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

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

OPPOSITION OF ONEWEST BANK, FSB TO MOTION TO REMAND

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I. INTRODUCTION

OneWest Bank, FSB ("OneWest") hereby opposes the Motion to Remand (Dkt. No. 4) filed by the Office of the Commissioner of Insurance ("OCI") of the State of Wisconsin, as the court-appointed rehabilitator (the "Rehabilitator") of the Segregated Account of Ambac Assurance Corporation ("Ambac"). Ambac issues financial guarantee policies for, among other transactions, residential mortgage-backed securitizations ("RMBS"). The recent financial crisis and resulting recession caused (i) Ambac to experience significant losses on many of those and other policies, (ii) OCI to permit Ambac to create a segregated account for its bad policies and other liabilities (the "Segregated Account"), and (iii) OCI to initiate a rehabilitation under the Wisconsin Insurers Rehabilitation and Insolvency Act for the Segregated Account (the "Ambac Rehabilitation Proceeding"). As discussed below, OneWest's only relevant connection to Ambac and the rehabilitation is that it holds mortgage servicing rights ("MSRs") covering the loans that were pooled in two RMBS that Ambac guaranteed under policies assigned to the Segregated Account. OneWest is not a creditor seeking to circumvent an unfavorable order by the state rehabilitation court or otherwise cut to the front of the line of claimants in the Ambac Rehabilitation Proceeding. To the contrary, OneWest is in this Court because the Rehabilitator is seeking to terminate OneWest's MSRs, as further described below.

Following confirmation of the Rehabilitator's plan for rehabilitation, and with significant litigation over that plan and the creation of the Segregated Account now pending before the Wisconsin Court of Appeals, a separate and independent dispute has arisen between Ambac and OneWest. Ambac would like to terminate OneWest's MSRs, but the operative agreements do not permit it to do so. Under the operative agreements, Ambac can terminate OneWest only under certain circumstances that are expressly described. One such provision allows Ambac to terminate OneWest if the percentage of loans that are "charged off" as uncollectable is "less"

than a certain percentage; the Rehabilitator, however, takes the position that the provision should be re-written to permit termination if loan charge-offs are "more" than that percentage. The Rehabilitator has therefore commenced a proceeding by filing a motion in the Ambac Rehabilitation Proceeding that (i) alleges a "drafting error," (ii) asks the court to rewrite the contracts at issue so as to give Ambac a right to terminate OneWest, and (iii) seeks OneWest's termination (the "Servicer Termination Proceeding"). By its Notice of Removal (Dkt. No. 1), OneWest expressly removed from state court the Servicer Termination Proceeding, and only the Servicer Termination Proceeding, based on the Court's diversity jurisdiction.

The Rehabilitator's principal argument for remand is wholly misdirected. The Court has already determined, he asserts, that OneWest's removal was inappropriate under reverse preemption and abstention doctrines. *E.g.*, Br. in Supp. of Mot. to Remand ("Remand Br.") at 1-3, 29, 34-35, Dkt. No. 5. This argument rests on the Court's decisions remanding and dismissing actions from a prior dispute between the Internal Revenue Service ("IRS") and the Rehabilitator relating to the Ambac Rehabilitation Proceeding: *In re Rehabilitation of Segregated Account of Ambac Assurance Corp.*, 782 F. Supp. 2d 743 (W.D. Wis. 2011), and *United States v. Wisconsin Circuit Court for Dane County*, 767 F. Supp. 2d 980 (W.D. Wis. 2011).

In that dispute, the IRS was auditing a tentative $700 million tax refund that Ambac had received, and it sought relief from injunctions issued in the rehabilitation proceeding that prohibited the commencement of claims against Ambac and the Segregated Account while the plan for rehabilitation was being formulated. This Court relied on the McCarran-Ferguson Act's "reverse" preemption provision, 15 U.S.C. § 1012(b), and the doctrine of abstention established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to remand one action and dismiss another.

The Rehabilitator presents OneWest's removal as making it "necessary to repeat those core holdings again." Remand Br. at 2. This presentation, however, ignores the dispositive factual differences between the Servicer Termination Proceeding and the IRS's dispute; it overstates the scope of the core proceedings in a Wisconsin rehabilitation; and it misrepresents this Court's prior holdings and related case law as based on purported *per se* rules treating federal jurisdiction as inappropriate for any dispute involving a receiver for a delinquent insurer.

In fact, the applicable case law requires a nuanced consideration of the relevant circumstances, even in disputes involving a receiver of an insolvent insurer. Simply put, not all disputes involving a receiver for an insolvent insurer trigger reverse preemption or abstention. Rather, a fact-intensive analysis of the particular dispute (here the Servicer Termination Proceeding), the insolvency proceeding, and the relationship between the two is necessary. And reverse preemption and abstention remain the *exception* rather than the rule -- even in disputes involving insolvent insurers.

The Servicer Termination Proceeding is entirely distinct from the IRS's dispute for purposes of McCarran-Ferguson Act reverse preemption and *Burford* abstention. The IRS's request for relief from the injunction against collection efforts threatened to jeopardize the very possibility for a successful rehabilitation. The assertion of federal jurisdiction over that request stripped the state court of jurisdiction over a challenge to the lawfulness of its own injunction, and it did so when others in that proceeding were bringing similar challenges to the Insolvency Injunction. The circumstances, therefore, created a strong basis to apply McCarran-Ferguson Act reverse preemption and *Burford* abstention, as this Court found. Under those facts, the United States argued, unlike OneWest here, that tax collection trumps other considerations and

the IRS could proceed with collection against various Ambac companies because that would not affect the Segregated Account.

Here, however, federal jurisdiction over the Rehabilitator's request to reform OneWest's MSRs and terminate it as a servicer does not threaten to jeopardize the rehabilitation. In fact, it is not a core formal proceeding of the rehabilitation, but simply an action that the Rehabilitator is authorized to bring in any state court or a variety of other courts. Unlike the many other matters resolved by the court in the Ambac Rehabilitation Proceeding, it does not address the scope or propriety of an insolvency injunction, the plan of rehabilitation, or the submission, resolution and payment of claims against the Segregated Account. Rather, it involves a simple and discrete matter of New York contract law, not one requiring application of the expertise of the state court presiding over the rehabilitation.

Numerous authorities, the great majority of which were not presented to this Court in the IRS dispute, hold that under these circumstances federal jurisdiction over a dispute involving a receiver for an insolvent insurer is not subject to McCarran-Ferguson Act reverse preemption or *Burford* abstention. All the cases applying either doctrine, like this Court's prior decisions, are entirely distinguishable from the circumstances found here.

The Rehabilitator's only other grounds for remand are technical arguments that removal jurisdiction is lacking. These arguments fail because (i) under federal law, the Ambac Rehabilitation Proceeding and the Servicer Termination Proceeding are separate civil actions, no matter how the state court and the Rehabilitator label them, and (ii) the *only* defendant in the Servicer Termination Proceeding is OneWest, not any of the other parties to the contracts at issue or participants in the Ambac Rehabilitation Proceeding.

II. BACKGROUND

A. The Ambac Rehabilitation Proceeding

This Court's prior decisions cover the relevant background on the Ambac Rehabilitation Proceeding up to the date of its remand and dismissal orders. To summarize, in March 2010, OCI permitted Ambac to create a segregated account for over 1,000 of Ambac's bad policies (the Segregated Account") and petitioned the Dane County Circuit Court for an Order of Rehabilitation of that account pursuant to the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645.32(a). The Dane County Circuit Court's Honorable William D. Johnston (the "Ambac Rehabilitation Court") entered that order, appointed OCI as rehabilitator, and issued an injunction under Wisconsin Statutes 645.05 to permit the Rehabilitator an opportunity to reorganize Ambac's affairs (the "Insolvency Injunction"). Judge Johnston has since presided over the subsequent Ambac Rehabilitation Proceeding. The Rehabilitator submitted a plan of rehabilitation to the Ambac Rehabilitation Court, which conducted evidentiary hearings to confirm the plan in November 2010. Before the Court could enter its order, however, the United States filed a notice of removal to this Court of a dispute over an order issued by the Ambac Rehabilitation Court enjoining the United States from taking certain actions related to the potential tax liability of Ambac. The Rehabilitator moved for remand, which this Court granted on January 14, 2011.

Weeks after remand, the Court approved a Plan of Rehabilitation for Ambac's Segregated Account. Declaration of Matthew T. Heartney in Opposition to Motion to Remand (hereinafter "Heartney") ¶ 3 & Ex. B. Numerous appeals challenging the lawfulness of this plan followed by, among others, trustees for various RMBS. *See* Annual Report of the Rehabilitation of the Segregated Account of Ambac Assurance Corp. ("2013 Annual Report") at 10, Dkt. No. 12. Those appeals have been consolidated with prior appeals regarding the creation of the

Segregated Account among other issues. *Id.* Those appeals were fully briefed by September 2011 and are currently under submission. *Id.*

OneWest is a remote third-party to the Ambac Rehabilitation Proceeding. OneWest has no monetary claims against Ambac's Segregated Account. Rather, OneWest holds the rights to service loans backing two RMBS that Ambac guarantees under policies in the Segregated Account. Second Affidavit of Iain H. Bruce (hereinafter "Bruce"), Dkt. No. 1-2 ¶¶ 3-4, 6. Under those securitizations, the loans were placed in IndyMac Certificate Trust 2004-2 and IndyMac Residential Asset-Backed Trust, Series 2004-LH1 (the "Trusts"), the trustee for which is Deutsche Bank National Trust Company ("Deutsche Bank"). Bruce ¶¶ 3-4. The Trusts and IndyMac Bank, F.S.B. ("IndyMac") then entered into agreements conferring mortgage servicing rights ("MSRs") on IndyMac with respect to loans held by the Trusts, including a right to receive related fees in exchange for assuming various loan servicing obligations (hereinafter referred to as the "Servicing Agreements"). Bruce ¶ 6 & Exs. A, B. After IndyMac was placed into insolvency proceedings and its assets were transferred to a newly chartered federal savings bank, the Federal Deposit Insurance Corporation ("FDIC"), as the receiver for the new entity, transferred the MSRs for the Trusts, among other assets, to OneWest for valuable consideration, in a transaction dated March 19, 2009. Heartney ¶ 4; Bruce ¶ 6.

OneWest has thus been only an observer of the Ambac Rehabilitation Proceeding. The Rehabilitator would include OneWest employees on the list of all interested parties who received notices by mail on various events in the proceeding. Heartney ¶ 5 & Ex. C. Lacking any direct claims against the Segregated Account, however, OneWest was not affected by the Ambac Rehabilitation Court's Insolvency Injunction, one provision of which directed OneWest and other servicers of loans backing RMBS insured by Ambac "to continue to service the underlying

mortgage notes and related loans *in accordance with the RMBS Transaction Documents*." Declaration of Matthew R. Lynch in Support of Motion for Remand (Dkt. No. 6) (hereinafter "Lynch") Ex. 1 at 9 (emphasis added). Similarly, the Plan of Rehabilitation contains no provisions purporting to affect OneWest's rights. Heartney ¶ 2 & Ex. A.

B. The Servicer Termination Proceeding

OneWest's role in the Rehabilitator's Servicer Termination Proceeding is entirely different. On April 5, 2013, the Rehabilitator filed with the Ambac Rehabilitation Court a Motion for an Order Confirming Authority To Terminate Residential Mortgage Loan Servicer [OneWest] and Appoint Successor Servicer ("Petition"). Dkt. No. 1-2. When serving notice of this proceeding, the Rehabilitator did not merely provide notice by mail to OneWest employees; rather, the Rehabilitator used a process server to serve OneWest's registered agent for service of process. Remand Br. at 13; Heartney Ex. D (service copy of Petition).

The papers request that the Ambac Rehabilitation Court issue an order tantamount to a termination of OneWest's valuable MSRs for loans held by the Trusts. The Rehabilitator begins with a mere request for a "confirmation" of the contractual authority to terminate OneWest as servicer of the loans backing the Trusts. Petition at 2. However, the basis for this alleged authority does not currently exist in the Servicing Agreements. Thus, the Rehabilitator seeks a reformation of those agreements based on an alleged "drafting error" in the Servicing Agreements at Section 7.01(x). *Id.* ¶¶ 4, 6-12. The Rehabilitator argues that a plain language interpretation of that provision would yield "absurd" results and so proposes alternate language that he claims would be more consistent with the intent of the parties to the contracts. *Id.* ¶¶ 8-10. Following this "confirmation" of the right to terminate OneWest, he then asks for an order "enjoining OneWest and anyone acting on OneWest's behalf from taking any actions to prevent

such termination and appointment." *Id.* at 2. Such relief is plainly a request for an adversarial adjudication of OneWest's substantive rights and a direct action against OneWest.

Contrary to the Rehabilitator's suggestion, Deutsche Bank has no interest in this dispute. Although the Rehabilitator also asks that Deutsche Bank be ordered to follow his direction that OneWest be terminated (*id.* at 2), Deutsche Bank has stated no interest in this dispute (*id.* ¶ 15). Nor does it have any direct stake in whether OneWest or another party services the loans pooled by the Trusts. Instead, the Servicing Agreements simply require Deutsche Bank to follow, as an administrative act, any exercise of Ambac's right to terminate the servicer. Bruce Exs. A & B at § 7.01 ("[U]pon the direction of the Insurer . . . the [Trustee] shall terminate the rights and responsibilities of the Servicer . . . ."). *See also infra* n.7.

Unlike routine motion practice within an action, the Servicer Termination Proceeding will require factual development for a final adjudication on the merits of the substantive elements of the Rehabilitator's claims and OneWest's affirmative defenses. *See* Joint Preliminary Pretrial Report at 6-7, Dkt. No. 10 (OneWest's statement of facts to be litigated). The Rehabilitator acknowledges that the Servicing Agreements are governed by New York law. Petition ¶ 7. Under New York law, a reformation action requires parole evidence of the parties' intent for the plaintiff to carry its burden.[1] As for affirmative defenses, reformation actions are subject to a six-year statute of limitations. N.Y. C.P.L.R. § 213(6); *Stidolph v. 771620 Equities Corp.*, 103 A.D.3d 705, 706 (N.Y. App. Div. 2013). Here, the statute began running on September 1, 2004, and December 1, 2004, the dates on which the relevant Servicing Agreements were executed and

[1] *Barbagallo v. Marcum LLP*, 820 F. Supp. 2d 429, 449 (E.D.N.Y. 2011) ("In [deciding a] reformation claim, the court must decide the intent of the parties at the time of contracting"); *Citibank, N.A. v. Morgan Stanley & Co. Int'l*, 724 F. Supp. 2d 407, 416 (S.D.N.Y. 2010); *Linzer Prods. Corp. v. Sekar*, 499 F. Supp. 2d 540, 549 (S.D.N.Y. 2007).

the alleged mistakes were made. *Stidolph*, 103 A.D.3d at 706 (reformation cause of action accrues "from the date the alleged mistake was made"). Therefore, the action is *barred* unless the Rehabilitator can establish a sufficient factual basis for equitable tolling. The factual circumstances are also relevant to the applicability of equitable defenses such as unclean hands, waiver and laches.[2] If the facts demonstrate, for example, that Ambac knew of the alleged error in the Servicing Agreements when OneWest paid value to assume rights under those agreements, but that Ambac did nothing to assert its rights and waited until the error was disadvantageous to it, the Rehabilitator would be barred from the equitable relief that he seeks.

C. OneWest's Notice of Removal

OneWest timely filed a Notice of Removal in this Court and the Ambac Rehabilitation Court to effect a removal, under this Court's diversity jurisdiction, of the Servicer Termination Proceeding as a separate and independent action from the Ambac Rehabilitation Proceeding. Dkt. No. 1 ("Notice of Removal" or "NOR"). The first page of the notice specifically provides that OneWest "hereby removes to this Court an action commenced by [OCI as Rehabilitator] of the Segregated Account of [Ambac] . . . , against OneWest for an 'Order Confirming Authority to Terminate Residential Mortgage Loan Servicer [OneWest] and Appoint Successor Servicer' ('Servicer Termination Proceeding')." *Id.* at 1. The notice goes on to identify the matter being removed as that commenced through the April 5, 2013 "motion" that the Rehabilitator filed in

[2] *Judge v. Travelers Ins. Co.*, 262 A.D.2d 983, 983-84 (N.Y. App. Div. 1999) (holding that "plaintiffs [seeking reformation] were not entitled to equitable relief because they came to the court with unclean hands"); *Charles Albert Co. v. Newtown Creek Realty Corp.*, 211 A.D. 1, 4 (N.Y. App. Div. 1924) ("Plaintiff knew that the clause in question was in the contract which it signed, and it well knew what the effect of the clause was. It cannot therefore . . . reform the contract by striking out that clause on the ground of mistake on its part"); *W.P. Fuller & Co. v. Schrenk*, 58 A.D. 222, 228 (N.Y. App. Div. 1901), *aff'd*, 171 N.Y. 671 (N.Y. 1902) (rejecting reformation claim where party delayed raising its claim until performance under the contract "became unprofitable").

the preexisting Ambac Rehabilitation Proceeding. *Id.* at 1. The notice then specifically explains that the former is a civil action that is independent of -- and therefore separable from -- the latter for purposes of removal jurisdiction. *Id.* at 4-5.

Shortly after the removal, the Rehabilitator asked OneWest about the scope of its removal. Heartney ¶ 7. OneWest responded that, as noted above, the Notice of Removal expressly limited itself to the Servicer Termination Proceeding. *Id.* & Ex. E. In addition, OneWest noted, because its removal of the Servicer Termination Proceeding was made pursuant to the Court's diversity jurisdiction, this is *not* a situation in which removal affects the entire Ambac Rehabilitation Proceeding as it would under paragraph (c) of 28 U.S.C. § 1441, which provides that, in the case of "joinder of federal law claims and state law claims," 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. OneWest's correspondence closed 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. Heartney Ex. E.[3]

[3] Although the Rehabilitator seemed to understand OneWest's point, he has since told others that the removal created "confusion." For example, the Rehabilitator sent a letter to the Ambac Rehabilitation Court requesting that it take the Servicer Termination Proceeding off calendar. Heartney Ex. F. If the entire rehabilitation had been removed, there would be no need to take a single motion off the calendar. Yet the Rehabilitator also sent a letter to all interested parties in the rehabilitation proceeding citing his purported confusion about the scope of the removal as a basis to delay a development that many policyholders would view as positive. *Id.* ¶ 9 & Ex. G. In that letter, the Rehabilitator states that he intends to seek permission from the rehabilitation court to increase the current cash payments on certain policy claims. The Rehabilitator then claims, however, that he must wait to seek permission because "the procedural status of the [rehabilitation] is now unclear due to the recent filing of a Notice of Removal by OneWest Bank, FSB." Heartney Ex. G. The Rehabilitator implies that he is unable to seek permission until a decision on the motion to remand. Not so. In fact, the Rehabilitator has *not* been prevented from filing any motion by the Ambac Rehabilitation Court. OneWest has

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III. ARGUMENT

A. OneWest Has Established All the Statutory Requirements for Diversity-Based Removal, Notwithstanding the Rehabilitator's Three Technical Arguments To the Contrary.

OneWest's notice of removal details all the necessary and sufficient grounds for removal of the Servicer Termination Proceeding under 28 U.S.C. §§ 1441(a) and 1441(b), including the diversity of the parties' citizenship and the amount in controversy. The Rehabilitator does not dispute these points, but rather offers three technical challenges to removal: (1) He argues that the Servicer Termination Proceeding is not a separate "civil action" from the Ambac Rehabilitation Proceeding and, thus, is not subject to removal under 28 U.S.C. § 1441; (2) he argues that OneWest should have filed its notice of removal when it first received notice of the latter proceeding -- *i.e.*, several years before he commenced the Servicer Termination Proceeding; and (3) he argues that Deutsche Bank had to join OneWest's notice of removal to satisfy the rule that all defendants to a civil action join a diversity-based notice of removal. Remand Br. at 14. None of these arguments has merit.

1. The Servicer Termination Proceeding Is a "Civil Action" Subject To Removal Under 28 U.S.C. § 1441 Because It Involves Independent Controversies and a Different Party.

The Servicer Termination Proceeding is a "civil action brought in a State court" that is subject to removal under 28 U.S.C. § 1441(a), notwithstanding the Rehabilitator's decision to present the controversy as a "motion" within the preexisting Ambac Rehabilitation Proceeding. Removability is a question of federal law, and therefore, the state's own characterizations are not decisive in determining whether those proceedings qualify as a separate, removable action or a

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requested that the Rehabilitator be more clear in his communications to interested parties. *Id.* ¶ 10 & Ex. H.

part of a continuous action that is not removable. *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 724 (7th Cir. 2012); *Fed. Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969). Under Seventh Circuit law, "where the supplemental proceeding is not merely a mode of execution or relief, but where it, in fact, involves an independent controversy with some new and different party, it may be removed into the federal court." *Travelers Prop. Cas.*, 689 F.3d at 724 (internal citation omitted). The dispute over Ambac's right to terminate OneWest and the disputes over the Segregated Account's rehabilitation are independent and involve different parties; and the Rehabilitator's various arguments to the contrary (Remand Br. at 16-20) lack merit.

a. The Controversy over OneWest's Termination Is Independent from That over Ambac's Rehabilitation and Involves a New Party.

A rehabilitation action is not so broad as to sweep within its purview any and all disputes between an insolvent insurer (or its rehabilitator) and a third-party, and particularly not Ambac's dispute with OneWest. A rehabilitation under the Wisconsin Insurers Rehabilitation and Liquidation Act must "be regarded as a management rather than as a legal task." Wis. Stat. § 645.32 cmt. It is for insurers that are "seriously sick but still salvageable." Wis. Stat. ch. 645 cmt. New management and a potential restructuring of policies, ownership, or debt are all tools to preserve the insolvent insurer as an ongoing concern in a manner that provides an opportunity for payment on the full value of all claims.

The types of formal legal procedures available within a rehabilitation action, therefore, are few. OCI files a petition in the circuit court for Dane County or that of the insurer's principal office. Wis. Stat. § 645.31. The court's subsequent order of rehabilitation "shall appoint the commissioner . . . in the office of rehabilitator and shall direct the rehabilitator to take possession of the assets of the insurer and to administer them under the orders of the court." *Id.* § 645.32(1).

The Rehabilitator may prepare and submit for court approval a plan for "reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer." *Id.* § 645.33(5). Such a plan of rehabilitation, however, does *not* directly adjudicate the substantive rights of third parties. Rather, it charts a course to respect all obligations of the insolvent insurer and preserve it as an ongoing concern.

The Plan of Rehabilitation for the Segregated Account has nothing whatsoever to do with the scope of Ambac's right to terminate OneWest's MSRs under the Servicing Agreements. It is simply a restructuring of the Segregated Account's financial obligations. Heartney Ex. A (Plan of Rehabilitation ("Plan")). The Plan establishes rules and procedures for treatment of claims against the Segregated Account, Plan at Art. 2, as well as for submission of and distribution on those claims, *id.* at Art. 4. With respect to the treatment of claims, the Plan provides for full payment of all valid claims against the Segregated Account. It restructures those financial obligations by making payment under a varying ratio of cash to interest-bearing notes. *Id.* §§ 1.08, 1.62, 2.01-03. As to the submission and administration of claims, the Plan provides procedures for summary adjudication of disputed financial claims against the Segregated Account. *Id.* § 4.06.

A rehabilitation action should not be confused with *other* independent actions that a rehabilitator has the authority to commence during the pendency of a rehabilitation -- whether in the same court or elsewhere -- to affect a substantive adjudication of claims against third-parties.[4] For example, a rehabilitator may seek an insolvency-related injunction against specific

[4] A rehabilitation action should also be distinguished from a liquidation. As an alternative to rehabilitation, the Wisconsin Insurers Rehabilitation and Liquidation Act provides, "[f]or companies that cannot be saved, the development of efficient, inexpensive, and expeditious procedures for liquidation that will distribute the unavoidable burden fairly . . . ." Wis. Stat. ch. 645 cmt. OCI commences a liquidation, not with the Wisconsin Statutes § 645.31 petition filed

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parties to prevent waste, protect property, and to provide a pause in efforts to collect on claims against an insurer. Wis. Stat § 645.05(1). Such an action may be brought in "any court of general jurisdiction in this state . . . under the relevant sections of ch. 813 [the chapter on injunctions under the Civil Procedure Code]" or "any court outside of this state." *Id.* § 645.05(1) & (2). The rehabilitator may initiate a proceeding to avoid fraudulent transfers. *Id.* §§ 645.33(6), 645.52 & 645.53. He may also, in the exercise of his discretion over the management of the business, bring all manner of independent action against third parties in any other court. *See id.* §§ 645.33, 645.34.

The Servicer Termination Proceeding falls within the Rehabilitator's authority to commence actions against third parties. The Rehabilitator seeks a reformation of OneWest's MSRs under the Servicing Agreements and an immediate termination of those rights. The proceeding will entail a substantive, disputed adjudication of OneWest's rights based on numerous relevant facts. *See supra* at 8-9. This will require significant factual development that is both unrelated to the Ambac Rehabilitation Proceeding, *supra* at 12-13 & *infra* Part III.A.1.b., and not generally permitted against Ambac or the Segregated Account, Heartney Ex. J at 16-17. Moreover, a final adjudication in the Servicer Termination Proceeding will be separately appealable. *See* Wis. Stat. § 808.03(1).

The distinct nature of the Ambac Rehabilitation Proceeding and the Servicer Termination Proceeding was not lost on the Rehabilitator. To the contrary, in commencing the Servicer

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for the Segregated Account, but with a Wisconsin Statutes § 645.41 petition for liquidation. Based on the nature of the petition, "[t]he chapter points the procedure in one direction or the other . . . ." Wis. Stat. ch. 645 cmt. A liquidation involves many legal proceedings to collect and liquidate assets, evaluate claims, and distribute funds to valid claimants according to priorities, which deliberately extinguish claims without full compensation to the extent that a deficiency exists. *Id.* §§ 645.41-.77.

Termination Proceeding, the Rehabilitator notably dispensed with his prior method of service on OneWest, as an interested third party to the rehabilitation proceeding, and instead used the same procedures required to commence an independent civil action against a corporation under Wisconsin's Civil Procedure Code. *See* Wis. Stat. § 801.11(5)(c).

OneWest is the "new party" to the proceedings because, while it is the only defendant in the Servicer Termination Proceeding, it is *not* a party to the Ambac Rehabilitation Proceeding. The Rehabilitator challenges only the latter point. Remand Br. at 20-21. This challenge is at odds with his admission that OCI "has maintained that under Wisconsin law there are no formal 'parties' to the rehabilitation other than the Commissioner and the Segregated Account." Remand Br. at 20.[5] The Rehabilitator's effort to finesse this point, Remand Br. at 20-23, rests on his erroneous presumption that the Servicer Termination Proceeding and the Ambac Rehabilitation Proceeding are one and the same for purposes of federal diversity jurisdiction.

As the Rehabilitator's own conduct demonstrates, the Servicer Termination Proceeding is not merely a "mode of execution or relief" on a final judgment in the Ambac Rehabilitation Proceeding. Rather, the former is an "independent controversy" that is removable under 28 U.S.C. § 1441. *Travelers Prop. Cas.*, 689 F.3d at 724, 725-26; *Quinn*, 419 F.2d at 1018. Indeed, exercising removal jurisdiction over this type of dispute involving an insurer's receiver is "consistent with the purposes behind allowing a defendant to remove an action to federal court in certain circumstances" because it "allows an out-of-town defendant to have a trial on the merits

[5] OCI is charged with the "protection of the interests of insured, creditors, and the public . . . ." Wis. Stat. § 645.01. As such, interested third parties are given notice by mail of developments in the rehabilitation, and they have the opportunity to make objections. At the Rehabilitator's express urging, however, the Ambac Rehabilitation Court has repeatedly held that these interested third parties "do not have standing as parties . . . in this rehabilitation proceeding." *E.g.*, Heartney Exs. J at 16-17, K at 2, L at 14.

of a state-law question free from local interests or prejudice." *Koken v. Viad Corp.*, 307 F. Supp. 2d 650, 654 n.4 (E.D. Pa. 2004) (denying remand motion in action by state insurance commissioner as liquidator of an insolvent insurer to recover preferential payments by the insurer).

b. The Rehabilitator's Comparison Between the Servicer Termination Proceeding and Numerous Motions in the Ambac Rehabilitation Proceeding Is Wrong and Irrelevant.

The Rehabilitator argues that the Servicer Termination Proceeding is "merely one of a series of motions" that "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." Remand Br. at 15, 16-18. The assertion is both wrong and irrelevant.

The comparison is wrong because the Rehabilitator conflates his broad general authority under an order of rehabilitation to bring an action against OneWest with the limited type of formal legal proceedings within a rehabilitation action, noted above. Thus, although the Rehabilitator vaguely alludes to "more than 1,000 docket entries in the State Rehabilitation Court," Remand Br. at 17-19, those docket entries all fall within the few types of legal proceedings provided by the Wisconsin Insurers Rehabilitation and Liquidation Act for a rehabilitation and are therefore distinguishable.

For example, the Rehabilitator litigated disputes over the scope of the Insolvency Injunction and supplemental insolvency injunctions against third-party actions to prosecute claims against the Segregated Account. 2013 Annual Report at 10. He sought approval for various commutations of policies or other settlements of claims, whether by or against the Segregated Account. *Id.* at 3-10. He has litigated the appropriateness of settlements. *Id.* at 11. He sought approval for the development of processes and a schedule for payment on claims. *Id.*

at 5-8. The Rehabilitator has also sought approval of, and defended against challenges to, the Segregated Account and the Plan for Rehabilitation. *Id.* at 10.

The only two proceedings that the Rehabilitator specifically holds out as examples, Lynch ¶¶ 12-14, are nothing at all like the Servicer Termination Proceeding.[6] One is a motion by the Rehabilitator seeking court approval for an interpretation of the scope of coverage under a policy that *increased* the amount of coverage for investors in an RMBS. Lynch Ex. 10 at 2-3. This was by no means an adversarial proceeding, as the trustee for the RMBS obviously did not object and the Ambac Rehabilitation Court approved the order without any opposition. *Id.* Ex. 11 at 1 (granting motion and noting that it was unopposed). Nor was the court's order a substantive adjudication of any dispute over the investor's rights. While the Rehabilitator suggests that here, too, he is just seeking permission from the court about how he should interpret a contract in his management of the Segregated Account's business, Remand Br. at 18, he in fact seeks a substantive adjudication of a disputed matter that would reform OneWest's contract rights.

The second proceeding cited was a motion by the Rehabilitator to enforce certain provisions of the Insolvency Injunction in the face of several clear violations. Assured Guaranty Corp. had refused to pay money owed to the Segregated Account under a reinsurance policy covering claims paid by the Segregated Account, and it petitioned to compel arbitration of the dispute. The petition to compel arbitration violated the Insolvency Injunction's ban on "commencing . . . claims . . . against Ambac . . . in respect of the Segregated Account." Lynch Ex. 9 at ¶¶ 11-12. In addition, Assured's refusal to pay the money owed violated the Insolvency

[6] The miniscule number of such motions cited by the Rehabilitator undermines his claim that OneWest's position is "fraught with peril for the management of the rehabilitation proceeding generally." Remand Br. at 15.

Injunction's ban on "failing to pay . . . payments . . . owed to [Ambac] or in connection with policies or contracts allocated to the Segregated Account." Lynch Ex. 9 at ¶¶ 13-14. Assured's conduct thus directly affected the availability of funds to pay claims under the Plan of Rehabilitation and did so in a manner that violated the Insolvency Injunction.

The Servicer Termination Proceeding is instead very similar to the representations and warranties litigation that the Rehabilitator commenced *outside* the Ambac Rehabilitation Proceeding. The Rehabilitator brought several such actions in the State of New York. Heartney ¶ 11. The actions are against RMBS issuers and loan originators for their alleged breaches of contract and fraud related to the quality of the loans pooled in the securitizations and insured by Ambac. The request for relief includes the "put back" of non-conforming loans in exchange for conforming loans and approximately $2 billion in claims paid by Ambac. *Id.* Ex. B ¶ 125. The put-back remedy "would improve the financial condition of the security and thus reduce projected losses under those policies." *Id.* That is precisely the nature of the alleged benefit to the Segregated Account here: "[T]ransferring the servicing responsibilities," the Rehabilitator claims, "will improve the performance of the mortgage loans held by the Trusts and, as a result, reduce the current projected claims for the Policies." Petition ¶ 19. This type of action is clearly *not* part of the core rehabilitation proceeding.

Regardless, any similarity that the Rehabilitator attempts to draw between the Servicer Termination Proceeding and any small subset of motions in the Ambac Rehabilitation Proceeding has no bearing on what constitutes a "civil action" under 28 U.S.C. § 1441, which concerns the *substance* of the controversies at issue. As such, the nature and number of actions in the Ambac Rehabilitation Proceeding that might resemble the Servicer Termination Proceeding in some purely procedural sense are not relevant to an interpretation of 28 U.S.C. §

1441. Such factors, at most, might bear on whether -- once removal jurisdiction has been established -- abstention might be required under the *Burford* doctrine, which provides practical factors for assessing the circumstances related to each type of motion and the effect on the rehabilitation proceeding of adjudicating the dispute in a federal forum.

c. The Rehabilitator's Request for Injunctive Relief in the Servicer Termination Proceeding Does Not Make That Proceeding Part of the Ambac Rehabilitation Proceeding.

The Rehabilitator argues that the Servicer Termination Proceeding is not a separate action because it is one under his authority under Section 645.05 to seek insolvency-related injunctions, *i.e.*, those to prevent waste of the Segregated Account's assets and otherwise take actions that may lessen the value of the Segregated Account's assets or prejudice policyholders or creditors. Remand Br. at 18. Section 645.05 does *not*, however, require a rehabilitator to apply for and receive such injunctions within the same action as the rehabilitation proceeding. To the contrary, it expressly provides that such an application may be brought "in any court of general jurisdiction in this state" or in "any court outside of this state." Wis. Stat. § 645.05(1) & (2). In addition, such an application must be made "under the relevant sections of ch. 813" of the Wisconsin code, a portion of the general Civil Procedure Code that outlines the bases for injunctive relief. The Servicer Termination Proceeding seeks relief that is independent from the Ambac Rehabilitation Proceeding.

d. The Servicer Termination Proceeding Is Not a Controversy over the Rehabilitator's Control Rights.

The Rehabilitator argues that the Servicer Termination Proceeding merely seeks to confirm his "exercise of control rights" over the Segregated Account and thus enforce the Insolvency Injunction. Remand Br. at 19, 22 n.7. He refers to the Insolvency Injunction's provisions that authorize the Rehabilitator to "exercise contractual rights possessed by Ambac

that related to Segregated Account policies" and, to that end, prohibit parties to RMBS from "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.'" Remand Br. at 5. However, this argument fails for two reasons.

First, OneWest's assertion of its contract rights under the Servicing Agreements is *not* a violation of the cited provisions of the Insolvency Injunction. Neither of those provisions purport to abrogate blindly a servicer's contractual rights to service loans. The Rehabilitator has not actually terminated OneWest, Bruce ¶ 12 (noting plan to terminate OneWest if court approves), nor does he currently possess the contractual right to do so. Indeed, he is expressly seeking reformation of the Servicing Agreements in order to obtain for himself that same right. As a result, this proceeding cannot be cast as an effort to enforce his existing powers under the Insolvency Injunction.

Second, the Servicer Termination Proceeding does not involve any controversy regarding the Rehabilitator's authority to control the Segregated Account's affairs and in that capacity bring suit against OneWest for reformation of the Servicing Agreements.[7] OneWest merely notes that the Servicer Termination Proceeding is not, for purposes of removal, technically the same civil action as the rehabilitation proceeding. The Rehabilitator certainly can decide that he would like to have the Servicing Agreements rewritten so that Ambac would have rights as a

[7] In contrast, as the Rehabilitator notes, in other proceedings Deutsche Bank previously has challenged the Insolvency Injunction's requirement that the Rehabilitator retain "controlling party" rights under RMBS agreements because those agreements cause Ambac to lose those rights upon an insolvency. Remand Br. at 6, 19 & 22 n.7; Lynch ¶ 5. Deutsche Bank has litigated that dispute over the appropriate scope of the injunction in the Ambac Rehabilitation Court, which ruled against Deutsche Bank. Heartney Ex. I at 10-13 & 20. The matter is currently on appeal. Lynch ¶ 5. In this dispute, no party contests the Rehabilitator's controlling party rights, and provisions of the Servicing Agreements require Deutsche Bank to follow any exercise of Ambac's termination rights. *Supra* at 8.

third-party beneficiary to terminate the Servicer. But he does not possess the power to re-write those provisions *sua sponte*. Rather, he must bring an action for reformation and obtain a judicial decree providing such a remedy. Such an action is independent from the Ambac Rehabilitation Proceeding.

e. The Rehabilitator's Decision To File the Servicer Termination Proceeding Within the Ambac Rehabilitation Proceeding Does Not Prevent Removal.

The Rehabilitator argues that removal was improper because he commenced the Servicer Termination Proceeding under the same action number and case name as the Ambac Rehabilitation Proceeding. Remand Br. at 16. As noted above, however, federal law looks to the *substance* of the two proceedings. Therefore, the state's characterization of the new proceeding as being under the same case name or action number is not sufficient. The Rehabilitator's citation to *Fischer v. Hartford Life Insurance Co.*, 486 F. Supp. 2d 735 (N.D. Ill. 2007), is not to the contrary. *Fischer* relied on the lack of a new case number simply as confirmation of its assessment that two matters were, in substance, a single action. *Id.* at 741. For the same reason, the existence of a single action number and case name does *not* prevent the federal court from looking to the substance and finding more than one civil action for purposes of removal jurisdiction. For example, *Growth Opportunity Connection, Inc. v. Philadelphia Indemnity Insurance Co.*, No. 11-cv-00601, 2011 WL 6141097 (W.D. Mo. Dec. 9, 2011), held that a party could remove a petition filed by a court appointed receiver from the preexisting receivership proceedings. In doing so, the court expressly rejected the same argument offered by the Rehabilitator in this case: "[A]lthough [Philly] is a third-party defendant by name, the Receiver's proceeding to recover amounts under the insurance agreement is a separate action, making [Philly] a defendant who may properly remove an action pursuant to [sections] 1441 and 1446." *Id*. at *7-8; *see also Nungesser v. Bryant*, No. 07-1285-WEB, 2007 WL 4374022, at *8

(D. Kan. Dec. 7, 2007). The Rehabilitator's characterization of the Servicer Termination Proceeding as existing wholly within the Ambac Rehabilitation Proceeding has no effect under federal law.

2. Notice To OneWest of the Ambac Rehabilitation Proceeding Does Not Prevent It from Removing the Separate Servicer Termination Proceeding.

The Rehabilitator offers a handful of arguments to the effect that OneWest cannot remove the Servicer Termination Proceeding because OneWest received notice of the Ambac Rehabilitation Proceeding upon its commencement in 2010. Remand Br. at 20-23. However, all of these arguments fail for the simple reason that the proceedings are two separate civil actions under federal law for purposes of removal jurisdiction. Moreover, the Rehabilitator's argument flatly contradicts his own position that OneWest is not a party to the Ambac Rehabilitation Proceeding. Finally, the Rehabilitator's argument would lead to the absurd proposition that OneWest was required to remove the Servicer Termination Proceeding three-years before the Rehabilitator commenced it.

3. OneWest's Notice of Removal Satisfies the Requirement That All Defendants Join in any Diversity-Based Removal.

The Rehabilitator argues that OneWest's notice of removal did not comply with 28 U.S.C. § 1446(b)(2)(A)'s requirement that "all defendants" must join in a diversity-based removal because Deutsche Bank is a defendant that did not join in the removal. Remand Br. at 23-25. This argument fails for two reasons.

First, Deutsche Bank is *not* a defendant in the Servicer Termination Proceeding. The Seventh Circuit's recent decision in *G.E. Betz, Inc. v. Zee Co*., --F.3d--, 2013 WL 1846541, at *13 (7th Cir. May 3, 2013), defines the meaning of the word "defendant" as used in this statute. Under that definition, the labels assigned to parties by state law do not matter because "federal

law determines who is plaintiff and who is defendant" for the purposes of removal. *Chicago, R.I. & P.R. Co. v. Stude,* 346 U.S. 574, 580 (1954). Instead, "[w]hat is determinative . . . is the alignment of the parties' interests." *G.E. Betz, Inc.* 2013 WL 1846541, at *13. The Rehabilitator uses *G.E. Betz* to argue that OneWest and Deutsche Bank "share the same 'qualities traditionally associated with a defendant . . . .'" Remand Br. at 24. Not so. As the Rehabilitator has himself conceded, Deutsche Bank "has taken no position on the proper construction of Section 7.01(ix)," the provision that the Rehabilitator would like a court to rewrite. Petition ¶ 15. Nor does Deutsche Bank have any interest in whether OneWest or a third party services the loans pooled in the Trusts. Any suggestion to the contrary is based on an overbroad presentation of this dispute. *Supra* at 8 & 22 n.7.

Second, Deutsche Bank did not need to join the removal because, even if it were a defendant (which it is not), it would at best be a nominal one, and OneWest can amend its notice of removal to include such an allegation, *N. Ill. Gas. Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982). The rule that all defendants must join a diversity-based removal "does not apply where the non-consenting party is a nominal defendant." *Miller v. Principal Life. Ins. Co.*, 189 F. Supp. 2d 254, 256 (E.D. Pa. 2002) (defendant insurance company's consent to removal not required where company was a "mere stakeholder" and "simply holding funds until it is determined to which of two other parties the funds belong"). The Seventh Circuit acknowledged this principle in *Northern Illinois Gas Co.*, where it held: "Nominal parties, however, are disregarded for removal purposes and need not join in the petition." 676 F.2d at 272. Here, the Servicer Termination Proceeding involves the reformation of provisions of contracts in a manner that affects Ambac's ability to terminate OneWest's servicing rights. If those provisions are rewritten, Deutsche Bank must follow Ambac's exercise of any rights to terminate. Deutsche

Bank is not a stake-holder in the outcome of the proceeding. Indeed, Deutsche Bank has not filed papers in the Servicer Termination Proceeding taking any position.

B. The McCarran-Ferguson Act Does Not Support Remand of the Servicer Termination Proceeding.

The McCarran-Ferguson Act provides for limited "reverse" preemption of federal laws of general applicability. Such laws are preempted to the extent that they "invalidate, impair, or supersede" state regulation over the business of insurance. 15 U.S.C. § 1012(b); *Humana Inc. v. Forsyth*, 525 U.S. 299, 306-07 (1999); *Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993). The Supreme Court's *Humana Inc.* decision, in addition to containing language quoted by the Rehabilitator, "reject[s] any suggestion that Congress intended to cede the field of insurance regulation to the States" under the Act. *Id.* at 308. Rather, a federal law must "frustrate any declared state policy or interfere with a State's administrative regime" for the Act to preclude the federal law's application. *Id.* at 310.

Applying these principles to the federal statutes governing federal diversity jurisdiction and removal, it is clear that: (1) the Act does not excuse federal courts from exercising jurisdiction over disputes involving delinquent insurers, and (2) exercising diversity jurisdiction over the Servicer Termination Proceeding would not "impair" Wisconsin's regulation of the business of insurance or the Ambac Rehabilitation Proceeding.

1. The McCarran-Ferguson Act Does Not Excuse Federal Courts from Exercising Diversity Jurisdiction over Disputes Involving Delinquent Insurers.

Numerous circuit court cases, which were *not* among those cited to this Court by the United States in *Rehabilitation of Segregated Account*, hold that the exercise of federal jurisdiction over a dispute involving a delinquent insurance company or its receiver does not itself impair state insurer delinquency regimes or proceedings. These decisions hold that

Congress did not mean for the McCarran Ferguson Act to abrogate the scope of federal jurisdiction. Rather, to assess whether the assertion of subject matter jurisdiction would impermissibly interfere with state regulation of insurance, courts should rely on well-established abstention doctrines, designed as they are for that nuanced and pragmatic task, rather than impose a generic, bright-line rule about how federal legislation should be construed when applied to the insurance industry.[8]

The Fourth Circuit, for example, reversed a district court's dismissal of counterclaims against the receiver of an insolvent insurer in *Gross v. Weingarten*, 217 F.3d 208 (4th Cir. 2000). The receiver had argued that federal jurisdiction would impair state law providing the insurance commission with jurisdiction over rehabilitations and liquidations of insolvent insurers. The court, however, was "skeptical that Congress intended, through the McCarran-Ferguson Act, to remove federal jurisdiction over every claim that might be asserted against an insurer in state insolvency proceedings." *Id.* at 222. The receiver's argument "proves too much" when the full scope of federal jurisdiction is considered, the court reasoned, particularly where the alleged impairment is not an actual risk because any judgment against the insolvent insurer would still be

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[8] *Hawthorne Savings F.S.B. v. Reliance Ins. Co.*, 421 F.3d 835, 842-44 (9th Cir. 2005), *amended and superseded on other grounds*, 433 F.3d 1089 (9th Cir. 2006) (rejecting argument that "federal jurisdiction necessarily 'impairs' the operation of [the] state-law liquidation regime" and holding instead that the federal diversity statute "is not reverse-preempted by the McCarran-Ferguson Act"); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (reversing remand of adversary proceeding "by the [insurance] Liquidator against a reinsurer to enforce contract rights for an insolvent insurer"); *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 960 (3d. Cir. 1993) (reversing remand of insurer liquidator's claim against reinsurers because, among other things, "[t]he McCarran-Ferguson Act . . . is totally irrelevant"); *Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249, 254 (5th Cir. 1990) (rejecting argument that the McCarran-Ferguson Act eliminated federal jurisdiction over claims against reinsurers of insolvent insurer); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) (rejecting argument that federal court had no jurisdiction over action by state liquidator of insurance company because the McCarran-Ferguson Act "did not intend to divest federal courts of the right to apply state law regarding the regulation of insurers in appropriate diversity proceedings").

satisfied through the insolvency proceeding. *Id.* Recognizing that in some cases the exercise of diversity jurisdiction might impair state laws establishing exclusive claims proceedings for insurance insolvencies, the court reasoned that "[t]his potential for conflict, however, is already contemplated in the principles governing the exercise of jurisdiction, which provide a safety valve through the pragmatic doctrine of abstention." *Id.* (pointing to *Burford* abstention).

Gross and other cases like it fall squarely within a broader line of cases beginning with the Tenth Circuit's decision in *Atlantic & Pacific Insurance Co. v. Combined Insurance Co.*, 312 F.2d 513 (10th Cir. 1962). The case was a state-law unfair competition action against an insurance company, which argued that the McCarran-Ferguson Act stripped the court of jurisdiction. The Tenth Circuit disagreed by reasoning that the Act "serves to limit the authority of federal regulatory agencies as to practices in the insurance business in the face of state acts and in the absence of specific federal law [citations omitted], but it does not follow that there is thereby a modification of diversity jurisdiction of the federal courts." *Id.* at 515.

The Rehabilitator's effort to distinguish these cases on their facts, Remand Br. at 31-32, ignores that they contradict the flawed central premise of many of his arguments: namely, that federal courts cannot exercise diversity jurisdiction over a dispute involving a delinquent insurer. The Rehabilitator, for example, begins with the broad declaration that "removal statutes are reverse preempted under the McCarran-Ferguson Act." Remand Br. at 26. Later, the Rehabilitator likens OneWest's and the IRS's removals because they both have the effect of "depriving the state rehabilitation court of jurisdiction" over a dispute. *Id.* at 29. He then construes this Court's holding in *Rehabilitation of Segregated Account* as one that "removal of particular disputes from the rehabilitation was barred by the McCarran-Ferguson Act." Remand Br. at 30. He even goes so far as to say that OneWest's reasons why "removal of *this* particular

dispute would not impair state law" were already offered "by the IRS and rejected by this Court" under the facts of *that* particular dispute. Remand Br. at 30 (emphasis added). Each of these arguments are flatly contradicted by *Atlantic & Pacific Insurance Co.*, the uniform line of cases upholding it, and those like *Gross* that apply it specifically to insurance delinquency proceedings.

2. In Any Event, Federal Jurisdiction over the Servicer Termination Proceeding Does Not "Impair" the Ambac Rehabilitation Proceeding.

A handful of courts, including this Court in *Rehabilitation of Segregated Account*, have used the McCarran-Ferguson Act together with *Burford* abstention to consider whether to exercise subject matter jurisdiction over a dispute involving an insurance company's receiver. The Rehabilitator's selective use and cursory description of those cases, Remand Br. at 29-30, 30-31, cannot obscure the fact that they are inapposite here. They in fact demonstrate that merely requiring the receiver to litigate a dispute in a federal court does not, standing alone, "impair" the state's delinquency regime or proceedings. Impairment does not arise until true exigencies cause the exercise of federal jurisdiction to jeopardize the integrity of the core delinquency proceeding.

Thus, in *Rehabilitation of Segregated Account*, the United States' dispute with the Rehabilitator jeopardized the Segregated Account's rehabilitation by risking a preferential exemption from the Ambac Rehabilitation Court's insolvency-related injunctions under Wisconsin Statutes 645.05. The United States sought to dissolve a supplemental injunction against certain actions related to a potential $700 million tax liability, and it removed that challenge to federal court when the state court was considering approval of the Rehabilitator's proposed plan of rehabilitation.. Finding that any plan for rehabilitating Ambac depended on the protection of assets provided by the various insolvency injunctions, this Court concluded that

"[a]llowing the United States to proceed against Ambac . . . would amount to pulling out the linchpin that secures the entire enterprise." 782 F. Supp. 2d at 749-50. The United States' claims were core elements of the rehabilitation proceeding, where numerous other entities had brought similar "challenges to the lawfulness of the account allocation and structure and the first-day injunction." *Id.* at 752.

Other cases finding impairment involved disputes with an insurer's receiver that would have disrupted an orderly liquidation of the insurer -- *i.e.*, precisely the type of concern recognized in *Gross* and protected by the Supreme Court in *Fabe*. In *Davister Corp. v. United Republic Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), for example, the court refused to order arbitration of a claim against an insurer in liquidation because the state's procedures required consolidation of all claims against the insurer to ensure equal treatment of all claimants and protection of policyholders. "Allowing a putative creditor to pluck from the entire liquidation proceeding" its claim for damages, the court reasoned, would "impair" such a resolution. *Id.* at 1281. Similarly, in *In re Amwest Surety Insurance Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002), the court remanded a preference action by an insurer's liquidator where the state's liquidation procedures required that all liquidation actions be brought in its Lancaster County court and gave that court summary jurisdiction over preferential transfer claims. These procedures, the district court reasoned, created "a comprehensive statutory scheme for collecting the assets and debts of an insurer for distribution to creditors under that court's supervision." *Id.* at 1044. The district court held that litigation of the preference claim in federal court would impair that liquidation process.[9]

[9] Like *Davister* and *Amwest*, all of the Rehabilitator's other cases involve circumstances under which federal jurisdiction would disrupt the orderly liquidation of an insolvent insurer in a single forum, whether the matter involved monetary claims against an insurer or actions by the

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Even when an insurer is in liquidation, not all disputes with its receiver are such that federal jurisdiction would impair state law or proceedings regarding insolvent insures. In *Suter v. Munich Reinsurance Co.*, the Third Circuit reversed the remand of an action by an insurance company's liquidator against a reinsurer. The action was for interpretation of the contract of reinsurance to assess whether coverage would be available on various policyholder claims that would be accelerated under the liquidation plan. The Third Circuit reasoned that the action was "not a delinquency proceeding or a proceeding similar to one." 223 F.3d at 161. Rather, it was a contract action "which, if meritorious, will benefit the insurer's estate." Recognizing that an adverse decision could cause the insurer's estate to be smaller, the Third Circuit reasoned that "the mere fact that policy holders may receive less money does not impair the operation of any provision of the [state] [l]iquidation [a]ct." *Id.* Similarly, in *Commissioner of Insurance of Michigan v. DMB Kyoto Plaza Shopping Center, LLC*, 42 F. Supp. 2d 726 (W.D. Mich. 1998), the court denied a motion to remand a declaratory relief action by an insurer's liquidator. The action was to determine rights to escrowed funds. The court reasoned that the action was not part of the liquidation required to be handled in a single forum. Rather, the liquidator had the power to institute its action "in this state or elsewhere." *Id.* at 733. Accordingly, the court rejected the liquidator's request for remand under the McCarran Ferguson Act. *See also AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (holding that the McCarran-Ferguson Act did not reverse preempt the declaratory relief statute because "impairment does not occur

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receiver to recover assets for distribution: *Hudson v. Supreme Enters., Inc.*, No. 2:06-cv-795, 2007 WL 2323380 (S.D. Ohio Aug. 9, 2007); *Covington v. Sun Life of Canada Holdings, Inc.*, No. C-2-00-069, 2000 WL 33964592 (S.D. Ohio May 17, 2000); and *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993).

unless the integrity of the core liquidation proceedings is attacked" and a declaratory relief action for no-liability against an insolvent insurer does not create such a risk).

The present case lacks the kinds of exigencies that have been seen to cause the exercise of federal jurisdiction to jeopardize a rehabilitation or liquidation. Unlike the United States in *Rehabilitation of Segregated Account*, OneWest is *not* attempting to circumvent the injunctions put in place to hold off collection efforts while a plan for rehabilitation is put in place. Nor does OneWest's dispute with the Rehabilitator threaten to jeopardize the entire rehabilitation. Nothing in the Plan of Rehabilitation or the Ambac Rehabilitation Court's decision approving the plan expressly contemplates this action or rests on the Rehabilitator's success therein. Heartney ¶¶ 2-3 & Exs. A & B. Moreover, unlike the cases finding that federal jurisdiction over an action impaired a state insurer liquidation proceeding, this case does not involve plucking a claim against an insurance company from a comprehensive system for submitting, adjudicating and paying all claims in a single forum. Indeed, the controversy in this case is distinct from the vast number of issues being litigated by others in the delinquency proceeding. *See supra* at 12-13 & Part III.A.1.b.

Here, the exercise of federal jurisdiction mirrors that which was held *not* to impair state insurance delinquency regimes and proceedings in *Suter* and *DBM Kyoto*. As in those cases, here an insurer's receiver has instigated a contract claim against a third party. Although the Rehabilitator argues that the outcome of this contract action would allegedly have some indirect effect on Ambac's financial health, as confirmed in *Suter*, this is *not* sufficient to interfere with state delinquency laws or proceedings. Moreover, like the receivers in *Suter* and *DBM Kyoto*, the Rehabilitator has discretion to bring these actions in any court under the broad scope of his general power, Wis. Stat. § 645.33(2), and the express scope of his power to seek injunctive

relief in "any court of general jurisdiction in this state" or "any court outside of this state," Wis. Stat. § 645.05(1) & (2). The Wisconsin Statutes do not establish the Ambac Rehabilitation Court as the exclusive forum for all matters related in any way to the Segregated Account's rehabilitation. *Supra* Part III.A.1.a. & c. Thus, like the statutes at issue in *Suter* and *DMB Kyoto*, the Wisconsin Statutes do not give rise to reverse preemption of federal jurisdictional statutes. *See Suter*, 223 F.3d at 161-62; *DMB Kyoto*, 42 F. Supp. at 733.

The Rehabilitator's attempt to compare the Servicer Termination Proceeding to *Rehabilitation of Segregated Account* and other case law finding impairment relies on a significant misstatement of Wisconsin law. In addition to ignoring the many distinctions noted above, the Rehabilitator argues that "[b]y 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." Remand Br. at 29; *see also* Remand Br. at 33 (presuming that the Ambac Rehabilitation Court's "comprehensive jurisdiction over matters pertaining to the rehabilitation" covers "motion[s] addressing the business of the insurer"). Nothing under Wisconsin law, however, purports to require that all actions regarding the business of the insurer in rehabilitation be adjudicated in a single forum. The quoted passage about "dealing with the business of the insurer" comes from a provision regarding the rehabilitator's general power. Because a rehabilitation is a change in management, the code makes express that the rehabilitator shall have the authority "to deal with the property and business of the insurer." Wis. Stat. § 645.33(2). Neither that nor any other provision of the code requires that any actions in dealing with that business must be brought in a single forum. Just the opposite. The code expressly states that the Rehabilitator can seek injunctive relief in "any court

of general jurisdiction in this state" or "any court outside of this state." Wis. Stat. § 645.05(1) & (2). The only requirement is that the Dane County court handle any "dissolution liquidation, rehabilitation, sequestration, conservation or receivership." Wis. Stat. § 645.04(3).

Finally, the Rehabilitator offers a distinction without a difference when pointing out that OneWest's cases involve actions that a receiver "voluntarily commenced outside of the rehabilitation," Remand Br. at 33. The Rehabilitator's decision to present the Servicer Termination Proceeding as a motion within the Ambac Rehabilitation Proceeding has no bearing on whether federal jurisdiction over the former will impair the latter. Indeed, nothing in the Wisconsin Rehabilitation and Liquidation Act requires that any reformation of the Servicing Agreements be done in the Ambac Rehabilitation Court. Regardless, the nature and substance of the Servicer Termination Proceeding and the Ambac Rehabilitation Proceeding determine the issue of impairment. For the reasons discussed above, no such impairment exists here.

C. Remand under the *Burford* Abstention Doctrine Would Be Inappropriate.

The Supreme Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), provides federal courts with a limited exception to what is otherwise an unflagging obligation to exercise jurisdiction conferred by Congress. *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 425 (7th Cir. 1990). *Burford* outlined an exception under which federal courts may "abstain in favor of state processes where federal litigation would interfere with a state administrative scheme and where adequate state judicial review exists." *Sevigny v. Emp'rs Ins. of Wausau*, 411 F.3d 24, 26 (1st Cir. 2005). The Supreme Court's decision in *New Orleans Public Service Inc. v. City Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), significantly limits *Burford*'s scope and confines it to two general sets of circumstances: (1) where the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) "where the exercise of federal review of the

question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 360-64 (internal citation and quotation marks omitted); *see also Hartford*, 913 F.2d at 425; *Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993) ("*NOPSI* cabins the operation of the *Burford* doctrine. Post-*NOPSI Burford* applies only in narrowly circumscribed situations where deference to a state's administrative processes for the determination of complex, policy-laden, state-law issues would serve a significant local interest and would render federal-court review inappropriate.").

The Rehabilitator argues that the second basis for *Burford* abstention applies here, Remand Br. at 35, as receivers for insolvent insurers "often" do, *Amsouth Bank v. Dale*, 386 F.3d 763, 780 (6th Cir. 2004). The Rehabilitator's argument implicates a multi-factor test, which weighs against abstention here, as confirmed by numerous cases involving insolvent insurers.

1. Consideration of *Burford* Abstention in Actions Involving Receivers of Insolvent Insurers Requires Application of a Multi-Factor Test.

The *Burford* abstention doctrine's application to cases involving receivers of insurers in state rehabilitation or insolvency proceedings cannot be reduced to a *per se* rule requiring abstention. Rather, the doctrine requires a fact-intensive analysis of the particular action involving the receiver, the insolvency proceedings, and the relationship between the two. The Seventh Circuit decision in *Harford Casualty Ins. Co*. establishes a "non-exclusive list of factors" to determine whether a federal court should exercise its jurisdiction within this context:

> First, is the suit based on a cause of action that is exclusively federal? Second, does the suit require the court to determine issues that are directly relevant to state policy in the regulation of the insurance industry? Third, do state procedures indicate a desire to create special state forums to regulate and adjudicate these issues? Fourth, are difficult or unusual state laws at issue?

McRaith v. Am. Re-Ins. Co., No. 09 C 4027, 2010 WL 624857, at * 4 (N.D. Ill. Feb. 17, 2010) (quoting *Hartford*, 913 F.2d at 425). Other courts have also considered whether the amount in

dispute in the action is significant in relation to the insolvent insurer's overall assets, *Bilden v. United Equitable Insurance Co.*, 921 F.2d 822, 827 (8th Cir. 1990), or whether the dispute involves policyholders or other claimants on the assets of the insolvent insurer, *McRaith*, 2010 WL 624857, at * 4. Under these factors, in cases involving receivers of insolvent insurers as in all cases, *Burford* "abstention is the exception and not the norm." *Hartford*, 913 F.2d at 425; *see also NOPSI*, 491 U.S. at 359 (collecting cases).

The Rehabilitator's *Burford* analysis is incomplete. According to the Rehabilitator, *Burford* applies if "two essential elements" are met: that the state offer some forum for litigation of the claims at issue and that the forum be a special forum for technical oversight or concentrated review. Remand Br. at 35. The Rehabilitator relies on *Property & Casualty Insurance Ltd. v. Central National Insurance Co.*, 936 F.2d 319, 323 (7th Cir. 1991), for his proposition. *Property & Casualty Insurance Ltd.*, however, in fact vacated an order remanding back to state court a damages suit filed against an insolvent insurer in a state-law rehabilitation. The Seventh Circuit ordered the district court to reconsider *Burford* abstention by carefully considering the two essential elements that the Rehabilitator identified here. However, it went on to state: "The ability to point to a specialized proceeding is a *prerequisite* of, not a factor in, the second type of *Burford* abstention." *Id.* at 323 (emphasis added). It then elaborated: "We take no position on whether abstention would be appropriate if, indeed, there exists a specialized proceeding in [the state]. . . . As has been stated time and time again, *Burford* abstention requires a very careful fact-specific inquiry." *Id.* at 326 n.13. The existence of a specialized proceeding then is necessary to even begin to consider the many other relevant factors in actions involving receivers for insurers in state rehabilitation or liquidation proceedings, but it is not

sufficient to establish abstention. *E.g.*, *McRaith*, 2010 WL 624857, at * 4 (applying *Hartford*'s non-exclusive list of factors).

In any event, *Property & Casualty Insurance Ltd*'s two essential elements reveal that abstention is inappropriate here. They are refinements of the third factor established by *Hartford* -- whether "state procedures indicate a desire to create special state forums to regulate and adjudicate these issues." *Hartford*, 913 F.2d at 425. As discussed below, the Rehabilitator cannot even satisfy these prerequisites, and *Property & Casualty Insurance Ltd.* itself demonstrates as much.

2. The Relevant Factors Require the Exercise of Jurisdiction.

The relevant factors weigh heavily against abstention, and they weigh against abstention so strongly that they in fact require the exercise of jurisdiction.

Hartford's first factor is not relevant because the Servicer Termination Proceeding does not involve an exclusively federal-law matter. Rather, it falls within this Court's diversity jurisdiction. Numerous courts decline to abstain in diversity cases. *Infra* at 38-39 & n. 10.

Hartford's second factor weighs against abstention because the Servicer Termination Proceeding does not require this Court to determine issues that are "directly relevant to state policy in the regulation of the insurance industry." 913 F.2d at 425. As the Third Circuit has held, "[s]imple contract and tort actions," such as the Servicer Termination Proceeding, "that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests." *Grode*, 8 F.3d at 959. This principle is particularly applicable here, where New York law, rather than Wisconsin law, applies. *See Prop. & Cas. Ins., Ltd.*, 936 F.2d at 322 n.5 (holding that "it makes no sense to abstain so that a Nebraska court can decide questions of *Illinois* law" arising in a matter involving an insolvent insurer's rehabilitator). Moreover, the dispute is "idiocratic and fact-specific" and not of substantial

importance to the rehabilitation -- e.g. one regarding the interpretation of insurance policies or the priority of claims. *See Fragoso*, 991 F.2d at 885.

Hartford's third factor also weighs against abstention. Neither the Wisconsin Insurers Rehabilitation and Liquidation Act nor the Ambac Rehabilitation Court indicates a "desire to create special state forums to regulate and adjudicate," 913 F.2d at 425, the issues presented by the Servicer Termination Proceeding. As discussed above, the Act contemplates that certain core proceedings related to the rehabilitation -- not every matter remotely involving the rehabilitator -- will take place before the Ambac Rehabilitation Court. *See supra* at 12-14. Here, the Servicer Termination Proceeding is unlike the many other issues raised in and decided by the Ambac Rehabilitation Court. *See supra* at 13 & Part III.A.1.b. That court has set up, under the Plan, a specialized claims proceeding for the purpose of centrally and uniformly resolving the claims of the Segregated Account's creditors. In the dispute between OneWest and Ambac, however, OneWest does not stand as Ambac's creditor seeking recovery on a debt. OneWest asserts a contractual right to continue servicing loans guaranteed by Ambac. The Ambac Rehabilitation Court has not set up a process for reforming rights of loan servicers. The Act permits such an action to be filed in any court; the Rehabilitator has simply selected a home forum.

These facts cause factor three to weigh against abstention so strongly as to eliminate any basis for refusing to exercise jurisdiction conferred over this matter. The facts here are unlike those in *Burford*, where the state had a complex administrative mechanism to address local oil well drilling rights, a company received an administrative order under that system permitting it to drill, and a competitor challenged that order, not in the designated state court, but in federal court. 319 U.S. at 327. The Rehabilitator's argument to the contrary, Remand Br. at 36-37, notes that the Ambac Rehabilitation Proceeding is a specialized one in a specialized court but

ignores that the Servicer Termination Proceeding is not part of the limited legal procedures of a rehabilitation or those established under the Plan of Rehabilitation. This distinction is dispositive. *Prop. & Cas. Ins., Ltd.*, 936 F.2d at 324-25 (reversing remand where like claims against insolvent insurer's rehabilitator were not "concentrated in a single forum"); *Fragoso*, 991 F.2d at 884-85 ("Just as the federal courts would not abstain from deciding legal issues pertaining to a party involved in a federal bankruptcy proceeding, . . . we can see no reason for *Burford* abstention simply because the judicial bankruptcy proceedings happen to be before a state court.").

With respect to the final *Hartford* factor, no difficult or unusual state laws are at issue because it is undisputed that this action to reform the agreements governing the Trusts will require the application of well-established New York state contract law. *See Hawthorne Savs.*, 421 F.3d at 847; *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815-16 (1976).

Other factors considered by courts further support a decision not to abstain. This matter does not involve claims of policyholders or other claimants on an insolvent insurer. *See Univ. of Md. at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (3d Cir. 1991) (rejecting abstention because claim against auditor of insurance company had too attenuated of a connection to the claims in the state insolvency proceeding); *McRaith*, 2010 WL 624857, at *4 (questioning whether abstention is ever appropriate when the insurer sues a third party that is not seeking a leg up on other creditors).

Moreover, any indirect financial effect that the Servicer Termination Proceeding is alleged to have is simply insufficient to warrant *Burford* abstention. *See Sevigny*, 411 F.3d at 29 ("[T]he financial effects on the liquidation cannot be enough . . . . Otherwise the Commissioner

could invoke *Burford* in every federal suit between himself as liquidator and any third party . . . , regardless of its actual disruptive effect upon the liquidation."); *see also Oklahoma v. Employers Reins. Corp.*, No. Civ-06-0426, 2006 WL 2520216, at *3 (W.D. Okla. Aug. 29, 2006) (holding that "having a financial effect on [an insurer's] liquidation, alone, is not enough to warrant abstention"). Moreover, the amount of any such indirect benefit to the Segregated Account is not enough in relation to the overall assets and liabilities to have any material effect on the rehabilitation. *See Bilden*, 921 F.2d at 827 (refusing abstention, in part, because only impact on the insurer's assets would be litigation fees in fighting the claim).

3. Under the Circumstances Here, Courts Have Frequently Held That Abstention Is Inappropriate, and the Rehabilitator's Cases Are Distinguishable.

Courts regularly decline to abstain on *Burford* grounds from exercising jurisdiction over actions initiated by the receiver of an insolvent insurer that, like the Servicer Termination Proceeding, involve straight-forward questions of another state's law, do not implicate the core proceedings of a liquidation or rehabilitation, and can be litigated in multiple different forums. In *Grode*, for example, the Third Circuit reversed the remand of an action by the receiver of an insolvent insurer seeking recovery under various policies of reinsurance. The receiver sought relief that would improve the prospect for rehabilitation and benefit policyholders. However, that effect was not enough. The Third Circuit reasoned:

> [C]ourts abstain in suits against insolvent insurance companies for the same reasons that district courts refer bankruptcy cases to the bankruptcy courts: Insurance companies tend to issue identical policies to a large number of people, rendering a single forum necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse.

8 F.3d at 960. *Grode* found no such race because it did not involve an action against the insolvent insurer or its receiver, and the receiver did not face a large number of similar disputes.

Id. Accordingly, the court refused to abstain. Here too, the action is one initiated by the Rehabilitator, and it is not like a large number of similar disputes.[10]

All the cases cited by the Rehabilitator in support of *Burford* abstention, Remand Br. at 34-38 & n.13, are distinguishable. Thus, in *Rehabilitation of Segregated Account*, this Court abstained from a dispute about whether the United States was going to have to wait, like all other creditors, to take action towards collection of any monetary claims against Ambac or the Segregated Account. As this Court found, removal and federal jurisdiction "has deprived the state court of the ability to address a direct challenge to the lawfulness of the rehabilitation structure and account application and has created the potential for conflicting rulings." 782 F. Supp. 2d at 751. Under those circumstances, federal jurisdiction threatened to impair the state priority statutes upon any plan for rehabilitation because the United States asked the Court to retain jurisdiction over any future issues that arise relating to the collection of the taxes owed. *Id.* at 752. Also, the Ambac Rehabilitation Court was uniquely qualified to hear the claims regarding the scope of the insolvency injunction. *Id*.

Similar to *Rehabilitation of Segregated Account*, many of the cases cited by the Rehabilitator in support of its *Burford* argument in the motion at hand, like those cited in support of its reverse preemption argument, involved an action *against* an insolvent insurer or affiliated companies by a creditor that would have interfered with a fair and orderly treatment of creditors

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[10] *See also, e.g.*, *Sevigny*, 411 F.3d at 28 (*Burford* abstention should be limited because some issues relating to insurer liquidation can be litigated in federal court without threatening state policy); *Hawthorne Savs*, 421 F.3d at 844-49 (affirming district court's refusal to exercise *Burford* abstention in "simple state-law contract claim"); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) ("[I]t is difficult to see how a federal court's pronouncement on issues of common-law liability having nothing to do with insurance could be disruptive of those proceedings"); *Gross*, 217 F.3d at 224 (4th Cir. 2000) (reversing abstention under *Burford* because, among other things "the Virginia receivership regime itself recognizes the need to pursue claims before other courts and gives the receiver the authority to do so").

in a liquidation being handled by the state court.[11] In *Hartford*, for example, the Seventh Circuit affirmed the decision to abstain under *Burford* under the rationale that, "[i]In effect, Hartford is attempting to jump ahead of [the insolvent insurer's] other creditors by filing a lawsuit outside the state rehabilitation proceedings." 913 F.2d at 426. "Allowing suits similar to Hartford's action to proceed," the court continued, "would lead to a system where the states would not control the ultimate distribution to creditors of insolvent insurers." *Id.*

One of the cases cited by the Rehabilitator justified abstention based on the distinguishable fact that the case presented important issues of state law that were committed to courts of special competence over those issues. In *Grimes v. Crown Life Ins.*, 857 F.2d 699 (10th Cir. 1988), a liquidator of an insolvent insurer sought a declaration regarding the insolvent insurer's ability to assign liability under policies to another insurer and thus write more policies of insurance. That ability turned on application of a state law regarding such actions to an insurer in insolvency proceedings, over which the Oklahoma County District Court exercised exclusive jurisdiction. *Id.* at 705. The court abstained because "[t]he questions at issue in this case are questions of state law which affect the fundamental purposes of a state liquidation proceeding" and it is one that "the Oklahoma County District Court should be allowed to answer

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[11] They are *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); *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976); *Mountain Funding, Inc. v. Frontier Ins. Co.*, 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004) and *Sebelius v. Universe Life Ins. Co.*, No. 98- 4114-RDR, 1999 U.S. Dist. LEXIS 2284, at *19 (D. Kan. Feb. 9, 1999). Two of the Rehabilitator's other cases do not involve traditional creditors, but they do involve similarly distinguishable claims against the insolvent insurer or its receiver: *Feige v. Sechrest*, 90 F.3d 846, 847-48 (3d Cir. 1996), and *Mathias v. Lennon*, 474 F. Supp. 949, 951 (S.D.N.Y. 1979). Two more -- *Smith v. Metropolitan Property & Liability Insurance Co.*, 629 F.2d 757 (2d Cir. 1980), and *Meicler v. Aetna Casualty & Surety Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975) -- do not even involve an insurer in delinquency proceedings or its receiver.

in the first instance." *Id.* *Grimes*, moreover, was decided before *NOPSI* cabined *Burford*'s reach, an important point in this context, *Fragoso*, 991 F.2d at 884 ("We believe . . . that the circuit court cases favoring abstention in insurer insolvency matters are suspect in light of *NOPSI*."). And in any event, no such important issues of state law exist in the present case, and the matter has not been committed to the jurisdiction of a single court.

Another case cited by the Rehabilitator, this Court's decision in *Metropolitan Life Insurance Co. v. Board of Directors of Wisconsin Insurance Security Fund*, 572 F. Supp. 460, 462 (W.D. Wis. 1983), is similarly distinguishable. In that case, insurance companies challenged the constitutionality of provisions of an insurance security fund for policyholders of certain insurers in liquidation. *Id.* at 461. This Court was faced with the task of addressing *Burford* abstention before *NOPSI* limited its scope and, thus, at a time when the doctrine was, in this Court's words, "difficult to distill" and of "uncertain scope." *Id.* at 472. The form of abstention that this Court elected to exercise is the first form recognized by *NOPSI*, not the one invoked here. This Court reasoned: "[T]he instant case involves unsettled question of state law . . . and it presents for decision questions bearing on state policy. . . . It is a matter of substantial state concern that the process of liquidating an insurance company be carried out in an orderly and efficient manner." *Id.* at 473. The "very existence of federal jurisdiction" prevented the state court from resolving that issue in a manner that would advance the state's concerns.

IV. CONCLUSION

For all the foregoing reasons, OneWest respectfully requests that this Court deny the Rehabilitator's Motion to Remand the Servicer Termination Proceeding back to the Ambac Rehabilitation Court. OneWest also requests that this Court deny the Rehabilitator's request for costs, Remand Br. at 38-41, because objectively reasonable grounds for removal are apparent.

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Respectfully submitted,

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