS recognized that the Commissioner "cite[d] several district court opinions regarding private parties without such federal claims," the IRS noted that the Commissioner had not "produced any authority suggesting that McCarran-

Ferguson forbids the removal of an action against a federal agency involving a claim presenting federal questions." (*Id.* at 14.)

Second, the IRS contended that removal of its dispute would not impair state law governing rehabilitations, because its dispute concerned Ambac's general account, which is not in rehabilitation. (*Id.* at 15-19.)

Finally, the IRS argued that *Burford* abstention is a narrow doctrine, that it does not automatically apply to rehabilitation proceedings, and that it was inappropriate here because "[t]his action raises no state law questions" and therefore would not "disrupt the Wisconsin insurance regulatory scheme." (*Id.* at 19-25.) The IRS further asserted that its dispute was unique, and therefore "will not set a precedent for other litigants or encourage them to remove a claim to federal court." (*Id.* at 24.)

This Court rejected the IRS's arguments, and remanded the case on both McCarran-Ferguson Act and *Burford* abstention grounds. With regard to the McCarran-Ferguson Act, this Court held:

> [T]he 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).

IRS Remand Order, 782 F. Supp. 2d at 748-49. This Court further rejected the IRS's arguments that McCarran-Ferguson's reverse-preemptive effect did not apply to a federal agency operating under federal statutes, *id.* at 750, and that matters pertaining to Ambac's general account were beyond the scope of the State Rehabilitation Court's exclusive jurisdiction, *id.* at 749.

Finally, this Court concluded that *Burford* abstention was warranted in deference to Wisconsin's comprehensive framework for the management of insurer rehabilitations:

> Wisconsin has a great interest in maintaining a uniform 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 . . . .
>
> 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. . . .
>
> . . . 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 751-52 (citations omitted).

Following remand, the State Rehabilitation Court entered an order approving the Plan on January 24, 2011, and scheduled a hearing to address the IRS's objections to the supplemental injunction. IRS Dismissal Order, 767 F. Supp. 2d at 982. Shortly thereafter, the IRS filed a direct action in this Court, seeking to enjoin the State Rehabilitation Court from exercising jurisdiction over its objections. This Court again found that the McCarran-Ferguson Act and the *Burford* abstention doctrine prevented the IRS from invoking federal jurisdiction, reiterated the holdings that are block-quoted above, and dismissed the case. *See generally* IRS Dismissal Order.

IV. Subsequent State Rehabilitation Court Proceedings and Disputes with OneWest

The State Rehabilitation Court resumed its jurisdiction over the management of the insurer in rehabilitation. In the two years since the IRS disputes, the State Rehabilitation Court has addressed numerous substantive motions relating to the management of the proceeding, ranging from motions to establish procedures for synthetic commutations to reduce projected losses, to motions to exercise call options to eliminate long-term liabilities, to motions to clarify the scope of the Injunction. (Lynch Dec. ¶ 11.) In addition, the State Rehabilitation Court addressed disputes with discrete parties-in-interest that required construction and interpretation of agreements and policies governed by New York law, including a dispute with Assured Guaranty Corporation regarding its right to withhold reinsurance payments from the

Segregated Account, and a motion to construe multiple ambiguous policies in a manner that protected policyholders. (Lynch Dec. at 4-5 (¶¶ 12-14) & Exs. 9-11.)

Consistent with that practice, the Commissioner brought a motion on April 5, 2013 (the "Servicing Motion"), asking the State Rehabilitation Court to approve and give force to the Commissioner's right to direct Deutsche to terminate and replace OneWest as the servicer for the IndyMac Trusts. (Notice of Removal Ex. A.) The Commissioner determined that termination was warranted on account of OneWest's high level of "charge-off amounts,"[4] resulting in unnecessarily high losses on the associated RMBS (and therefore unnecessarily high policy claims against the Segregated Account). (*Id.* at 4 (¶ 3), 9 (¶ 12).) Within his responsibility to "rehabilitate the business of a domestic insurer," Wis. Stat. § 645.32(1), for the purpose of minimizing avoidable losses, Wis. Stat. § 645.01(4)(d), the Commissioner sought an order: (1) confirming that he has the right to direct Deutsche under the pooling and servicing agreement; (2) compelling Deutsche to effectuate the Commissioner's directions; and (3) enjoining OneWest from interfering with Deutsche implementing the change in servicers directed by the Commissioner. (*Id.* at 1.) As with the prior motions, judicial approval of this exercise of the Commissioner's control rights requires the construction of New York law, which governs many of the policies and related transaction documents allocated to the Segregated Account. (Lynch Dec. at 4 (¶ 12).)

[4] Broadly speaking, a "charge-off amount" is recorded when loans are delinquent for a prolonged period or the servicer determines that they cannot be collected. Servicers are expected to employ a variety of loss mitigation techniques to reduce charge-off amounts, including working with borrowers to restructure loans to avoid defaults, maintaining frequent contact with delinquent borrowers before the problems become worse, and engaging in efforts to maximize the value of the loan collateral. (Notice of Removal Ex. A, at 4 (¶ 3), 5 (¶ 5).)

"To give OneWest an opportunity to express any opposition it may have to th[e] Motion and the planned termination of its role as servicer" for the IndyMac Trusts, the Commissioner served the Servicing Motion upon OneWest's registered agent and scheduled a hearing to address its merits.[5] (Notice of Removal Ex. A at 1, 10-11 (¶ 17).) The Commissioner consented to reschedule that hearing to a later date at OneWest's request. (Lynch Dec. at 5-6 (¶ 15).) Rather than maintaining that hearing date and presenting any arguments it has as to why termination is inappropriate, OneWest instead filed a notice of removal purporting to remove the Servicing Motion to this Court under 28 U.S.C. § 1441(a). Though the Servicing Motion primarily seeks to compel specific actions by Deutsche, Deutsche did not join OneWest's Notice of Removal.

At the time of the removal, the rescheduled hearing in the State Rehabilitation Court was set for May 24, 2013. (Lynch Dec. at 6 (¶ 16).) Rather than proceed with the hearing against Deutsche alone, the Commissioner has asked the State Rehabilitation Court to further delay that hearing to allow adjudication of this remand motion, so that both Deutsche and OneWest can participate if and when remand is ordered. (*Id.* & Ex. 12.)

ARGUMENT

I. ONEWEST'S REMOVAL NOTICE IS DEFECTIVE.

The bulk of OneWest's Notice of Removal attempts to demonstrate that its removal took place under "different circumstances" than the IRS's removal. (Notice of Removal at 8 (¶ 22).) The Commissioner agrees that there are some key factual differences between

[5] Among other reasons, the State Rehabilitation Court has personal jurisdiction over OneWest because many of the loans included in the IndyMac Trusts are Wisconsin mortgages. (Notice of Removal Ex. A at 11 (¶ 18).) In addition, OneWest is a frequent litigant in Wisconsin state courts; it has filed scores of foreclosure actions in Wisconsin, including at least 75 in Dane County Circuit Court alone. (*Id.*)

OneWest's attempted removal and that of the IRS—but those differences do not help OneWest's position. In fact, those differences merely provide this Court with additional grounds to remand this case, above and beyond those set forth in the IRS Remand Order. Setting aside (for now) the McCarran-Ferguson Act and the *Burford* doctrine, OneWest's Notice of Removal is fatally defective under 28 U.S.C. § 1441.

Section 1441 permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," such as where diversity is present. 28 U.S.C. § 1441(a). In actions removed under Section 1441(a), "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). Unlike 28 U.S.C. § 1442, which is "broadly construed" in favor of removal of actions involving federal agencies and officers, *Kolibash v. Comm. on Legal Ethics*, 872 F.2d 571, 576 (4th Cir. 1989), Section 1441 must be construed "narrowly," and "[a]ny doubt regarding jurisdiction should be resolved in favor of the states." *Doe v Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

In arguing that removal is proper, OneWest relies upon three fictions: (1) that the Servicing Motion "clearly involves a controversy that is independent from, and with parties different than those in, the Ambac Rehabilitation Proceeding," and can therefore be removed piecemeal from the larger rehabilitation (Notice of Removal at 4 (¶ 11)); (2) that OneWest "was not a party to the Ambac Rehabilitation Proceeding," but became one when the Commissioner filed the Servicing Motion (Notice of Removal at 5 (¶¶ 12-13)); and (3) that OneWest is the only "defendant" in that independent controversy (Civil Cover Sheet (dkt. 1-1)). A finding that any one of these characterizations is incorrect would require a remand of these issues. For the reasons described below, all three are wrong.

A. The Servicing Motion is Not Independently Removable Under Section 1441

To contort the Servicing Motion into a "civil action" conceivably falling within the rubric of Section 1441, OneWest characterizes that motion as an "independent controversy with some new and different party" from the ongoing rehabilitation. (Notice of Removal at 4 (¶ 10) (quoting *Buford v. Strother*, 10 F. 406, 407 (C.C.D. Iowa 1881), and citing *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 724 (7th Cir. 2012).) OneWest is inaccurate on both counts: the Servicing Motion is merely one of a series of motions raised by the Commissioner in his management of the business of the Segregated Account, and OneWest is not a new and different party in the rehabilitation.

1. The Servicing Motion is Not an Independent Controversy

OneWest claims that its objection to the Servicing Motion is an "independent controversy" that can be removed piecemeal from the larger rehabilitation proceeding, decided by this Court, and then reintegrated by the State Rehabilitation Court into its ongoing oversight of the business of the Segregated Account. OneWest's argument is flawed under the law, and fraught with peril for the management of the rehabilitation proceeding generally.

The Seventh Circuit has "long interpreted § 1441(a) to allow removal only of independent suits but not ancillary or supplementary proceedings." *GE Betz, Inc. v. Zee Co.*, --- F.3d ---, No. 12-3746, 2013 U.S. App. LEXIS 9047, at *16-*17 (7th Cir. May 3, 2013) (internal quotations omitted). "This prudential interpretation of § 1441(a), which dates back as early as *Barrow v. Hunton*, 99 U.S. 80, 83, 25 L. Ed. 407 (1878), 'seeks to avoid the waste of having federal courts entertain satellite elements of pending state suits and judgments.'" *Id.* at *17 (quoting *Travelers*, 689 F.3d at 724). "No bright-line formula exists for separating the independent and removable sheep from the ancillary and non-removable goats," and courts must assess independence based on the context of the particular case. *Travelers*, 689 F.3d at 724.

Within the Seventh Circuit, such independent controversies typically arise in the context of actions to collect upon prior judgments, where the merits of the underlying judgment are no longer at issue and new parties are named to address issues of asset location and potential fraudulent transfers. *See, e.g.*, *GE Betz*, 2013 U.S. App. LEXIS 9047, at *1-*7 (judgment collection action instituted in a new jurisdiction that named a new party, the defendant's lender, to address issues of lien priority); *Travelers*, 689 F.3d at 725 (citing cases involving independent controversies in garnishment proceedings against third parties).

The context of the Servicing Motion, like other motions in the rehabilitation proceeding, does not fit the model of independent controversies that are removable in other contexts, for at least four reasons.

First, unlike the collection proceedings in *GE Betz* and *Travelers*, the Servicing Motion is not a newly filed action. It is a motion filed in the same court, with the same caption and case number, as the rehabilitation. *See Fischer v. Hartford Life Ins. Co.*, 486 F. Supp. 2d 735, 741 (N.D. Ill. 2007) ("Similar to the instant case, the supplementary nature of the proceeding was evident because no new case number or docket was assigned to the citation proceeding."). As with all other motions in that proceeding, all entities that had appeared were provided copies of the motion, it was posted to the court-approved website for all others with an interest in the proceeding, and all were invited to be heard on the motion. In form, there was nothing to distinguish the Servicing Motion from all other motions filed to date in the State Rehabilitation Court.

Second, the Servicing Motion advances the same purpose as virtually all other substantive motions by the Commissioner to date: to manage the business of the insurer for the benefit of policyholders. OneWest gives short shrift to the nature of the rehabilitation

proceedings (which have lasted over three years), characterizing them as nothing more than proposing a Plan of Rehabilitation, obtaining approval of that Plan, and carrying it out. (Notice of Removal at 5 (¶ 12).) But the rehabilitation proceeding is and has been far more than the mechanical execution of a court-approved plan; it is an ongoing and comprehensive "management task." Wis. Stat. Ann. § 645.32 cmt. *See also* Wis. Stat. Ann. § 645.01 cmt. ("Rehabilitation should emphasize the management process, not the legal process.") By statute, the Commissioner has assumed "all the powers of the officers and managers" of the Segregated Account, and is responsible for "deal[ing] with the property and business of the insurer" and taking the actions he "deems necessary or expedient to reform and revitalize the insurer." Wis. Stat. § 645.33(2). In fact, the drafters of the rehabilitation statutes flatly rejected OneWest's characterization of the rehabilitation process as merely proposing and carrying out a formal plan: "Conceptually [the rehabilitator] should be treated as new management with especially broad powers, including the power to propose to the court the formal legal reorganizational devices that have heretofore been the focus of rehabilitation *but that should normally be subordinated in the future to the larger management task*." Wis. Stat. Ann. ch. 645 introductory cmt. (emphasis added).

Legal issues arise in the context of performing that management task, of course, as more than 1,000 docket entries in the State Rehabilitation Court amply indicate. And because the business of the insurer was conducted in New York and resulted in policies and contracts that typically apply New York law, several of those legal issues have involved and will continue to involve the application of New York contract law. But just as bankruptcy courts' comprehensive jurisdiction includes the jurisdiction to hear matters involving the application of state law, there is a sound reason why the "Wisconsin statutes contemplate that rehabilitation proceedings should

be conducted almost exclusively in the state rehabilitation court." IRS Remand Order, 782 F. Supp. 2d at 751. Specifically, the "management task" itself would become hopelessly unmanageable and slow if the Commissioner's motions pertaining to the business of the insurer were each construed as separate civil actions, subject to removal and transfer to various courts. Such a practice would disserve both the State Rehabilitation Court, which would be deprived of the full context of the rehabilitation in making determinations regarding those motions and matters that are not removed, and those federal courts forced to expend judicial resources acquiring the context that the State Rehabilitation Court already possesses through its oversight of this matter for more than three years.

The Servicing Motion falls squarely within the province of managing the business of the insurer. The question of whether to replace a servicer that the Commissioner believes to be creating unnecessary losses is a business decision, for which he sought the approval of the court overseeing the rehabilitation. As with all motions brought by the Commissioner, the State Rehabilitation Court must assess whether that decision is legally permissible. But OneWest cannot seriously contend that it is independent from the overall purpose of the rehabilitation proceeding: to soundly manage the business of the insurer for the benefit of policyholders, creditors, and the public. Wis. Stat. § 645.01(4). Thus, the Servicing Motion is at most "a proceeding which is substantially a continuation of a prior suit, [which] is not removable." *Fed. Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969).

Third, and more specifically, the Servicing Motion is another effort to meet the overarching objectives of preventing "[w]aste of the insurer's assets" and other actions that may "lessen the value of the insurer's assets." Wis. Stat. § 645.05(1)(d, k). As noted in the Motion, effective loan servicing is an important tool for reducing future claims on Segregated Account

policies. (Notice of Removal Ex. A at 4 (¶ 3).) As servicer, OneWest is the primary point of contact with borrowers and controls the various loss mitigation efforts that are necessary to maximize collection of the mortgage payments that fund the insured RMBS. (*Id.*) Monitoring the servicer's loss mitigation efforts and replacing the servicer when necessary is an important managerial task for the Commissioner and directly impacts his efforts to reduce claims and maximize the financial resources available to pay policyholders. Most of the Commissioner's efforts to date in his management of the Segregated Account have been aimed at that same objective, beginning with the filing of the rehabilitation itself. The Servicing Motion is not an independent effort, but rather one in an ongoing series of steps to reduce the magnitude of present and future claims against the Segregated Account.

Fourth, the Servicing Motion seeks to confirm the propriety of the Commissioner's exercise of authority provided by the Injunction—namely, the exercise of control rights. The control-rights' provisions of the Injunction have been the subject of substantial litigation in the rehabilitation proceeding to date, including challenges by Deutsche and others that are presently pending before the Wisconsin Court of Appeals. (Lynch Dec. at 3 (¶ 5).) Because OneWest has not yet filed its objections to the Servicing Motion, it is uncertain whether it will include a challenge to the Commissioner's retention of control rights in an effort to preserve the issue should the Court of Appeals reverse those aspects of the Injunction. Even if OneWest decides to waive the issue, however, the fact remains that the Servicing Motion is not independent from the Injunction, but rather the direct application of the authority granted by it.[6]

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[6] As noted in the Commissioner's Servicing Motion:

> This Court's injunction requires parties such as OneWest to cooperate with, and not interfere with, directions issued by the Rehabilitator, the Segregated Account and/or Ambac with respect

(footnote continued on following page)

In sum, the present controversy is no more independent from the larger rehabilitation proceeding than any one of several motions the Commissioner has brought to date that address specific policies, entities, or contracts. OneWest's argument would establish a right to issue-by-issue, dispute-by-dispute removal from state proceedings that are designed to be comprehensive—a result that is not permissible under the necessarily "narrow[]" construction of Section § 1441. *Allied-Signal, Inc.*, 985 F.2d at 911.

2. OneWest is Not a "New and Different Party" to the Rehabilitation

Even when a controversy is genuinely independent from the original proceeding, the Seventh Circuit holds that removal of such a controversy is only permissible when it involves "some new and different party." *Travelers*, 689 F.3d at 724. Here, OneWest appears to assert that it was *not* a party to the rehabilitation proceeding prior to the Servicing Motion, but became "a new and different" one once that motion was filed. While the Commissioner has maintained that under Wisconsin law there are no formal "parties" to the rehabilitation other than the Commissioner and the Segregated Account, it is not necessary to decide that question here. Whatever OneWest's status as a party or non-party to the rehabilitation, that status did not change upon the filing of the Servicing Motion.

Unlike the IRS, which did not receive direct notice of the rehabilitation prior to the Commissioner's motion against it, OneWest was sent formal notice at the outset of the rehabilitation in March 2010 and an invitation to object within 90 days to the Injunction.

> to transactional documents respecting, *inter alia*, residential mortgage-backed securities insured by policies allocated to the Segregated Account with the approval of this Court. (*See, e.g.*, Injunction ¶¶ 4 and 9-B.)

(Notice of Removal Ex. A at 11 (¶ 18).)

Specifically, because OneWest had a known interest in the Segregated Account prior to the rehabilitation, and because the Injunction's control rights and jurisdictional provisions bore on that interest, OneWest was among the entities to receive formal notice of the rehabilitation and the Injunction by mail one day after the rehabilitation commenced in March 2010. (Lynch Dec. at 2-3 (¶ 4) & Ex. 4.) Indeed, because OneWest serviced multiple transactions, it received at least four copies of that notice by mail. (*Id.*) More than a dozen notices were also sent to various individuals and departments at IndyMac Bank, F.S.B.—the former servicer from whom OneWest acquired the servicing contracts at issue when it purchased certain assets from IndyMac Bank's receiver in 2009 (Notice of Removal at 2 (¶ 1))—with many sent to the same corporate address as OneWest. (Lynch Dec. at 2-3 (¶ 4) & Ex. 4.) And the Commissioner also sent more than two dozen notices to various individuals and departments of Deutsche, the trustee for the IndyMac Trusts. (*Id.*)

Thus, almost from day one, OneWest and all other entities connected with the servicing of the IndyMac Trusts were directly informed of the rehabilitation, the jurisdictional restrictions the Injunction placed upon them, and the retention of control rights by the Commissioner and Ambac. At the same time, OneWest was also directly invited to participate in the proceeding and raise objections to the jurisdictional restrictions or any other aspect of the Injunction. Deutsche accepted that invitation and challenged various aspects of the Injunction, the Plan of Rehabilitation, and other matters. OneWest did not, thereby waiving any objections to the jurisdictional limitations of the Injunction, the nature or scope of the proceeding, or the supervisory and managerial authority of the Commissioner and the State Rehabilitation Court. Nor did OneWest attempt to remove the case within 30 days of receiving direct notice of its commencement.

OneWest cannot excuse these waivers and seek to remove now by claiming that its party status suddenly changed upon the filing of the Servicing Motion. From the outset, OneWest has been an entity with an interest in (and formal notice of) the rehabilitation, as well as orders (such as the Injunction) that directly impacted its interests and rights as servicer for the IndyMac Trusts.[7] In the Servicing Motion, the Commissioner seeks to exercise those rights in a specific transaction involving OneWest. OneWest has the right to challenge the propriety and legality of that specific exercise of the Commissioner's authority in the State Rehabilitation Court, just as it had the right to challenge the orders establishing that authority, and the right to challenge the Commissioner's prior motions seeking approval of their exercise in a variety of contexts. OneWest cannot claim that it was any more or less a "party" to the rehabilitation proceeding than any other entity that received formal notice of it upon its commencement in 2010, including those who opted to participate in the State Rehabilitation Court.

Therefore, to the extent OneWest is a "party" to the rehabilitation proceeding at all, its assertions that the State Rehabilitation Court's jurisdiction is non-exclusive have long since been waived, and its motion to remove this case is untimely by more than three years. 28 U.S.C. § 1446(b). To the extent it is not a party (and therefore not a defendant), it is not eligible to remove the case. 28 U.S.C. § 1441(a) (civil actions "may be removed by the defendant or the

[7] OneWest attempts to distance itself from the rehabilitation proceedings to date by asserting without explanation that "[n]othing in the rehabilitation plan proposed by the Rehabilitator and approved by the Dane County Circuit Court on January 24, 2011, did affect, or could have affected, OneWest's contractual rights to service mortgages held by the Trusts." (Notice of Removal at 5 (¶ 12).) OneWest's spin is unpersuasive. Absent the Injunction, Ambac and the Commissioner would have arguably lost the control rights necessary to direct OneWest's termination as servicer (due to an "insurer default" trigger mechanism in the pooling and servicing agreement). (*See, e.g.*, Notice of Removal Ex. D (§ 1.01 (defining "insurer default"), § 7.01 (making insurer's right to direct termination contingent upon absence of an insurer default).) In addition, OneWest would have had the right to bring legal action challenging that termination outside the State Rehabilitation Court. (Lynch Dec. Ex. 1 at 2 (¶ 1).)

defendants"). Either way, it is not a "new and different party" to the rehabilitation for the purpose of the independent controversy doctrine.

B. OneWest's Removal Notice Violates Clearly Established Law Requiring All Defendants to Join in the Removal.

Even if, *arguendo*, OneWest were indeed a "new and different party" to the rehabilitation, engaged in an "independent controversy" with the Commissioner, it is not entitled to remove that controversy for a more fundamental reason: the other "defendant" to that controversy, Deutsche, did not join the Notice of Removal.

In a removal under Section 1441(a), "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). Joinder by all defendants is an "essential step," *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 353 (7th Cir. 2000), and "[a] petition for removal is deficient if not all defendants join in it." *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997). To meet this joinder requirement, all defendants must timely sign the removal petition. *Id.*

If OneWest is a "defendant" in the Servicing Motion—as it must be in order to file a notice of removal under Section 1441(a)—then so is Deutsche. Deutsche is a party to the pooling and servicing agreement with OneWest (Notice of Removal Exs. D & E), with significant responsibilities in managing the servicing relationship with OneWest, receiving statements and proceeds from OneWest, and making subsequent distributions to note holders or certificate holders in the IndyMac Trusts. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980) ("[A] trustee is a real party to the controversy for purposes of diversity jurisdiction when [it] possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others."). Indeed, Deutsche is an indispensable party to the Servicing Motion: under its pooling and servicing agreement with OneWest, only Deutsche can carry out the directions of the

Commissioner and Ambac to terminate and transfer servicing of the IndyMac Trusts. (Notice of Removal Ex. A at 5 (¶ 5).) The Servicing Motion seeks to compel Deutsche to follow the direction of the Commissioner and Ambac regarding servicing of the IndyMac Trusts. The proposed form of Order the Commissioner filed with the Servicing Motion (Notice of Removal Ex. B) clearly reflects that the focus of the relief being sought is directed at Deutsche.[8]

The Servicing Motion was served on Deutsche, it asked the State Rehabilitation Court to compel Deutsche to take specific action, and it granted Deutsche the right to appear and object—a right it has exercised in its capacity as trustee at multiple times during the course of the rehabilitation. If the motion is granted, it will subject Deutsche to contempt if it fails to comply with the order. In short, OneWest and Deutsche share the same "qualities traditionally associated with a defendant," *GE Betz*, 2013 U.S. App. LEXIS 9047, at *39, and are thus defendants within the meaning of Section 1441. *See id.* ("There is no reason to think that, in drafting § 1441, Congress intended the word 'defendant' to be understood in some unusual or extraordinary way."). As a result, Section 1446 required OneWest to obtain Deutsche's written joinder in the removal.

This removal pointedly illustrates the reasons for the rule of unanimity among defendants. The Servicing Motion remains pending against Deutsche in the State Rehabilitation Court; if that court concludes that termination is proper and permissible, then Deutsche will be ordered to terminate OneWest as servicer. Meanwhile, if OneWest were permitted to remove its allegedly independent controversy with the Commissioner, this Court would be charged with

[8] Notice of Removal exhibits D, E, and F are all transaction documents relating to the servicing of the IndyMac Trusts, and Deutsche is a key party to each of them. If approved, the Servicing Motion will require Deutsche to enter into a Servicing Transfer Agreement, the proposed form of which is attached as Exhibit F to the Notice of Removal. Neither OneWest nor any of its predecessors would be a party to that Servicing Transfer Agreement.

deciding the same question—whether termination is proper and permissible—with reference to the same law and evidence. Through its failure to join Deutsche, OneWest would have created the direct risk of contrary rulings, as well as the risk that its arguments will be mooted by an order compelling Deutsche to terminate OneWest as servicer before OneWest's arguments are decided in this Court.

OneWest's failure to join Deutsche in the removal cannot be cured now; in fact, by the time OneWest filed its Notice of Removal, it was already too late for Deutsche to join in it. Deutsche's counsel was served with the Servicing Motion the day it was filed, April 5, 2013—more than 40 days ago, and 34 days before OneWest filed its Notice of Removal. (Notice of Removal Ex. A (cover letter noting service on all counsel of record, which includes counsel for Deutsche).) Thus, Deutsche's 30-day time period for removal expired on May 5, 2013. "Courts in this circuit have held that the failure to include a written consent in a removal petition may only be cured by filing the written consent *within* the 30-day time period." *Denton v. Universal Am-Can, Ltd.*, No. 12 C 3150, 2012 U.S. Dist. LEXIS 123871, at *9 (N.D. Ill. Aug. 30, 2012) (citing cases); *Bertrand v. Fed. Pac. Elec. Co.*, No. 07-C-602, 2007 U.S. Dist. LEXIS 63905, at *10-*11 (E.D. Wis. Aug. 29, 2007) (remanding because one defendant failed to file written consent to removal with the Court within 30 days, and rejecting arguments for excusing that failure because "the procedural rules governing removal cannot be lightly set aside as mere technicalities. Their technical nature and strict application further the goal of restraining the reach of removal jurisdiction to cases where it is clear that all of the defendants desire a federal forum.").

II. THE MCCARRAN-FERGUSON ACT REVERSE-PREEMPTS THE FEDERAL REMOVAL STATUTES IN THIS CASE.

Even if the statutory criteria for removal were met, this Court nevertheless lacks subject matter jurisdiction over this dispute for the same reason it lacked subject matter jurisdiction over the dispute the IRS attempted to remove: the removal statutes are reverse preempted are under the McCarran-Ferguson Act.

In the McCarran-Ferguson Act, Congress reverse-preempted any non-insurance federal statutes to the extent they interfere with state regulation of the business of insurance:

> (a) State regulation – The 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.
>
> (b) Federal regulation – 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 . . . .

15 U.S.C. § 1012. "This act reflects the strong federal policy of deferring the regulation of the insurance industry to the states and exempting insurance companies from the federal Bankruptcy Code." *In re Amwest Surety Ins. Co.*, 245 F. Supp. 2d 1038, 1043 (D. Neb. 2002).

Under the McCarran-Ferguson Act, any federal statute is reverse-preempted by state law if (1) the federal statute at issue does not specifically relate to the business of insurance; (2) the state law at issue was enacted for the purpose of regulating the business of insurance; and (3) "application of the federal statute would 'invalidate, impair or supersede' the state law." *Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037, 1042 (7th Cir. 1998) (citing *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993). As this Court found in the IRS Remand Order, all three requirements are met here.

A. The Removal Statutes Do Not Specifically Relate to the Business of Insurance

First, the removal statutes (and diversity jurisdiction statute) are statutes of general application, and do not relate specifically to the business of insurance. *See Amwest*, 245 F. Supp. 2d at 1044 ("Undoubtedly, the congressional statute granting diversity jurisdiction to the federal courts is not specifically related to the business of insurance, but applies to a broad range of claims."). OneWest does not dispute that point, but rather appears to argue that this Court should analyze federal jurisdictional or removal statutes differently than other generally applicable federal laws for McCarran-Ferguson purposes. (Notice of Removal at 12-13 (¶ 32).) That is not permissible under the plain language of the McCarran-Ferguson Act or the law of this Circuit. *See Am. Deposit Corp. v. Schacht*, 84 F.3d 834, 844 (7th Cir. 1996) (noting that "any" federal law is "within the reach of the McCarran-Ferguson Act"). By its terms, the *only* exemption to McCarran-Ferguson's reach lies for federal statutes that "specifically relate[] to the business of insurance." *See Autry*, 144 F.3d at 1040 ("Congress intended the McCarran Act to allow the states to regulate the business of insurance 'free from inadvertent preemption by federal statutes of general applicability.'").

B. The State Laws at Issue Regulate the Business of Insurance

Second, the relevant provisions of Chapter 645 of the Wisconsin Statutes regulate the business of insurance. "Statutes aimed at protecting *or* regulating th[e] relationship between insurer and [policyholders], *directly or indirectly*, are laws regulating the 'business of insurance,'" and any laws that "possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance fall with the "broad category of laws enacted 'for the purpose of regulating the business of insurance.'" *Fabe*, 508 U.S. at 503, 505 (emphasis added, quoting citation omitted). *See also Autry*, 144 F.3d at 1044. Here, Wis. Stat. §§ 645.04 and 645.05 regulate the relationship between the insurer and policyholders by (1) preserving the

assets available to fund the rehabilitation, thereby enhancing the ability of the insurer to meet its obligations to policyholders; and (2) ensuring that the insurer will be rehabilitated in an orderly and predictable manner in a comprehensive proceeding. *See* IRS Remand Order, 782 F. Supp. 2d at 749 ("These sections of chapter 645 relate specifically to regulating the business of insurance."); *id.* at 751 ("The Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court . . . .").[9]

C. Exercise of Federal Jurisdiction Here Would Impair State Law Governing Insurer Delinquency Proceedings.

1. Removal Would Impair Wisconsin Law Governing Insurer Rehabilitations

Finally, the exercise of federal jurisdiction here would impair that state law regulating the business of insurance. "Impair" in this context means to weaken, make worse or

[9] *See also Munich Am.*, 141 F.3d at 592-93 ("[T]he specific provisions of the statute at issue here—vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court and authority the court to enjoin any action interfering with the delinquency proceedings—are laws enacted clearly for the purpose of regulating the business of insurance."); *Davister Corp. v. United Republic Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998) ("The stay [of all proceedings against the insolvent insurer] makes clear it is the policy of . . . Utah to consolidate in one forum all matters attendant to the liquidation . . . . [T]he stay manifests a purpose of protecting policyholders . . . [and] meets the test of having been enacted for the purpose of regulating the business of insurance.") *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995) ("The Kentucky Liquidation Act has the 'end, intention, or aim of adjusting, managing or controlling the business of insurance,' in that it regulates the winding up of an insolvent insurance company and "'protects policyholders . . . by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner . . . .") (quoting *Fabe*, 508 U.S. at 505); *Amwest*, 245 F. Supp. 2d at 1044-45 ("While the Nebraska legislation does not specifically state that the [liquidation] court shall have 'exclusive' jurisdiction over insurer liquidation proceedings, the clear import and purpose of the statutes was to consolidate all insolvency proceedings in one court only. . . . This statutory designation of forum promotes the orderly adjudication of claims; . . . and eliminates the risk of conflicting rulings [and] piecemeal litigation . . ., all of which are of significant interest to insurance companies and policyholders."); *Warfield*, 839 F. Supp. 684, 688-89; *Eden Fin. Grp., Inc. v. Fid. Bankers Life Ins. Co.*, 778 F. Supp. 278, 280-82 (E.D. Va. 1991); *Corcoran v. Universal Reins. Corp.*, 713 F. Supp. 77, 80-81 (S.D.N.Y. 1989).

lessen in power, diminish, relax, or injure. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999). "Direct conflict with state law is not required to trigger this [McCarran-Ferguson] prohibition; it is enough if the interpretation would 'interfere with the State's administrative regime.'" *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (quoting *Humana*, 525 U.S. at 310 (1999)).

OneWest's removal here impairs state law, in the same way that the IRS removal impaired the same state law: "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." IRS Remand Order, 782 F. Supp. 2d at 749. By depriving the State Rehabilitation Court of jurisdiction over this dispute, OneWest has similarly disrupted the goal of comprehensive proceedings to manage and "deal with the property and business of the insurer," Wis. Stat. § 645.33(2), in a single forum, Wis. Stat. §§ 645.04 & 645.05. IRS Remand Order, 782 F. Supp. 2d at 748-49. *See also Davister*, 152 F.3d at 1281 ("Allowing a putative creditor to pluck from the entire liquidation proceeding one discrete issue and force arbitration contrary to the blanket stay entered by the Utah state court would certainly impair the progress of the orderly resolution of all matters involving the insolvent company."); *Hudson*, 2007 U.S. Dist. LEXIS 58280, at *19-*20 ("If this court were to apply the removal statute, it would deprive the state court of its jurisdiction [over the removed issues]. Thus, this Court holds that the federal removal statute 'invalidates, impairs, or supersedes' the state laws at issue in this case."); *Amwest*, 245 F. Supp. 2d at 1044–45 ("To permit removal of [piecemeal disputes] would undermine the purpose of Nebraska's statutory method for regulating and supervising, in one forum, insurance company insolvency

proceedings."); *Covington*, 2000 U.S. Dist. LEXIS 20902, at *30–*31 (holding that "the federal statutory authority governing the removal of this action effectively invalidates, impairs, or supersedes [Ohio law] by preventing the consolidation of all liquidation proceedings related to an insolvent insurance company in one forum.").

2. OneWest's Arguments for Non-Impairment Are Flawed.

OneWest's Notice of Removal does not mention any of the case law previously cited by this Court in concluding that removal of particular disputes from the rehabilitation was barred by the McCarran-Ferguson Act, including most of the cases cited above. *See* IRS Remand Order, 782 F. Supp. 2d at 749 (citing *Hudson*, *Amwest*, *Covington*, *Warfield*, and *Munich Am. Reinsurance Co.*, *supra*). Instead, OneWest appears to rest its case for non-impairment on two flawed arguments, both of which were also made by the IRS and rejected by this Court: (1) removal of this particular dispute would not impair state law; and (2) other cases, most of which were presented to this Court and rejected in the IRS dispute, purportedly favor its position. Neither argument stands up to scrutiny.

a. Removal of the Servicing Motion Would Impair the Rehabilitation

First, as illustrated by the case law above, the McCarran-Ferguson Act is not dependent upon the relative importance or unimportance of a particular dispute to the larger rehabilitation proceeding, but rather whether it impairs the state statutory objective of consolidating all matters pertaining to the rehabilitation of an insurer in the same proceeding.[10]

[10] The IRS made the same arguments on this point as OneWest. (*See* Lynch Dec. Ex. 8 at 22 ("This action raises no state law questions, unsettled or otherwise, because the only relevant issue is [federal tax law]; 23 ("The tax issues before the Court do not involve unsettled claims of state law or questions bearing on state policy[.]"), 24 ("The arguments the United States has raised here apply to no other litigant. As a result, this case will not set a precedent for other litigants or encourage them to remove to federal court.").)

Forcing the Commissioner to litigate matters relating to the management of the rehabilitation plainly impairs that purpose, regardless of the particular issues involved in a given dispute. *See Amwest*, 245 F. Supp. 2d at 1045 ("Nebraska's statute designating the state forum for adjudication of these claims regulates the business of insurance and, under the McCarran-Ferguson Act, cannot lawfully be 'invalidated, impaired, or super[s]eded' by permitting additional litigation in the federal court on the basis of diversity."); *Warfield*, 839 F. Supp. at 689 (federal jurisdiction would impair state law aimed at "protecting receivers from having to litigate in multiple forums, which might lead to a depletion of the insurance company's assets"). Discrete issues or not, permitting the removal of policy-specific, issue-specific, or entity-specific disputes, as OneWest urges here, would cause the state objectives of a comprehensive proceeding to suffer death by a thousand cuts.

b. The Case Law Cited by OneWest Does Not Support its Removal Petition

Second, OneWest's Notice of Removal ignores the case law cited by this Court regarding the McCarran-Ferguson Act's application to insurer delinquency proceedings in favor of citing much of the same case law relied upon by the IRS. None of it is persuasive, and none nearly as relevant to the present removal as the case law relied upon by this Court in the IRS Remand Order.

One of the cases OneWest cites did not even involve insurers in delinquency proceedings, but was merely a dispute among insurers that were not subject to a rehabilitation or liquidation. *See Atl. & Pac. Ins. Co. v. Combined Ins. Co. of Am.*, 312 F.2d 513 (10th Cir. 1962) (unfair competition claim between competing insurers, neither of which was in a delinquency proceeding). The others involved suits that had been commenced by a rehabilitator or liquidator *outside* the context of the delinquency proceeding (or by private parties before the delinquency

proceeding began), and McCarran-Ferguson issues arose when the opposing parties raised counterclaims against the insurer or removed the separate case to federal court. *See Hawthorne Savings FSB. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 838 (9th Cir. 2005) (California litigation commenced between an insurer and private parties before the insurer was placed in a delinquency proceeding); *Gross v. Weingarten*, 217 F.3d 208, 211 (4th Cir. 2000) (receiver brought sixteen-count complaint against defendants in federal court; defendants brought counterclaims against the insurer); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 251-52, 255 (5th Cir. 1990) (case was filed between two entities not in delinquency proceedings, and dismissed on abstention grounds when it was determined that the claims involved "what are, on their face, assets of" an out-of-state insurer in delinquency proceedings); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 701 (10th Cir. 1988) ("We are persuaded by [the defendant]'s argument because the [liquidation court] specifically authorized a *separate* judicial action" against the defendant, which thereafter removed the separate action) (emphasis added); *Comm'r of Ins. v. DMB Kyoto Plaza Shopping Ctr., LLC*, 42 F. Supp. 2d 726, 729 (W.D. Mich. 1998) (defendants removed case brought by commissioner that had been "[f]iled separate and apart from the liquidation proceedings, . . . given a different case number and assigned by blind draw to a different judge").[11]

[11] The final case cited by OneWest, *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000), is distinguishable for different reasons: it involved a removal of a dispute by a German reinsurer for the purpose of compelling arbitration under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The opinion describes—at great length—the foreign relations considerations associated with that dispute, *id.* at 154-61, which are "not apropos to the federal diversity statute" at issue here, *id.* at 157. For the reasons described above, the Commissioner believes the law in this Circuit would hold that under McCarran-Ferguson state law regulating the business of insurance cannot be impaired by a federal statute of general application, regardless of the foreign relations concerns associated with that particular statute. But OneWest's removal presents no such concerns regarding the foreign policy of the United States. Moreover, the *Suter* court noted that the liquidator there had actually
(footnote continued on following page)

This distinction matters, because federal jurisdiction over matters that the Commissioner has voluntarily commenced *outside* of the rehabilitation do not impair the rehabilitation proceeding to the same degree as removal of the present motion *from* the rehabilitation itself. The act of removing claims filed by a commissioner in a separate lawsuit against a third party outside the rehabilitation—as occurred in *Grimes* and *DMB Kyoto*—does not impair the jurisdiction of a rehabilitation or liquidation court, because the claims would have been prosecuted outside the rehabilitation even if removal had not occurred. The same holds true for counterclaims raised against the insurer in litigation outside the rehabilitation court: it does not necessarily impair the state's comprehensive jurisdiction to permit counterclaims to be heard in the same external proceeding the commissioner filed against the counterclaimant, because the commissioner has already invoked the jurisdiction of an outside court.[12]

Here, operation of the federal removal and jurisdictional statutes would deprive the State Rehabilitation Court of the ability to fully adjudicate a motion addressing the business of the insurer *while the motion is pending before that court*. It is difficult to conceive of a more direct impairment of the State Rehabilitation Court's comprehensive jurisdiction over matters pertaining to the rehabilitation. For that reason, federal courts addressing removal from the rehabilitation itself—rather than the other contexts present in the cases cited by OneWest—

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contended that the liquidation court *lacked* exclusive jurisdiction and sought to compel arbitration of other disputes raised in the liquidation court, thus undermining her arguments that arbitration of Munich Re's dispute would impair the jurisdiction of the liquidation court. *Id.* at 161.

[12] Nor does it impair state priority statutes. When counterclaims are raised against an insurance commissioner in litigation outside the rehabilitation or liquidation court, any monetary judgments on those counterclaims are recoverable only by distribution under the rehabilitation plan and priority statute governing all other claimants of the insurer. *Gross*, 217 F.3d at 221-222.

routinely conclude that the exercise of federal removal and/or jurisdictional statutes would impair state law regulating the business of insurance. *See* IRS Remand Order, 782 F. Supp. 2d at 748-49 (citing cases).

III. *BURFORD* ABSTENTION IS WARRANTED.

As with its arguments relating to the McCarran-Ferguson Act, OneWest's attempts to escape abstention under the *Burford* doctrine rely on the same case law cited by the IRS, with the same assurances that federal adjudication of its issues will not disrupt the comprehensive state rehabilitation. *Compare, e.g.*, Lynch Dec. Ex. 8 at 20-21 ("The tax issues before the Court do not involve unsettled claims of state law or questions bearing on state policy, as required for *Burford* abstention. Having this Court decide these federal issues, therefore, will not be 'disruptive' to the state's efforts to establish a coherent policy with respect to a matter of substantial public concern.") *with* Notice of Removal at 10 (¶ 28) ("Here, once again, the Rehabilitator's Servicer Termination Proceeding presents a straightforward contract interpretation dispute that, although it involves an insurer in rehabilitation, is in no way related to any issue of state policy pertaining to the regulation of the insurance industry.").

OneWest, like the IRS before it, takes an improperly narrow view of both state policy for insurer rehabilitations generally and this rehabilitation specifically. OneWest fails to recognize that because "[t]he Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court," IRS Remand Order, 782 F. Supp. 2d at 751, "*the very exercise of federal jurisdiction* will interrupt the state's efforts to effect its policy respecting the liquidation and rehabilitation of Wisconsin insurance companies and the concomitant protection of policyholders," *Met. Life Ins. Co. v. Bd. of Dirs. of Wis. Ins. Sec. Fund*, 572 F. Supp. 460, 473 (W.D. Wis. 1983) (emphasis added). For that reason,

Burford abstention is just as appropriate here as it was in the IRS Remand and a long line of cases abstaining from matters involving insurer delinquency proceedings.[13]

A. The Framework for *Burford* Abstention

Abstention under *Burford* is proper in two situations. *First*, federal courts should abstain from deciding difficult questions of state law bearing on policy problems of substantial import. *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 362 (7th Cir. 1998). *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*. (internal quotations, citation omitted).

With respect to the second basis for *Burford* abstention, which applies here, there are two essential elements:

(1) The state must offer some forum in which claims may be litigated; and

(2) "that forum must be special—it must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims."

Prop. & Cas. Ins. Ltd. v. Cent. Nat'l Ins. Co., 936 F.2d 319, 323 (7th Cir. 1991).

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[13] *See, e.g., Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 425-27 (7th Cir. 1990); *Feige v. Sechrest*, 90 F.3d 846, 847-51 (3d Cir. 1996); *Grimes*, 857 F.2d at 703-07; *Barnhardt Marine Ins., Inc. v. New Eng. Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 (5th Cir. 1992); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2d Cir. 1986); *Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757 (2d Cir. 1980); *Mountain Funding, Inc. v. Frontier Ins. Co.*, 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004); *Sebelius v. Universe Life Ins. Co.*, No. 98-4114-RDR, 1999 U.S. Dist. LEXIS 2284, at *19 (D. Kan. Feb. 9, 1999); *Met. Life Ins. Co.*, 572 F. Supp. at 462, 469-73; *Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979); *Meicler v. Aetna Cas. & Sur. Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975).

B. The Elements of *Burford* Abstention Exist Here.

Here, both of these elements are met. *First*, OCI initiated a specialized proceeding in March 2010 to rehabilitate the Segregated Account, a proceeding that is "part of the regulatory structure" for insurance under state law. Wis. Stat. Ann. § 645.01(4)(f) & cmt.[14] The state rehabilitation court is the forum in which matters related to the rehabilitation are being litigated. Thus, unlike the facts in *Property & Casualty Insurance* (cited in Notice of Removal at 9-10 (¶ 26)), where abstention was denied because there was no evidence that the state court was providing a forum in which claims could be asserted, 936 F.2d at 323, there is an ongoing state court rehabilitation proceeding here in which dozens of entities have availed themselves of the opportunity afforded by the state court to litigate issues pertaining to their respective claims. *See* IRS Remand Order, 782 F. Supp. 2d at 751-52; *Mountain Funding*, 329 F. Supp. 2d at 997-98 (in view of pending New York rehabilitation proceedings, first element of *Burford* analysis was met).

Second, Wisconsin has a complex administrative and judicial system for regulating and rehabilitating domestic insurance companies. Having regulated Ambac for decades, and having made the determination that significant regulatory action in the form of a rehabilitation of the Segregated Account was warranted, the Commissioner is uniquely qualified to administer this complex rehabilitation involving the management of billions of dollars of assets and claims against them. *See Prop. & Cas. Ins. Ltd.*, 936 F.2d at 324 (rehabilitation that involves "specialized claims proceeding . . . for the purpose of centrally and uniformly resolving" all claims against insurer constitutes a "specialized proceeding" for purposes of *Burford*); *Mountain Funding*, 329 F. Supp. 2d at 999 (Where purpose of rehabilitation

[14] *See also* Wis. Stat. §§ 645.04(3), 645.32(1), 645.33(2).

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

Furthermore, Wisconsin has provided a particular court to oversee insurer delinquency proceedings, Wis. Stat. § 645.31, and, because of the specialized and complex nature of such proceedings, Wisconsin's Fifth Judicial Administrative District has for the past 20 years assigned all such cases to Judge Johnston by standing order, and he has developed substantive expertise handling such proceedings. (Lynch Dec. at 6-7 (¶ 18) & Ex. 14.) As a result, the State Rehabilitation Court has "a special relationship of cooperation, technical oversight and concentrated review with the [Wisconsin] Commissioner of Insurance," *Grimes*, 857 F.2d at 705, and the "most familiarity with the rehabilitation proceeding," IRS Remand Order, 782 F. Supp. 2d at 752. Thus, both elements of the *Burford* analysis are met.

Moreover, because OneWest failed to join Deutsche and the Servicing Motion against Deutsche remains pending in the State Rehabilitation Court, the potential for conflicting state and federal rulings supports abstention. *Hartford*, 913 F.2d at 426.

Finally, this case involves important federalism and policy considerations that support abstention. As this Court has noted:

> The states have a paramount interest in seeing that liquidation proceedings conducted by court-appointed liquidators and overseen by their courts are free from the interference of outside agencies. This interest is of even greater importance when the company undergoing liquidation is a domestic insurance company or other financial institution. The interests of the company's owners, policyholders, and creditors, as well as the public, are best served and protected by an orderly and efficient process of

> liquidation. The liquidation of [the insurer] is *best left to a proceeding which will settle all of its affairs* and dispose of all of its property. *Federal courts should refrain from deciding select issues confronting another court in pending proceedings.*

Blackhawk Heating & Plumbing Co. v. Geeslin, 530 F.2d 154, 159-60 (7th Cir. 1976) (emphasis added, citations and footnotes omitted). *See also Mountain Funding*, 329 F. Supp. 2d at 999 (holding that, if litigation of rehabilitation-related disputes in federal court outside the state rehabilitation court proceeding were permitted, it would set a bad precedent and "[t]he possibility of inconsistent decisions between this [federal] Court and the New York rehabilitation proceeding could lead to confusion. . . . This type of federal usurpation would be inconsistent with the McCarran-Ferguson Act and general notions of comity").

IV. THIS COURT SHOULD AWARD COSTS UNDER SECTION 1447(C).

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The fee award may be made in a separate order following the remand, and therefore need not delay adjudication of the remanded proceedings. *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 365 (7th Cir. 2000) (attorney fees and costs may be awarded in a separate order following remand); *Husko v. Geary Elec., Inc.*, 316 F. Supp. 2d 664 (N.D. Ill. 2004) (awarding costs in separate order following remand).

The Supreme Court has held that fee-shifting under Section 1447(c) is appropriate where the removing party lacked "an objectively reasonable basis" for removing the case. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *Wolf v. Kennelly*, 574 F.3d 406, 411 (7th Cir. 2009). According to the Seventh Circuit:

> [I]f, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorneys' fees. By contrast, if clearly established law did not foreclose a

> defendant's basis for removal, then a district court should not award attorneys' fees.

Lott v. Pfizer, Inc., 492 F.3d 789, 793 (7th Cir. 2007).

OneWest's Notice of Removal fails to demonstrate an objectively reasonable basis for removal, in several respects. *First*, Section 1447(c) could not be clearer in establishing the need for all defendants to join the removal petition. At the time OneWest filed its removal notice, the time for Deutsche to join in the removal had already expired, yet OneWest proceeded to remove the case notwithstanding Deutsche's absence. OneWest's Notice of Removal gives no explanation for its failure to join Deutsche as required by Section 1447(c). The failure to adhere to that clearly established law is ground for an award of fees. *See, e.g.*, *McDonald v. BAM, Inc.*, No. 13-2048-KHV-JPO, 2013 U.S. Dist. LEXIS 29176, at *8-*9 (D. Kan. Mar. 5, 2013) (awarding fees when removing party failed to join all defendants in removal, and therefore lacked an objectively reasonable basis for removal); *Harvey v. Quality Loan Servs. Corp.*, No. C09-1615RSM, 2010 U.S. Dist. LEXIS 8287, at *17-*18 (W.D. Wash. Jan. 11, 2010) (same); *Doughtery, Clifford & Wadsworth Corp. v. Magna Grp. Inc.*, No. 07-1068(HAA), 2007 U.S. Dist. LEXIS 68454, at *14-*15 (D.N.J. June 19, 2007) (same).

Second, OneWest's claim that removal is appropriate because it is a "new and different party" to the rehabilitation involved in an "independent controversy" willfully ignores OneWest's formal notice of the rehabilitation the week it was filed in 2010, its waiver of opportunities to object to the jurisdictional and other provisions of the Injunction, and the fact that it is seeking to remove from an ongoing, comprehensive proceeding a *motion* relating to the purpose of that proceeding. OneWest had no objectively reasonable basis for asserting that it was a new and different party, or that the motion raised an "independent controversy" within the meaning of well-established law. (*See* Argument section I.A, *supra*.)

Third, OneWest removed in spite of two clear decisions from this Court regarding the same rehabilitation proceeding holding that federal jurisdiction over matters in the rehabilitation is unavailable on the basis of the McCarran-Ferguson Act and the *Burford* doctrine.[15]

Section 1447(c) fee awards are intended to compensate the non-removing party, rather than sanctioning the removing party, and therefore the removing party's good faith or lack thereof is not relevant to the Section 1447(c) inquiry. *See Bosse v. Pitts*, 455 F. Supp. 2d 868, 875 (W.D. Wis. 2006) ("Section 1447(c) is not a sanctions rule. Rather, it is a fee-shifting statute which grants a district court the authority to make the victorious party whole."). Nevertheless, it warrants mention that improper removals in this proceeding are particularly detrimental to the success of the rehabilitation. In a proceeding to manage the assets of an insurer facing billions of dollars of claims, with hundreds of sophisticated parties-in-interest each having significant financial interests in the business of the insurer, the administration of the rehabilitation is a complex process. At any given time, it includes multiple pending matters in

[15] While the Seventh Circuit has noted that "district court decisions . . . do not render the law clearly established" in and of themselves for the purposes of Section 1447(c), *Lott*, 492 F.3d at 793; *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995), they are "evidence of the state of the law" that may support a finding objective unreasonableness. *Anderson*, 72 F.3d at 525; *Butler v. Kohl's Dep't Stores, Inc.*, No. 08-cv-84-LJM-JMS, 2008 U.S. Dist. LEXIS 33616, at *10-*11 (S.D. Ind. Apr. 23, 2008) (finding removal objectively unreasonable where largely indistinguishable case decided months earlier by the same court determined remand was necessary, and removing party's efforts to distinguish it in the subsequent case were objectively unreasonable). Here, OneWest cites no intervening precedent that would support a different result from the IRS Remand Order, and fails to offer a principled justification for why the legal authority relied on by this Court is not correct or why the core holdings of this Court's decision—in particular, the holding that "[a]pplication 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," IRS Remand Order, 782 F. Supp. 2d at 749—are not equally applicable to the present dispute.

both the State Rehabilitation Court and the state appellate courts, as well as ongoing negotiations with policyholders, trustees, and others. Removal throws a wrench in the gears of that process, and creates an incentive for parties-in-interest to use or threaten it as leverage in negotiations or strategy in litigation. Such tactical removals do more than run up unnecessary attorney fees; they can inflict financial harm on the policyholders the Commissioner is charged with protecting. Though an award of costs under Section 1447(c) is not a sanction, an award here may nevertheless serve to deter such plainly improper removals as this proceeding continues, and prevent further interference with the continuing task of the rehabilitation.

CONCLUSION

For the reasons stated above, this action should be remanded to the State Rehabilitation Court, and this Court should enter a separate order awarding the Commissioner his fees and costs incurred on account of OneWest's improper removal.

Dated this 21st day of May, 2013.

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