

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

)	Case No.: Case No. 3:13-cv-00325
)	
SEGREGATED ACCOUNT OF AMBAC)	
ASSURANCE CORPORATION)	
)	
v.)	
)	
ONEWEST BANK, FSB)	
)	
)	
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_____)	

JOINT PRELIMINARY PRETRIAL REPORT

In accordance with Federal Rule of Civil Procedure 26(f) and this Court’s Standing Order Governing Preliminary Pretrial Conferences, counsel for the Commissioner of Insurance for the State of Wisconsin, in his role as the court-appointed rehabilitator of the Segregated Account of Ambac Assurance Corporation (the “Rehabilitator”), and counsel for OneWest Bank, FSB (“OneWest”), have met and conferred and now submit this Joint Preliminary Pretrial Report.

As a preliminary matter, the parties note that a Motion to Remand (Dkt. No. 4) filed by the Rehabilitator will be under a briefing schedule at the time of the Preliminary Pretrial Conference. To comply with the Court’s scheduling order, the parties nevertheless submit this report. The plan proposed below accommodates the resolution of that motion and the possibility that the parties will succeed in resolving their dispute without continued litigation. Given the purpose of the Preliminary Pretrial Conference, this plan addresses what litigation will need to proceed in this Court if the Motion to Remand is denied. The Rehabilitator joins this report

while reserving all rights to continue to assert that all matters removed by OneWest should be remanded to the state rehabilitation court consistent with his pending Motion for Remand.

I. INFORMATION REQUIRED BY THIS COURT'S STANDING ORDER.

A. Nature of the Case.

OneWest's Statement

The parties' dispute arises from OneWest's role as servicer of loans that are pooled in two residential mortgage-backed securitizations (the "Securitizations") for which Ambac Assurance Corporation ("Ambac") issued financial guarantee insurance policies. The Securitizations are documented through, among other agreements, servicing agreements (together the "Servicing Agreements"), which provide that a master loan servicer shall have the right and obligation to service the loans that are part of the Securitizations. OneWest holds the mortgage servicing rights ("MSRs") under the Servicing Agreements. The Rehabilitator wishes to terminate those rights and transfer servicing to another loan servicer. Section 7.01 of the Servicing Agreements gives Ambac, as a third-party beneficiary, the right to terminate the servicer if any one of several enumerated "events of Servicing Termination" occurs. None of the relevant conditions, however, has occurred in the manner that they are written in the Servicing Agreements. Ambac alleges that one of those conditions -- Section 7.01(ix) -- contains a drafting error, and as a result of this drafting error, the Rehabilitator seeks a reformation of the contract or a declaration that the condition as written shall be given a different meaning. Should this relief be granted, Ambac also seeks termination of OneWest's MSRs.

Without endorsing the remainder of the Rehabilitator's statement below, OneWest specifically disagrees with the statement below that Deutsche Bank National Trust Company ("Deutsche Bank") should be viewed as a defendant in the Servicer Termination Proceeding. The Rehabilitator bases this statement on the fact that Deutsche Bank is a party to the Servicing

Agreements. As will be explained extensively in OneWest's opposition to the motion to remand, Deutsche Bank is not party to this dispute. For now, it is sufficient to say, as the Rehabilitator has himself conceded, that Deutsche Bank "has taken no position" (Petition at ¶ 15), and Deutsche Bank has no stake in whether OneWest or any other party services the loans pooled in the Securitizations.

The Rehabilitator's Statement

The motion that is the subject of this removed action is part of an ongoing court-supervised insurer rehabilitation proceeding that has been pending in the State of Wisconsin Circuit Court for Dane County (Judge William Johnston of Lafayette County sitting by designation) (the "Rehabilitation Court") for more than three years. On March 24, 2010, the Commissioner of Insurance for the State of Wisconsin (the "Commissioner") filed in the Rehabilitation Court a petition for rehabilitation of the Segregated Account of Ambac Assurance Corporation (the "Segregated Account") pursuant to chapter 645, Wis. Stats. On March 24, 2010, the Rehabilitation Court granted the petition and ordered that the Commissioner serve as the rehabilitator of the Segregated Account pursuant to Wis. Stat. § 645.32. OneWest was served with the petition for rehabilitation and related initial filings, including a motion for injunctive relief that was granted, at the commencement of the Rehabilitation Court proceedings in 2010. Since that time, there have been active proceedings in the Rehabilitation Court, with more than 1,000 entries on that court's docket. The present motion is one of many that have been filed by the Rehabilitator as part of his ongoing management of the Segregated Account and the Rehabilitation Court's supervision of those proceedings. The motion relates to insurance policies that have been allocated to the Segregated Account.

The motion requests a declaration from the Court that Ambac has the contractual authority to direct Deutsche Bank National Trust Company (“Deutsche Bank”) to terminate OneWest as the mortgage loan servicer for certain residential mortgage-backed securities insured by the Segregated Account. As part of the motion, the Court must determine whether the Servicing Agreements entered into by Deutsche Bank and OneWest’s predecessor-in-interest contain a clear drafting error. Deutsche Bank appeared in the Rehabilitation Court proceedings and has been an active participant in those proceedings, but did not join in OneWest’s removal to this Court.

The Rehabilitator also notes that the case caption created by OneWest for use in the removed matter is inaccurate. The actual case caption in the proceeding as to which OneWest filed its removal papers is *In the Matter of the Rehabilitation of: Segregated Account of Ambac Assurance Corporation*. As noted by the Wisconsin Court of Appeals, insurer rehabilitation proceedings do not involve plaintiffs and defendants in the traditional sense such as the manner in which OneWest captioned the present proceeding; only the Commissioner, as petitioner, and the insurer, as the subject of the proceeding, are parties in the formal sense. *See* Court of Appeals Decision and Order, dated May 3, 2011 at pages 10-11, available at <http://ambacpolicyholders.com/court-filings>. Nevertheless, to the extent this court deems it appropriate to create a new case caption for purposes of the motion removed from the rehabilitation by OneWest, it should identify Deutsche as a party aligned with OneWest.

B. Other Related Cases.

OneWest’s Statement

There are no other related cases. The Rehabilitator has obtained an order from the Dane County Circuit Court for a rehabilitation of the Segregated Account, pursuant to Wisconsin Statutes §§ 645.31-32. The Dane County Circuit Court appointed the Commissioner as

rehabilitator, which gives OCI the power to manage the business affairs of the Segregated Account and commence actions on behalf of the Segregated Account. The Rehabilitator's Servicer Termination Proceeding is an exercise of that authority; it is not a matter within the Ambac Rehabilitation Proceeding for purposes of the federal law of removal, as OneWest's opposition to the motion to remand will demonstrate. State-law labels do not override substance for purposes of federal law. In the Ambac Rehabilitation Proceeding, the Dane County Circuit Court has approved a plan of rehabilitation with an order that is currently on appeal to the Wisconsin Court of Appeals.

OneWest disputes the Rehabilitator's suggestion below that OneWest's removal of the Servicer Termination Proceeding has created uncertainty whether the separate Ambac Rehabilitation Proceeding continues in the state court. Shortly after the removal, counsel for the Rehabilitator asked OneWest about the scope of its removal. Counsel for OneWest responded immediately with correspondence explaining how the Notice of Removal expressly limited itself to the Servicer Termination Proceeding. OneWest does not take the position that it has removed the Ambac Rehabilitation Proceeding along with the Servicer Termination Proceeding. Rather, it is a separate civil action for purposes of federal removal law.¹ Counsel for OneWest closed his correspondence to counsel for the Rehabilitator with the following offer: "Should this be helpful, OneWest would be happy to take reasonable steps to reiterate the foregoing to the federal and state court." The Rehabilitator has not taken OneWest up on that offer.

¹ In addition, OneWest's removal rests solely on diversity jurisdiction and, thus, does not fall within paragraph (c) of 28 U.S.C. § 1441, which provides in the case of "joinder of federal law claims and state law claims" for a procedure under which all claims joined together in the state court are initially removed to the federal court, requiring the district judge to "sever from the action all" non-removable claims and remand them to state court.

The Rehabilitator's Statement

The motion that is the subject of this dispute is part of the Rehabilitation Court proceedings described above, which had been proceeding as *In the Matter of Rehabilitation of: Segregated Account of Ambac Assurance Corporation*, Dane County Case No. 10 CV 1576. As a result of OneWest's removal, it is now unclear whether any proceedings in the Rehabilitation Court can continue or if the entire rehabilitation proceeding has been removed to this Court. Note also that this Court has issued two prior published decisions pertaining to the Segregated Account rehabilitation proceeding, *Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation*, 782 F. Supp. 2d 743 (W.D. Wis. 2011); and *United States v. Wis. Circuit Court for Dane Cty.*, 767 F. Supp. 2d 980 (W.D. Wis. 2011). Those prior decisions were appealed by the United States. Although they recently were settled pending appeal, the appeals have not yet been dismissed by the Seventh Circuit. The Rehabilitator acknowledges that OneWest purports to remove only the servicing termination motion from the rehabilitation proceeding, under the theory that it is an independent controversy. For the reasons described in the Rehabilitator's motion to remand, the independent controversy doctrine is inapplicable here, and thus it is unclear whether OneWest has removed the entire proceeding.

C. Factual and Legal Issues To Be Resolved at Trial.

OneWest's Statement

OneWest anticipates that the following issues of fact and law may need to be resolved in the course of this case or at trial:

- Whether the parties to the Servicing Agreements intended -- at the time they negotiated, drafted and executed those agreements -- to write Section 7.01(ix) in the manner that the Rehabilitator would like the Court to reform or interpret it.

- Whether Ambac knew or should have known of the alleged drafting error when it executed the Servicing Agreement, and therefore New York law bars the Rehabilitator from requesting the equitable relief that it seeks.
- Whether the Rehabilitator's case is barred by the applicable New York statute of limitation.
- Whether Ambac has had in its possession a copy of the Servicing Agreements that contains the alleged drafting error such that, under New York law, the Rehabilitator's case is barred.
- Whether Ambac discovered the alleged drafting error and then delayed in providing notice of the error such that the Rehabilitator's case is barred by New York law affirmative defenses to claims in equity.
- Whether the Rehabilitator's case is barred by New York law affirmative defenses of laches, waiver or unclean hands.
- Whether the Rehabilitator's case is barred by federal law giving the Federal Deposit Insurance Corporation ("FDIC") the power to transfer any asset of financial institutions for which it acts as conservator/receiver, 12 U.S.C. § 1821(d)(2)(G), because OneWest assumed the MSRs of versions of the Servicing Agreements containing the alleged error through a transaction with the FDIC acting as the conservator/receiver for IndyMac Federal Bank, FSB.

The Rehabilitator's Statement

There are two straightforward issues in this case: 1) whether the Rehabilitator has the authority to direct Deutsche Bank to change the party servicing the two insured transactions for which Deutsche Bank is the trustee; and 2) whether the Servicing Agreements contain a clear

drafting error because they inadvertently state that Deutsche Bank can be directed to change the servicer when losses are “less” than a certain percentage, rather than when they are “greater” than a certain percentage.

D. Descriptions of Any Pleading Amendments That a Party Intends To Make.

OneWest’s Statement

OneWest intends to file an answer, which will contain admissions or denials to the various factual allegations that the Rehabilitator has made, and which will contain an assertion of affirmative matter, including various affirmative defenses.

The Rehabilitator’s Statement

The Rehabilitator does not intend to amend the motion that is the subject of this dispute.

E. Identity of Any New Parties.

OneWest’s Statement

OneWest does not anticipate adding other parties to this case. OneWest disagrees that Deutsche Bank need be added to the Servicer Termination Proceeding, for the reasons stated above.

The Rehabilitator’s Statement

Deutsche Bank is a necessary party to these proceedings. If the Rehabilitator’s motion to remand is denied, it will be necessary to join Deutsche Bank.

F. Estimated Length of Time Required for Trial.

One West’s Statement

OneWest estimates that any trial in this matter can be completed in one week.

The Rehabilitator’s Statement

The Rehabilitator estimates that any trial can be completed in one day.

G. Other Matters Affecting the Just, Speedy and Inexpensive Disposition of This Case.

OneWest's Statement

OneWest is not aware of any other matters that would have such an effect.

OneWest not only disagrees with the Rehabilitator's statement below to the contrary, but it specifically objects to his assertion that OneWest's Notice of Removal as to the Servicer Termination Proceeding has been disruptive of the Ambac Rehabilitation Proceeding. The Rehabilitator of course has the discretion to decide when to make particular motions in the Ambac Rehabilitation Proceeding, but for the reasons stated above, OneWest's removal of the Servicer Termination Proceeding has not impacted that ability.

The Rehabilitator's Statement

It is imperative to the Rehabilitator that the Court rule on this dispute as quickly as possible. The Rehabilitator expects that a significant portion of the savings associated with a transfer of servicing responsibilities would be realized within one year of the filing of his motion – savings which cannot be recovered later. In addition, the significant delays caused by OneWest's removal are disruptive to the Rehabilitator's statutory and court-ordered obligations to rehabilitate the Segregated Account and are financially detrimental to the policyholders whose interests the Rehabilitator is charged with protecting. For example, the Rehabilitator has been forced to delay filing of a motion for supplemental payments to certain policyholders as a result of the jurisdictional uncertainty created by OneWest's removal.

II. PROPOSED DISCOVERY PLAN PURSUANT TO FED. R. CIV. P. 26(F)**A. Rule 26(a) Initial Disclosures.**

As approved by this Court's Standing Order Governing Preliminary Pretrial Conferences, the parties stipulate that they do not need to comply with the disclosure requirements of Rule 26(a)(1).

B. Plan for Discovery and Pretrial.**OneWest's Statement**

OneWest anticipates the potential need for discovery into such matters as the actual subjective intent of the parties to the Servicing Agreements when negotiating, drafting and executing these agreements; Ambac's discovery of the alleged defect; and Ambac's acts to notify others of its view that the Servicing Agreements contain an alleged defect. OneWest anticipates that discovery may involve document productions and interrogatories. It might also involve depositions of select individuals. OneWest proposes the following schedule:

Event	Date
Disclosure of Affirmative Experts and Reports under Rule 26(a)(2) (A), (B), (D)	September 16, 2013
Disclosure of Rebuttal Experts and Reports under Rule 26(a)(2) (A), (B), (D)	October 15, 2013
Deadline for Filing Dispositive Motions	October 24, 2013
Discovery Cutoff	February 7, 2014
Settlement Letters	February 7, 2014
Deadline for all Rule 26 disclosures, motions in limine, and proposed jury instructions and voir dire, if any	February 7, 2014
Deadline for responses to all Rule 26 disclosures, motions in limine, jury instructions and voir dire	February 21, 2014
Final pretrial conference	February 28, 2014
Trial	March 11, 2014

The Rehabilitator's Statement

The Rehabilitator believes that discovery in this case is unnecessary because the drafting error in the Servicing Agreements is obvious and leads to absurd results that could not have been intended by any rational person. The Rehabilitator believes that a trial is unnecessary and that the issues in this case can be resolved based on submissions made in connection with the Rehabilitator's original motion. If the Court believes that it is necessary to schedule a trial date, the Rehabilitator requests that it be scheduled as soon as possible and that all other deadlines in the case be adjusted accordingly.

C. Electronic Discovery.

The parties agree that, if discovery is necessary, they will produce documents electronically in .pdf or other agreed upon production formats, with electronic discovery database load files. Documents that are kept in word-searchable form will be produced in word-searchable form, but the producing party shall not be obligated to produce OCR documents that are not otherwise maintained in word-searchable form. The parties will produce Excel files in native (.xls) format, and they will provide other file types in native format when requested and when native format is reasonably necessary for the purposes of the case. The parties will discuss and seek agreement on protocols with respect to identification, review, and production of electronically stored information. The parties agree that this paragraph is not intended to alter the scope of discovery in this case.

D. Privilege Claims.

(1) The parties agree that the inadvertent production or disclosure of privileged or otherwise protected materials shall not be deemed per se a waiver or impairment of any claim of privilege or protection. The parties will negotiate in good faith a provision concerning inadvertent production and/or confidentiality in connection with a Proposed Protective Order.

(b) The parties agree that the following do not need to be included on any privilege log provided pursuant to Rule 26(b)(5): any communications and documents generated after the filing of the litigation, if privileged or protected as work product. Notwithstanding the foregoing, the parties reserve the right to request information within the scope of Rule 26(b)(5)(A) regarding such communications and documents on a case-by-case basis.

E. Discovery Limits.

OneWest is not able to anticipate at this time whether there will be a need to deviate from the discovery limits in the Federal Rules of Civil Procedure. The Rehabilitator does not anticipate any need to vary the standard limits. The parties agree to cooperate in connection with discovery whenever possible.

F. Other Items.

(1) Protective Order. If one becomes appropriate, the parties will submit to the Court a proposed Protective Order governing the production and use of confidential information.

(2) Electronic Service. The parties hereby consent in writing that service by electronic means shall be allowed as set forth in Federal Rule of Civil Procedure 5(b)(2)(E) and that such service shall be deemed complete upon transmission by email in .pdf format, provided that the serving party does not learn that it did not reach the person to be served. The parties will meet and confer regarding service lists, but in the absence of any additional agreement, the parties will serve outside counsel via the e-mail addresses shown on the signature page of this document. The parties stipulate that the three-day rule in Fed. R. Civ. P. 6(d) shall not apply to documents served pursuant to Rules 5(b)(2)(E) and (F).

Respectfully submitted,

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