UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

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

FOLEY & LARDNER LLP

Michael B. Van Sicklen, SBN 1017827
Jeffrey A. Simmons, SBN 1031984
Matthew R. Lynch, SBN 1066370

150 East Gilman Street
Madison, WI 53703
(608) 257-5035 (phone)
(608) 258-4258 (fax)

*Attorneys for the Wisconsin Commissioner of Insurance, as Court-Appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Cases**

**Statutes**

**Rules**

## INTRODUCTION

Throughout its brief in opposition to remand, OneWest Bank, FSB ("OneWest") strains to find some principled basis for why the Commissioner's motion (the "Servicing Motion") to require Deutsche Bank National Trust Company ("Deutsche") to change servicers for a particular set of trusts should be found to be removable, while other motions raised in the State Rehabilitation Court are not. At times, OneWest says the key question is whether the motion is a "core proceeding" in the rehabilitation. (OneWest Br. at 4, 18, 28.) It is unclear what constitutes a "core proceeding" in the insurer rehabilitation context—that term never appears in the Wisconsin Statutes—but according to OneWest, all of the other 1,000-plus docket entries in the State Rehabilitation Court were part of the core proceeding, while only the Servicing Motion is not. (*Id.* at 16.) At other places, OneWest asserts that the test for removability should be whether "true exigencies cause the exercise of federal jurisdiction to jeopardize the integrity of the core delinquency proceeding." (*Id.* at 27, 30.) Elsewhere, OneWest says that removability hinges not upon whether the Servicing Motion was filed in the State Rehabilitation Court, but whether the Commissioner hypothetically *could* have filed it elsewhere. (*Id.* at 4, 13-14, 19.)

None of OneWest's arguments provide a principled basis for distinguishing the Servicing Motion from the many other motions pursued by the Commissioner in the State Rehabilitation Court. Nor do its arguments distinguish this attempted removal from the prior removal attempt of the United States Internal Revenue Service and the numerous authorities cited in this Court's remand order. *See generally Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp.* ("IRS Remand Order"), 782 F. Supp. 2d 743 (W.D. Wis. 2011). Individually or collectively, OneWest's arguments do not come close to meeting its burden of showing that removal is proper under the necessarily "narrow[]" construction of 28

U.S.C. § 1441, in which "[a]ny doubt regarding jurisdiction should be resolved in favor of the states." *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

In reality, as set forth in the Commissioner's opening brief, the Servicing Motion goes to the core of one of the principal tasks of the rehabilitation: responsibly managing the assets of the delinquent insurer (in this case, the collateral) for the benefit of policyholders, creditors, and the public. The fundamental importance of that task to a successful rehabilitation has been evident from the first day of the rehabilitation, when the Commissioner sought and obtained an injunction (the "Injunction") that specifically addressed the servicing of the large number of Ambac-insured residential mortgage-backed securities ("RMBS") such as the two particular trusts at issue in the Servicing Motion. It is unpersuasive for OneWest to argue that the Servicing Motion is distinct from the remainder of the rehabilitation, and its grounds for characterizing this dispute as a separate, removable controversy would apply with equal force to virtually all other matters comprising the "management task" of this ongoing state insurer rehabilitation. Wis. Stat. Ann. § 645.32 cmt.

Equally problematic, OneWest's attempted removal not only seeks a different forum for one motion in the largest insurer rehabilitation in Wisconsin history, but also to carve out only a single issue in relation to that motion. The Commissioner brought the Servicing Motion primarily against Deutsche, the entity that is responsible to the Segregated Account for servicing on the mortgages underlying the two trusts involved here. OneWest's failure to obtain Deutsche's timely consent to its removal has created the direct risk of inconsistent rulings, deprived this Court of the ability to provide the complete relief sought in the Servicing Motion, and violated the straightforward command of 28 U.S.C. § 1446(b)(2)(A), which requires that "all defendants" must join in or consent to the notice of removal.

## ARGUMENT

### I. THE SERVICING MOTION IS NOT "INDEPENDENT" FROM THE REHABILITATION; NOR DOES IT INVOLVE A "NEW AND DIFFERENT" PARTY

OneWest's repeated assertions of an "independent controversy" involving a "new and different party" (OneWest Br. at 11-12, 18, 21) depend on mere semantics. An examination of the substance of both the rehabilitation and the Servicing Motion reveals that the dispute with OneWest is not some independent controversy distinct from the overarching management task of the rehabilitation, but rather a "continuing and supplementary part of the underlying delinquency proceeding, thus warranting remand." *Robertson v. Franco*, No. 10-cv-1663-TWP-MJD, 2011 U.S. Dist. LEXIS 56406, at *6 (S.D. Ind. May 25, 2011).

#### A. The Servicing Motion is Not an Independent Controversy

##### 1. Servicing is an Integral Aspect of the Rehabilitation

OneWest's defense to remand depends heavily on trying to create the illusion that the Commissioner's ongoing efforts to improve the mortgage loan servicing being provided by third-party servicers like OneWest is an unimportant, peripheral aspect of the Commissioner's management task. The record, however, reflects just the opposite.

The Commissioner and the State Rehabilitation Court recognized the importance of servicing from day one of the rehabilitation. Several provisions of the Injunction (dkt. 6-1) address servicing, including the retention of Ambac's "control" and "direction" rights against parties to the "Transaction Documents" relating to Ambac-insured RMBS in the Segregated Account. (Injunction at 4-5 (¶ 6), 8-9 (¶ 9.b).) Anticipating that servicer transfers may occur as part of the rehabilitation, the Injunction specifically enjoins parties to those agreements (like OneWest) from "failing to take any action . . . as directed by the Rehabilitator . . . under the

RMBS Transaction Documents, including without limitation directions in connection with the transfer of servicing." (*Id.* at 9 (¶ 9.b.2).)

As anticipated by the Injunction, supervision of servicing has been an integral part of the Commissioner's rehabilitation of the Segregated Account. Although OneWest mentions the most recent Annual Report (the "Report") the Commissioner filed on June 4, 2013 with this Court and the State Rehabilitation Court (dkt. 9), it ignores the directly relevant provisions of the Report that address the Commissioner's efforts on servicing. (OneWest Br. at 5, 16.) The Report describes the importance of promoting optimum servicing on the mortgage collateral that protects the Segregated Account's position on each of the many RMBS policies it insures:

> E. Improving Mortgage Loan Servicing
>
> Throughout the pendency of the Rehabilitation, the Rehabilitator and the Management Services Provider have pursued various efforts and strategies directed at maximizing claims-paying resources and mitigating the amount of insured claims expected to be presented for payment to the Segregated Account. Those efforts are consistent with the Rehabilitator's overall effort to improve outcomes for insured policyholders through prompt, efficacious management and administrative strategies. Those efforts have included improvement of the quality of the servicing being performed by third parties for mortgage loans in the various RMBS transactions related to Segregated Account policies. *In certain instances, the Rehabilitator and AAC have replaced mortgage loans servicers, either through voluntary agreements or through the exercise of control rights provided in the transactional documents governing the insured securities.*

(Dkt. 9 at 8 (emphasis added).)

The importance of servicing to the entire rehabilitation is obvious. The RMBS mortgage pools serviced by OneWest are but two of the 269 RMBS transactions insured by policies in the Segregated Account. (*Id.* at 21.) Those 269 RMBS transactions presently account for over $19 billion of exposure in the Segregated Account (net par outstanding), constituting 70% of the total exposures presently being managed by the Commissioner as part of the rehabilitation. (*Id.*)

### 2. OneWest Fails to Distinguish the Servicing Motion from the Rehabilitation Generally

Ignoring the importance of servicing to the rehabilitation, OneWest rests its "independent controversy" argument upon asserted distinctions between the Servicing Motion and other litigated issues in the rehabilitation. The distinctions prove false, however, as soon as OneWest attempts to explain how the Servicing Motion is different. Most prominently, OneWest summarily claims that the other 1,000-plus docket entries in the rehabilitation "all fall within the few types of legal proceedings provided by [Chapter 645] for a rehabilitation and are therefore distinguishable" from the Servicing Motion (OneWest Br. at 16), while the Servicing Motion is different because the Commissioner "seeks a substantive adjudication of a disputed matter that would reform OneWest's contract rights" (OneWest Br. at 17).

But the resolution of disputed matters affecting contract rights has been the focus of most substantive filings in the rehabilitation to date. Virtually every sentence of the Injunction substantively affects the contract rights of various entities with an interest in Ambac, from enjoining the exercise of automatic termination provisions (Injunction at 3 (¶ 4)), to preserving insurer rights to premiums and other payments in spite of contractual defaults (*id.* at 5 (¶ 7)), to dictating the forum where claims for breaches of those contracts must be brought (*id.* at 2 (¶ 1)), to maintaining the very contractual control rights over servicing that the Commissioner seeks to exercise in the Servicing Motion (*id.* at 4 (¶ 6), 6-13 (¶ 9)). The Plan of Rehabilitation alters the timing and mechanisms for parties to obtain contractual payments. Other motions, two examples of which were attached to the remand motion's supporting declaration (dkt. 6-9, 6-10 & 6-11), concerned various entities' contract rights. All of those actions affecting contract rights have been adjudicated in the State Rehabilitation Court.

Here, the Servicing Motion seeks lesser relief: rather than barring OneWest from exercising certain contract rights altogether, it asks the State Rehabilitation Court to confirm the Commissioner's interpretation of those rights and effectuate their exercise pursuant to that interpretation. This too, is a common task in the rehabilitation. Each policy claim requires an interpretation of the policy and underlying transaction documents to determine the claimant's entitlement to payment, with any questions subject to resolution by the State Rehabilitation Court (as occurred in one example referenced in the Commissioner's opening brief (dkt. 6-10 & 6-11)). Similarly, each contract obligation owed to the insurer requires interpretation, with any disputes over its terms subject to resolution by the State Rehabilitation Court (as occurred in another example referenced in the opening brief (dkt. 6-9)). In short, the rehabilitation involves interpretation of contracts on a regular basis, all subject to the oversight and ultimate authority of the State Rehabilitation Court. There is no principled distinction between the contract issues in the Servicing Motion and those at issue in other disputed matters in the rehabilitation to date.

**3. Precedent Undermines OneWest's Assertion of an Independent Controversy**

OneWest cites three Seventh Circuit cases concerning garnishment and other post-judgment proceedings for the general framework of the independent controversy doctrine,[1] but none of those cases applies that doctrine in the insurer delinquency context. More apt is *Robertson v. Franco*, No. 10-cv-1663-TWP-MJD, 2011 U.S. Dist. LEXIS 56406 (S.D. Ind. May

[1] *See GE Betz, Inc. v. Zee Co.*, --- F.3d ---, No. 12-3746, 2013 U.S. App. LEXIS 9047, at *1-*7 (7th Cir. May 3, 2013) (action to collect judgment entered in different jurisdiction against judgment debtor's lender); *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 717 (7th Cir. 2012) (action to discover assets held by third party for purpose of judgment satisfaction); *Fed. Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1019 (7th Cir. 1969) (action attacking existing judgment "on the ground that [the judgment debtor] had not been given credit for certain sums alleged to have been paid").

25, 2011). There, the Indiana commissioner of insurance petitioned for rehabilitation of a financially distressed insurer. *Id.* at *2-*3. Two years later, the commissioner filed a complaint in the rehabilitation court, alleging that former employees of the insurer breached contracts, violated securities laws, and breached their fiduciary duties. *Id.* at *3. The defendants sought to remove, arguing that the separate complaint "covers different terrain than the delinquency proceeding because a claim for damages against third parties on behalf of an insurer in rehabilitation is distinct from the underlying rehabilitation proceeding itself." *Id.* at *5. Therefore, they asserted, it was a removable independent controversy.

Applying Seventh Circuit precedent, the Indiana federal court disagreed: "The Court finds that the Complaint in this action is merely a continuing and supplementary part of the underlying delinquency proceeding, thus warranting remand." Relying heavily upon an analogous case arising from a bank receivership, *Florida Dept. of Ins. v. Chase Bank of Tex. Nat'l Assoc.*, 243 F. Supp. 2d 1293 (N.D. Fla. 2002), the court held that the action to recover losses that in part contributed to the insurer's distressed financial condition "cannot be cleanly disassociated" from a rehabilitation that sought to alleviate that distress for the benefit of policyholders. *Robertson*, 2011 U.S. Dist. LEXIS 56406, at *7. Though the court also noted that Indiana state law required the commissioner to bring such actions in the rehabilitation court, it did so only after concluding that the complaint did not present an independent controversy. *Id.* at *7-*9.

OneWest has far weaker grounds than the unsuccessful defendants in *Robertson* to assert that the Servicing Motion is an independent controversy justifying its own federal adjudication. Unlike *Robertson*, where the commissioner sought to recover losses incurred in the past, the Servicing Motion is intended to reduce losses prospectively as the rehabilitation

proceeds. Also unlike *Robertson*, the Servicing Motion does not assert causes of action against OneWest or seek monetary relief for acts that occurred pre-rehabilitation. Instead, the Servicing Motion asks the State Rehabilitation Court to direct Deutsche to replace a vendor that is presently underperforming in its ongoing duties to service collateral subject to the Rehabilitator's oversight, and for equitable relief to ensure an efficient transfer of those duties. Thus, if the complaint in *Robertson*—which had "all the hallmarks of a new lawsuit," including a separate summons and complaint, *id.* at *5—does not qualify as an "independent controversy" from the underlying rehabilitation, the Servicing Motion at issue here does not come close to fitting within that doctrine.

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

In addition, OneWest fails to adequately explain why it is a "new and different party" to the rehabilitation. It concedes that, at the outset of the rehabilitation over three years ago, it received direct notice of the rehabilitation and an invitation to participate, including the opportunity to timely object to the Injunction becoming permanent. But prior to the Servicing Motion, OneWest—unlike Deutsche—chose to be "only an observer of the Ambac Rehabilitation Proceeding" rather than an active litigant. (OneWest Br. at 6.) In essence, OneWest implies that each of the hundreds of entities receiving court-ordered notice of the rehabilitation upon its commencement becomes a "new and different party" to the rehabilitation whenever it first decides to weigh in on an issue.

OneWest's choice to stand on the sidelines prior to filing its notice of removal does not make it a new and different party to the rehabilitation. Despite OneWest's assertions to the contrary, the Injunction directly affected its legal rights vis-à-vis Ambac, because Ambac's status as a third-party beneficiary of OneWest's servicing agreements with Deutsche is conditioned upon the absence of default triggers such the filing of a petition "under any federal

or state bankruptcy, insolvency, or similar law against the Insurer" or the appointment of a receiver for the insurer's property. (Notice of Removal Ex. D at 15; Notice of Removal Ex. E at 12; Notice of Removal Exs. D & E (together, the "Servicing Agreements") § 11.13.) The Injunction protected against those triggers, enjoining all parties to such agreements (including OneWest) from "[t]aking any action to . . . impede, impair, restrict, or delay the exercise by the Rehabilitator in his own right under the RMBS Transaction Documents or as 'controlling party' or 'control party' (or a term with similar effect, howsoever designated, under such agreements), notwithstanding the occurrence of an 'insurer default' . . . ." (Injunction ¶ 9.b.1.)

Thus, the third-party beneficiary rights the Commissioner seeks to exercise in the Servicing Motion exist only by virtue of the Injunction. OneWest may not have cared enough to raise a timely objection in the State Rehabilitation Court, but it cannot make a colorable argument that it is a "new and different party" in a dispute over the interpretation of certain contract rights, while it "was not affected" by the Injunction that established those rights in the first place. (OneWest Br. at 6.)

Rather than addressing the substantive relationship between the early rehabilitation proceedings it "observe[d]" and the Servicing Motion it now opposes, OneWest rests its "new and different party" argument on two irrelevant facts: (1) the Commissioner has contended (and continues to contend) that there are no formal "parties" to the rehabilitation, at least not in the sense that term is applied to traditional civil litigation, and (2) the Commissioner effected personal service of the Servicing Motion upon OneWest, rather than by mail. Neither has any bearing on whether OneWest became a new and different party upon the filing of the notice of removal.

*First*, OneWest is correct that the Commissioner has taken the position that the only two formal parties to the rehabilitation are the Commissioner and the Segregated Account of Ambac Assurance Corporation, but it is unclear how that observation furthers OneWest's argument. As the Commissioner noted in his opening brief, whatever OneWest's technical party status may be, that status did not change upon the filing of the Servicing Motion. Both before and after the Servicing Motion, OneWest had formal notice of the rehabilitation proceedings and an ongoing invitation to appear, raise objections, seek relief, and bring appeals. These are the same rights possessed by Deutsche and all other entities that have raised objections and appeals in the rehabilitation proceeding. OneWest is not "new and different"; it has the same rights to participate as every other entity with an interest in the rehabilitation, it has held those rights for the same duration, and it has been apprised of those rights since the rehabilitation commenced.

*Second*, equally without merit is OneWest's claim that it is a "new and different party" because the Commissioner sent the initial notices of the rehabilitation by mail, but effected personal service of the Servicing Motion upon OneWest. From the outset of this proceeding, the Commissioner endeavored to provide the most effective notice that was feasible for any given filing. Obviously, it was not feasible to effect personal service of the first-day order for rehabilitation and the Injunction on the multitude of trustees, servicers, and other entities with an interest in the roughly 1,000 policies allocated to the Segregated Account; therefore, the State Rehabilitation Court approved notice by mail, by publication, and through the court-approved website for the rehabilitation. (Dkt. 6-2.) But for subsequent matters involving "a single interested party or a reasonably small and identifiable number of parties," the State Rehabilitation Court required the Commissioner to provide notice "in accordance with the requirements of the Wisconsin Rules of Civil Procedure." (Dkt. 6-3 at 2 (¶ 4).) Thus, effecting

personal service of the Servicing Motion on OneWest was neither "notabl[e]" nor an indication that "[t]he distinct nature of the [rehabilitation] and the [Servicing Motion] was not lost on the Rehabilitator." (OneWest Br. at 14-15.) It was an instance of the Commissioner carrying out a direct obligation to provide such notice when feasible, just as the Commissioner did in informing the IRS of the supplemental injunction against it. IRS Remand Order, 782 F. Supp. 2d at 746.

**C. OneWest Cannot Justify Its Removal Without Deutsche's Consent**

Not only is OneWest attempting the piecemeal removal of a motion from the ongoing rehabilitation proceeding, but it is also attempting to remove only a piece of that motion. Specifically, because OneWest failed to obtain the consent of Deutsche—the primary entity against which the Commissioner seeks relief in the Servicing Motion—to the removal, OneWest has created the direct risk of inconsistent rulings regarding the Segregated Account's rights and Deutsche's obligations.

If OneWest alone is permitted to remain in federal court, the State Rehabilitation Court presumably could proceed to hear the Servicing Motion insofar as it pertains to Deutsche, decide the necessary contract interpretation issue, and order Deutsche to terminate OneWest and replace it with another servicer. Meanwhile, OneWest asks this Court to interpret the same provision of the same agreement. If this Court's interpretation differed from that of the State Rehabilitation Court, then Deutsche would face conflicting obligations arising from contrary rulings from two different courts. For that reason (among others), 28 U.S.C. § 1446(b)(2)(A) requires all defendants to join in or consent to removal. *See Hess v. Great Atl. & Pac. Tea Co.*, 520 F. Supp. 373, 375 (N.D. Ill. 1981) (rule of unanimity of defendants' consent "eliminates the risk of inconsistent adjudications in state and federal court," prevents one defendant from imposing its "choice of forum upon other unwilling defendants and an unwilling plaintiff," and

preserves "the legislative and judicial policy that state courts are considered as competent as federal courts" to hear matters not exclusively assigned to federal courts).

OneWest's opposition brief never addresses the real risk of inconsistent adjudications arising from its failure to join Deutsche, and offers little explanation or justification for its removal of this case without obtaining Deutsche's consent. OneWest offers only two defenses to its failure to abide by the rule of unanimity here: (1) it claims without explanation that Deutsche is a "nominal" party to the Servicing Motion that need not participate in its adjudication; and (2) it asserts that Deutsche is not a "defendant" in the motion because it has not yet expressed any opposition to it. (OneWest Br. at 23-24.) These arguments gloss over both the law and the importance of Deutsche to this dispute.

**1. Deutsche's Interest in the Servicing Motion is Not Nominal**

"A nominal defendant is not a real party in interest because it has no interest in the subject matter litigated"; its involvement is merely "incidental." *Selfix, Inc. v. Bisk*, 867 F. Supp. 1333, 1335 (N.D. Ill. 1994). "[A] nominal defendant cannot be a 'necessary' or 'indispensable' party as those terms are used in Fed. R. Civ. P. 19." *Id.* at 1336 (citing *SEC v. Cherif*, 933 F.2d 403, 414 n.13 (7th Cir. 1991)). A party is necessary under Rule 19 if, among other reasons, "in that person's absence, the court cannot accord complete relief among existing parties," or if it would "as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1).[2]

[2] In addition, the Supreme Court has held that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when [it] possess certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980). For the reasons that follow, and those set forth in the opening brief, Deutsche certainly possesses those customary powers.

Far from nominal, Deutsche is the only truly indispensable defendant to the Servicing Motion. Under the Servicing Agreements, the insurer can only direct Deutsche to terminate OneWest; the insurer has no right to terminate OneWest directly, and only Deutsche (as "Indenture Trustee" or "Certificate Trustee" to the Servicing Agreements) has the authority to effectuate the termination. (Servicing Agreements § 7.01.) Upon termination, "all authority and power of the Servicer under this Agreement . . . shall pass to and be vested in [Deutsche]" (*id.*), and Deutsche further assumes OneWest's rights and obligations under any sub-servicer agreements (*id.* § 3.01(d).) Deutsche can then appoint a successor servicer (with Ambac's consent), assume the servicing duties itself if such a successor is not found or agreed upon, and, if necessary, petition a court for the appointment of a successor servicer. (*Id.* § 7.02(a).) Following termination, OneWest is obligated to cooperate with Deutsche—not Ambac or the Commissioner—in facilitating the transition of servicing. (*Id.* § 7.01.)

Thus, Deutsche is ultimately responsible to the insurer and the bondholders for servicing of the trusts. If a third-party servicer such as OneWest underperforms in ways specified in the Servicing Agreements, then the insurer and the bondholders have the right to instruct Deutsche to terminate that servicer, and Deutsche (or an agreed-upon successor) assumes the servicing role. In essence, Deutsche is a general contractor for the insurer and the bondholders with regard to servicing; the insurer and bondholders have certain rights with regard to whom Deutsche appoints as a subcontractor to perform that servicing function and that subcontractor's level of performance, but those rights exist as to Deutsche rather than its subcontractor, and Deutsche remains responsible for ensuring that servicing is performed properly.

OneWest, on the other hand, is not even a necessary party to the Servicing Motion. As reflected in the proposed form of order the Commissioner filed with it, the Servicing Motion seeks relief directly against Deutsche, and the only relief sought against OneWest is not to interfere with the relief sought against Deutsche. That limited relief as to OneWest does nothing more than restate the already existing first-day Injunction—which OneWest chose not to oppose. (*Compare* Injunction at 9 (¶ 9.B.2) (enjoining entities from "[w]illfully failing to take any action . . . as directed by the Rehabilitator as 'controlling party' or a term with similar effect, howsoever designed under the RMBS Transaction Documents, including without limitation directions in connection with the transfer of servicing") *with* Notice of Removal Ex. B (proposed order for Servicing Motion, which would enjoin OneWest "from taking any actions to prevent OneWest's termination as servicer" and the appointment of a successor servicer).) While the Commissioner gave OneWest direct notice of the Servicing Motion to ensure its opportunity to participate and raise any factual or legal objections to the relief sought in the State Rehabilitation Court, he did not need to do so in order to obtain that relief.

For those reasons, the relief the Commissioner seeks in the Servicing Motion is directed at Deutsche, the only party to the Servicing Agreements that can effect a servicer change. The Commissioner cannot obtain the relief he seeks in the Servicing Motion—namely, an order compelling Deutsche to terminate OneWest and appoint a successor servicer—without Deutsche's inclusion. *See* Fed. R. Civ. P. 19(a)(1)(A).

**2. Deutsche's Failure to Take a Position on the Servicing Motion is Not Relevant, Because OneWest Removed Before Deutsche Was Obligated to Respond**

OneWest attempts to downplay Deutsche's necessity, arguing that its failure to join Deutsche is inconsequential because it "has not filed papers in the Servicer Termination Proceeding taking any position." (OneWest Br. at 24.) That is neither dispositive, for the

reasons set forth in the prior section, nor is it surprising: OneWest removed this action two weeks before the scheduled May 24, 2013 hearing on the Servicing Motion, which had been pushed back at OneWest's request. (Dkt. 6 at 5-6 (¶ 15).) Because OneWest's removal stalled the rehabilitation by putting it into jurisdictional limbo,[3] the hearing was taken off the State Rehabilitation Court's calendar until this remand motion is resolved. (*Id.* at 6 (¶ 16); dkt. 6-12.) Thus, the deadline for Deutsche to state its position about the issues presented in the Servicing Motion has not arrived.

As noted in the Servicing Motion, Deutsche had previously "taken no position on the proper construction" of the provision the Commissioner contends warrants termination and replacement of OneWest as servicer. (Servicing Motion at 10 (¶ 15).) That, of course, does not mean Deutsche would have continued to take no position at the hearing had OneWest not put the Servicing Motion on hold through its removal. But even if Deutsche had maintained neutrality with regard to the proper interpretation of that provision, the interpretation is just one issue of several in the Servicing Motion. Deutsche, as the contractual party with the ultimate responsibility for servicing, has an interest in whether a successor servicer will be appointed, who that successor will be, and whether OneWest should be replaced at all, regardless of the construction given to the Servicing Agreements—all of which are issues for the court that

[3] OneWest's brief (at page 10 and n.3) lacks candor in regard to its comments about the Commissioner's position that, until this Court rules, there is uncertainty about the scope of the proceedings removed from the rehabilitation by OneWest. Although counsel for OneWest submits a declaration which details certain communications on the subject (dkt. 12 at 3-4 (¶¶ 7-10), neither his declaration nor the OneWest brief makes any mention of the June 7, 2013 response letter submitted on behalf of the Commissioner on the subject, just four days before the OneWest declaration and brief were filed. A copy of that June 7 letter is attached to the accompanying Declaration of Attorney Van Sicklen. That letter explains the Commissioner's position, which is consistent with the manner the State Rehabilitation Court addressed removal the last time a litigant (in that instance, the IRS) attempted to remove a portion of the rehabilitation proceeding.

decides the Servicing Motion. Thus, OneWest's efforts to excuse its failure to obtain Deutsche's consent to the removal rest on speculation.

## II. REMAND IS REQUIRED UNDER THE MCCARRAN-FERGUSON ACT

### A. OneWest Mischaracterizes the Commissioner's Position Regarding the Impact of McCarran-Ferguson Upon Federal Jurisdiction

OneWest's brief misstates the Commissioner's position on the impact of the McCarran-Ferguson Act, and thereby spends the bulk of its argument attacking a straw man. According to OneWest, "the central premise of many of [the Commissioner's] arguments" is "that federal courts cannot exercise diversity jurisdiction over a dispute involving a delinquent insurer." (OneWest Br. at 26.)

That was not the central premise of the Commissioner's arguments. Indeed, the Commissioner's opening brief discussed the very cases OneWest relies upon, where federal courts exercised jurisdiction over disputes pertaining to a delinquent insurer. As the Commissioner noted there, the key distinction lies not in whether the dispute relates in some way to the delinquent insurer, but whether removal would oust the State Rehabilitation Court of jurisdiction over a pending matter in the rehabilitation, and thereby impair the ongoing proceeding:

> This distinction matters, because federal jurisdiction over matters that the Commissioner has voluntarily commenced *outside* of the rehabilitation do not impair the rehabilitation proceeding to the same degree as removal of the present motion *from* the rehabilitation itself. The act of removing claims filed by a commissioner in a separate lawsuit against a third party outside the rehabilitation—as occurred in [cases cited in the Notice of Removal]—does not impair the jurisdiction of a rehabilitation or liquidation court, because the claims would have been prosecuted outside the rehabilitation even if removal had not occurred. . . .
>
> Here, operation of the federal removal and jurisdictional statutes would deprive the State Rehabilitation Court of the ability to fully adjudicate a motion addressing the business of the insurer *while the*

> *motion is pending before that court*. It is difficult to conceive of a more direct impairment of the State Rehabilitation Court's comprehensive jurisdiction over matters pertaining to the rehabilitation. For that reason, federal courts addressing removal from the rehabilitation itself—rather than the other contexts present in the cases cited by OneWest—routinely conclude that the exercise of federal removal and/or jurisdictional statutes would impair state law regulating the business of insurance. *See* IRS Remand Order, 782 F. Supp. 2d at 748-49 (citing cases).

(Comm'r's Opening Br. at 33-34 (internal footnote omitted).) For a variety of reasons, such as the inability to obtain personal jurisdiction in Wisconsin, the Commissioner may and has filed or joined actions at law that were inherited from the delinquent insurer, which seek judgments for money damages in courts outside the State Rehabilitation Court. The Commissioner has never asserted that such cases cannot be removed (provided the other statutory requirements for removal are met), because those cases were not part of the comprehensive rehabilitation proceeding in the first place. In these instances, removal would not divest the State Rehabilitation Court of jurisdiction over a matter that is pending in the rehabilitation, and would not necessarily impair the state goal of a comprehensive forum.

OneWest's opposition brief never addresses the Commissioner's true central premise, which is consistent with both the case law and the principles underlying the various grounds for remand here. Instead, OneWest offers multiple theories for avoiding the application of McCarran-Ferguson to the present dispute, none of which is persuasive.

### B. OneWest's Various Theories of Removability Are Not Supportable

Three common (if sometimes contradictory) threads run through OneWest's arguments that reverse preemption under McCarran-Ferguson should not apply: (1) that the federal courts may exercise jurisdiction over any motions filed in the State Rehabilitation Court, so long as the motions are not part of the "core proceedings" in the rehabilitation (OneWest Br. at 3, 4, 16-18, 27-28); (2) that the federal courts may exercise jurisdiction over any motions filed

in the State Rehabilitation Court "unless true exigencies" threaten to "jeopardize the integrity of the core delinquency proceeding" (OneWest Br. at 27-30); and (3) that the federal courts may exercise jurisdiction over any motions filed in the State Rehabilitation Court if the Commissioner could have hypothetically sought relief from some other court (OneWest Br. at 19, 31-32). The McCarran-Ferguson Act makes no such distinctions, and each of them runs counter to the weight of the case law applying it.

**1. There Are No Separate Categories of "Core" and "Non-Core" Motions in a Rehabilitation Proceeding, and Any Such Distinction Would Have No Bearing on the McCarran-Ferguson Analysis**

Throughout its brief, OneWest appears to categorize certain types of motions in the rehabilitation—namely, every filing except the Servicing Motion (OneWest Br. at 16)—as "core proceedings." According to OneWest, the core proceedings may not be removed, whereas non-core proceedings (consisting solely of the Servicing Motion) are removable.

It is difficult to understand where OneWest gets the idea that such a distinction exists in the insurer delinquency context, much less has relevance to the removability of a particular motion from an ongoing state rehabilitation proceeding. "Core proceeding" is not a term that appears in the Wisconsin Insurance Code, and nowhere in Chapter 645 of the Wisconsin Statutes does the legislature purport to categorize matters arising in rehabilitation proceedings by their relative importance. The only indication it provides lies in the commentary to those statutes, which elevates the ongoing task of managing the affairs of the insurer—a task that plainly encompasses replacing a servicer that is performing poorly—above the more formal task of proposing a plan of rehabilitation, which OneWest concedes to be a "core" part of the proceeding. *Compare* Wis. Stat. Ann. ch. 645 introductory cmt. ("Conceptually [the rehabilitator] should be treated as new management with especially broad powers, including the power to propose to the court the formal reorganizational devices that have heretofore been the

focus of rehabilitation *but that should normally be subordinated in the future to the larger management task*.") (emphasis added) *with* OneWest Br. at 4 (characterizing the plan of rehabilitation as a "core" element of the rehabilitation).[4]

With nowhere to turn in the applicable law, OneWest leaves the term "core proceedings" undefined and ambiguous. OneWest acknowledges (as it must) that rehabilitation is "regarded as a management rather than as a legal task." (OneWest Br. at 12.) It further notes that "[n]ew management and a potential restructuring of policies, ownership, and 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," and suggests that the use of these management tools would fall within its definition of "core proceedings." (*Id.*) OneWest But OneWest's definition excludes the Commissioner's primary "tool[] to preserve the insolvent insurer as an ongoing concern": the Commissioner's authority to seek injunctive relief for any "threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders . . . or the administration of the proceeding." Wis. Stat. §

[4] To the extent OneWest is urging some kind of parallel to "core proceedings" in the federal bankruptcy context, that analogy also fails. The Bankruptcy Code introduces the concept of "core" and "non-core" proceedings to address the specific constitutional issues associated with having non-Article III bankruptcy judges adjudicate certain causes of action. *See generally, e.g.*, *Stern v. Marshall*, --- U.S. ---, 131 S.Ct. 2594 (2011). No such constitutional concerns exist here. OneWest has not disputed that the State Rehabilitation Court has personal jurisdiction over it, and has not argued that adjudication of the Servicing Motion by the State Rehabilitation Court would deprive OneWest of due process. Moreover, even if the federal Bankruptcy Code definition of a core proceeding were applicable to this state insurer delinquency proceeding, the Servicing Motion would fall within the scope of a "core proceeding" because the servicing of Ambac's collateral directly impacts the extent of policy claims against the estate. *See In re U.S. Lines, Inc.*, 197 F.3d 631, 638 (7th Cir. 1999) ("Notwithstanding that the Trust's claims are upon pre-petition contracts, we conclude that the impact these contracts have on other core bankruptcy functions nevertheless render the proceedings core. . . . [R]esolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate.").

645.05(1)(k). Absent that authority, the order for rehabilitation and plan for rehabilitation would be futile. *See* IRS Remand Order, 782 F. Supp. 2d at 749-50.

In addition, OneWest's narrow definition of "core" proceedings is contradicted by the case law. None of the cases relied upon by this Court in the IRS Remand Order concerned attempted removals of matters falling within OneWest's apparent definition of "core" matters, yet in all cases the federal court refused to exercise jurisdiction on the basis of the McCarran-Ferguson Act, *Burford* abstention, or both. *See, e.g.*, *Hudson v. Supreme Enters., Inc.*, No. 06-cv-795, 2007 U.S. Dist. LEXIS 58280 (S.D. Ohio Aug. 9, 2007) (remanding six-count complaint filed by insurance commissioner to recover sums owed to delinquent insurer); *In re Amwest Surety Ins. Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002) (remanding claim by Commissioner to recover pre-rehabilitation payments from insurer to third party); *Covington v. Sun Life of Canada (U.S.) Holdings, Inc.*, No. C-2-00-069, 2000 U.S. Dist. LEXIS 20902 (S.D. Ohio May 17, 2000) (same); *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993) (dismissing claim by third party against delinquent insurer arising out of transaction occurring prior to insurer's delinquency). None of those matters involved issues that were more "core" to the delinquency proceeding than the Servicing Motion at issue here. Indeed, most of those cases involved suits by the respective insurance commissioners for money damages, under causes of action that arose prior to the delinquency proceeding. Here, the Commissioner seeks equitable relief to facilitate a change in servicing for transactions that are ongoing and presently affecting the level of losses the delinquent insurer continues to incur. If anything, the Servicing Motion is *more* of a "core proceeding" than the proceedings in other cases finding federal jurisdiction inappropriate.

In sum, OneWest's imaginary line separating "core proceedings" in the rehabilitation from "non-core proceedings" is hopelessly vague, and application of it would

render removable virtually any motion the Commissioner files, other than the petition for rehabilitation and the motion to confirm the rehabilitation plan.

**2. Reverse Preemption Under McCarran-Ferguson Does Not Depend Upon the Existence of "True Exigencies"**

Building on its fictitious "core proceedings" theory, OneWest at various points in its brief suggests that removal of individual motions from the rehabilitation is permitted unless "true exigencies cause the exercise of federal jurisdiction to jeopardize the integrity of the core delinquency proceeding." (OneWest Br. at 27, 30.) Essentially inviting this Court to carve a "small claims" exception to the various doctrines calling for remand of motions filed in an insurer delinquency proceeding, OneWest says that removal of the Servicing Motion does not jeopardize the rehabilitation to the same degree as the IRS disputes.

In fact, the opposite is true. The rehabilitation involves many more five-, six- and seven-figure issues than the nine-figure IRS dispute, and all of the entities with an interest in those smaller matters could plausibly claim that resolution of *their* particular issues in federal court would not necessarily jeopardize the integrity of the proceeding for everyone else. OneWest's "true exigency" theory would thus open the floodgates to a wholesale federalization of the rehabilitation process, where essentially every motion that is below a certain financial threshold (but above the jurisdictional minimum for diversity) can be removed and addressed independently in federal court. That result is not permissible under federal law, as evidenced by all of the cases addressed in the preceding section—none of which involved matters as "integral" as the IRS dispute, but all of which held that federal jurisdiction threatened broader state interests in maintaining orderly, prompt, and unified delinquency proceedings.

It is far-fetched for OneWest to claim that a wholesale federalization of this proceeding would not ensue. A wide variety of parties—ranging from multinational banks such

as Deutsche to Wall Street hedge funds, reinsurers, bondholders, and even Ambac's landlord—have raised objections to a number of motions filed in the rehabilitation to date. They have naturally pursued positions that maximize their self-interests or the interests of their trust beneficiaries, often without regard to the effect those positions may have upon others with an interest in the rehabilitation. For that reason, there is no question that such parties would prefer to remove in order to have their own issues decided in isolation from the larger rehabilitation proceeding. Thus, opening the door to removal of any individual issue that does not present a "true exigency" would lead to many more removals of purportedly discrete issues, and thereby create a new and more severe exigency for the administration of the proceeding as whole.

**3. The Legislature's Grant of Flexibility to the Commissioner and the State Rehabilitation Court in Administering the Rehabilitation Makes Reverse-Preemption More Appropriate, Not Less**

Finally, like the IRS before it,[5] OneWest posits that the cases it cites—which almost exclusively involved actions that were filed *outside* the delinquency proceedings at issue—stands for the proposition that federal jurisdiction is appropriate over any motion in the State Rehabilitation Court that *could*, hypothetically, been filed in another court. (OneWest Br. at 19, 31-32.) OneWest's logic does not withstand scrutiny.

For starters, it turns federal deference to state policy regarding insurance upside down. States that grant *more* authority and broader discretion to their insurance commissioners and rehabilitation courts in determining how best to manage delinquency proceedings, including whether to file certain motions or actions in other courts, would have *less* control over such proceedings as a whole. Under OneWest's theory, by giving the Commissioner the discretion to

[5] (Dkt. 6-8 at 12 & n.9.)

seek relief in other jurisdictions and courts besides the State Rehabilitation Court, matters filed within the State Rehabilitation Court itself become subject to removal.

That is not the law, nor should it be. OneWest's argument misunderstands the difference between actions that the Commissioner can affirmatively take in response to an insurer's insolvency, and actions that others can take once the Commissioner has initiated an exclusive rehabilitation proceeding under § 645.04. As one court has explained:

> Universal also raises the flawed argument that because the Superintendent may bring suit in federal court in other states in order to consolidate the assets of the estate, there cannot be exclusive jurisdiction in a New York state court. . . . If, with the permission of the liquidation court, the liquidator brings suit in state or federal court of a different jurisdiction, no harm is done to the plan of unified liquidation. Needless to say, such action is often necessary to recover assets from debtors not subject to New York jurisdiction. *This type of permissive action by a liquidator does not implicate McCarran-Ferguson, nor does it lend any credence to Universal's attempts to litigate its claims separately from* [*the insurer's*] *other creditors*.

*Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77, 82 (S.D.N.Y. 1989) (emphasis added); *see also Covington*, 2000 U.S. Dist. LEXIS 20902, at *23 n.3 (rejecting same argument under Ohio law).

Here, Chapter 645 of the Wisconsin Statutes contemplates a "comprehensive rehabilitation structure" and gives the State Rehabilitation Court and the Commissioner the statutory tools to accomplish that objective, including the power to enjoin parties from interfering with the "administration of the proceeding" by litigating elsewhere. IRS Remand Order, 782 F. Supp. 2d at 749; Wis. Stat. §§ 645.04 & 645.05. The cases cited by the Commissioner and previously relied upon by this Court involve the same comprehensive statutory schemes, materially indistinguishable statutes within those schemes, and the same impairments to those schemes caused by removals of specific issues or claims to federal court as

exist here. Take, for example, the Ohio Liquidation Act, OHIO REV. CODE CH. 3903, which was at issue in the *Covington* and *Hudson* cases described in the Commissioner's opening brief and relied upon in the IRS Remand Order. As the Supreme Court of Ohio recently explained:

> The General Assembly designed the Liquidation Act to be centralized in order to enhance efficiency. R.C. 3903.02(D)(3). The general rule is that all liquidation actions brought pursuant to R.C. 3903.01 to 3903.59 "shall be brought in the court of common pleas of Franklin county" (the "liquidation court"). R.C. 3903.04(E). . . . [E]lsewhere it sets forth limited exceptions under which the liquidator may select a forum other than the liquidation court. . . .
>
> The liquidator's power of forum selection stands in *sharp contrast* to the creditors' *limited right to file suits in the liquidation court only*. R.C. 3903.24(A) (establishing that upon the issuance of a liquidation order, "no civil action shall be commenced against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing action be maintained or further prosecuted"). *In short, when allowed, forum selection belongs to the liquidator, and the liquidator alone*.

*Taylor v. Ernst & Young, L.L.P.*, 958 N.E.2d 1203, 1209 (Ohio 2011) (emphasis added). *See also Amwest*, 245 F. Supp. 2d at 1044-45 (remanding action removed from a delinquency proceeding because "[w]hile the Nebraska legislation does not specifically state that the [liquidation] court shall have 'exclusive' jurisdiction over insurer liquidation proceedings, the clear import and purpose of the statutes was to consolidate all insolvency proceedings in one court only"); Wis. Stat. § 645.05(1)(k) (authorizing injunctions against actions that would "prejudice . . . the administration of the proceeding").

These principles make sense. After all, as OneWest correctly points out, Section 645.05 permits the Commissioner to seek injunctive relief in any court. On the first day of the rehabilitation, the Commissioner *could* have hypothetically filed its motion for first-day injunctive relief in every jurisdiction where Ambac did business across the 50 states or knew of foreign parties with an interest in the rehabilitation—in essence, seeking the same relief in a

variety of courts throughout the United States and much of the developed world. The Commissioner *could* have hypothetically sought supplemental injunctive relief against the IRS in the District of Columbia. And the Commissioner *could* have hypothetically brought the Servicing Motion seeking injunctive relief against Deutsche and OneWest in California, where they are both headquartered. In each instance, the Commissioner would have been required to expend assets otherwise distributable to policyholders in those pursuits, and those courts would be required to expend time and resources educating themselves regarding the various pieces of this complex rehabilitation proceeding in order to assess the propriety of the injunctive relief sought. The end result would inevitably be delays and a hodgepodge of injunctive provisions, completely undermining the goal of a comprehensive, efficient rehabilitation proceeding.

But recognizing that the Commissioner *could* conceivably take actions that would undermine that goal of a comprehensive proceeding does not imply that other parties have the right to undermine it themselves by removing individual issues or motions from the State Rehabilitation Court. As both *Corcoran* and the Wisconsin Statutes recognize, it may at times be beneficial for the Commissioner to bring actions outside the State Rehabilitation Court. But the Wisconsin Statutes give the Commissioner and the State Rehabilitation Court the discretion to determine whether an action outside the State Rehabilitation Court would be appropriate in furthering the purposes of the rehabilitation, and "when allowed, forum selection belongs to the [Commissioner], and the [Commissioner] alone." *Taylor*, 958 N.E.2d at 1209.

### C. This Court Should Refuse OneWest's Implicit Request to Reverse the Rationale of the IRS Remand Order

Finally, OneWest boldly proclaims that McCarran-Ferguson reverse preemption simply does not apply to federal jurisdictional statutes, and therefore each of the courts deciding

that issue to the contrary—including this one—misread the statute. (OneWest Br. at 25.) This Court should refuse OneWest's invitation to re-write the McCarran-Ferguson Act.

By its terms, McCarran-Ferguson holds that "*No* Act of Congress" can impair state law regulating the business of insurance, with the sole exception of federal statutes that regulate the business of insurance themselves. 15 U.S.C. § 1012(b). Though one court expressed "skeptic[ism]" as to whether Congress intended as broad a scope as the statute provides, *Gross v. Weingarten*, 217 F.3d 208, 222 (4th Cir. 2000) (cited in OneWest Br. at 25), the Seventh Circuit has properly noted that such skepticism of Congress's motives in passing the McCarran-Ferguson Act is irrelevant to its meaning: "We must determine what Congress meant *by what it enacted*, not what Senators and Representatives said, thought, wished, or hoped. . . . 'No Act of Congress' could not be more comprehensive. The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a 'plain statement' approach." *NAACP v. Am. Fam. Mut. Ins. Co.*, 978 F.2d 287, 294 (7th Cir. 1992) (emphasis in original). Nor would OneWest's proposed revision to the McCarran-Ferguson Act fit that statute's purposes. *See Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037, 1040 (7th Cir. 1998) ("Congress intended the McCarran Act to allow the states to regulate the business of insurance 'free from inadvertent preemption by federal statutes of general applicability.'") (citation omitted).

## III. *BURFORD* ABSTENTION IS APPROPRIATE

OneWest's argument against *Burford* abstention rests on the same mischaracterization of the importance of mortgage loan servicing issues to the rehabilitation as its prior arguments, and the Commissioner's response is the same.

In *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990), the Seventh Circuit specifically warned against taking the sort of narrow view of a dispute advocated by OneWest. Seeking to avoid abstention, the plaintiffs in *Hartford* characterized their lawsuit

"as involving nothing more than a dispute between an insurer's parent and one of the insurer's customers." *Id.* at 426. The Seventh Circuit rejected that view, explaining that states "have the paramount interest in a uniform rehabilitation process" and that "[i]t is these larger policies that [courts] must consider, and not the comparatively small stakes" of an individual dispute.[6] *Id.*

Ignoring the importance of mortgage servicing issues to the successful rehabilitation of the Segregated Account, OneWest fails to properly analyze the non-exclusive factors set forth in *Hartford*. First, *Hartford* directs a court to consider whether "the suit is based on a cause of action that is exclusively federal." *Id.* at 425. OneWest contends that this factor is "not relevant" here because the Rehabilitator's motion "does not involve an exclusively federal-law matter." (OneWest Br. at 35.) But the fact that this dispute has no connection to federal law or federal regulatory interests and involves the exercise of the Commissioner's managerial discretion under Wisconsin's rehabilitation statutes and contract rights under state common law weighs in favor of abstention. *See McRaith v. Am. Re-Ins. Co.*, No. 09-C-4027, 2010 U.S. Dist. LEXIS 14021, at *15 (N.D. Ill. Feb. 17, 2010) ("This case does not involve an exclusively federal cause of action, which tends to favor abstention.") (cited in OneWest Br. at 33-35, 37).

Second, courts must consider whether the dispute "require[s] the court to determine issues that are directly relevant to state policy in the regulation of the insurance

[6] OneWest cites several cases from other jurisdictions to support its contention that abstention is appropriate when individual disputes, viewed in isolation, involve relatively small or indirect financial benefits to an insurer in rehabilitation. (*See* OneWest Br. at 33-34, 37-38.) To the extent OneWest is accurately characterizing those decisions, they are in conflict with the binding precedent of *Hartford*. Consistent with the reasoning of *Hartford*, the Second Circuit has also recognized that individual disputes can have a cumulative impact on insurer's assets that justifies abstention. *See Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 37 (2d Cir. 1988) ("Under [NewYork's insurance liquidation statute], the Superintendent's power to collect on reinsurance agreements entered into by a liquidated company is a matter of no little concern. . . . The extent to which the Superintendent is able to collect thus affects the degree to which the insolvent insurer's estate will have assets sufficient to satisfy the claims of its creditors.").

industry." *Hartford*, 913 F.2d at 425. OneWest cites *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993), for the proposition that "simple contract and tort actions" involving insolvent insurers do not justify abstention. (OneWest Br. at 35 (citing *Grode*, 8 F.3d at 95.) The *Grode* court, however, emphasized that abstention is appropriate when an insurer has a large number of similar contracts that might receive inconsistent treatment if they are not reviewed by a single rehabilitation court. *See Grode*, 8 F.3d at 960. Here, there are hundreds of similar agreements that apply to mortgage loan servicers with respect to the RMBS policies allocated to the Segregated Account. As evidenced by the Injunction, it is essential to the rehabilitation that the Rehabilitator's and Ambac's contractual rights with respect to servicers be treated in a consistent manner in order to promote effective servicing and reduce claims against Segregated Account policies. Abstention in this case promotes the Rehabilitation Act's express regulatory policy of "protection of the interests of insureds [and] creditors" by ensuring that the one court well-versed in this specialized area of insurance decides all cases bearing on matters having a significant impact on the financial resources available to pay claims to Segregated Account policyholders. *See Metropolitan Life Ins. Co. v. Board of Directors of Wis. Ins. Sec. Fund*, 572 F. Supp. 460, 473 (W.D. Wis. 1983) ("the potential for conflict in the results of federal and state court adjudication could bring to a halt the state's efforts" at rehabilitation).

Third, *Hartford* instructs courts to consider whether "state procedures indicate a desire to create special state forums to regulate and adjudicate these issues." *Hartford*, 913 F.2d at 425. Again taking a narrow view of the significance of this dispute to the rehabilitation of the Segregated Account, OneWest contends that it is not one of the "core proceedings" contemplated by Chapter 645. As noted above, nothing in Chapter 645 supports that notion. To the contrary, it expressly grants the State Rehabilitation Court broad powers to rule on all manner of issues

having a significant impact on the financial resources of an insurer. *See* Wis. Stat. §§ 645.05, 645.33(2). Moreover, Chapter 645 specifically contemplates that the state court presiding over the rehabilitation will oversee the Rehabilitator's exercise of management functions such as the decision to replace a mortgage loan servicers. *See* Wis. Stat. § 645.33(2) ("*Subject to court approval*, the rehabilitator may take the action he or she deems necessary or expedient to reform and revitalize the insurer.") (emphasis added). The State Rehabilitation Court has not, as OneWest contends, limited itself to resolving only claims of Ambac's creditors. The State Rehabilitation Court has previously considered a variety of issues, including the interpretation of servicing agreements very similar to the agreements at issue here.[7] (Dkt. 6-10 & 6-11.)

In sum, disputes relating to the Commissioner's management of mortgage servicing issues, such as the present motion, directly impact the magnitude of the claims being submitted against the Segregated Account, implicate the statutory management and oversight functions of the Commissioner and the State Rehabilitation Court, and involve issues unique to RMBS insurance policies that are best resolved by the specialized state court that has presided over such issues since March 2010.

## CONCLUSION

For the foregoing reasons, this Court should remand the Servicing Motion OneWest purports to remove. In addition, for all the reasons stated in the Commissioner's opening brief and above, OneWest has failed to show an objectively reasonable basis for removing the portion of the Servicing Motion that is directed against it. Therefore, this Court

[7] The fourth non-exclusive factor is whether "difficult or unusual state laws are at issue." Although not a forceful consideration here, Chapter 645 is a specialized area of state law seldom addressed in federal court.

should enter a separate order requiring OneWest to reimburse the Commissioner for the legal fees and expenses incurred as a result of OneWest's improper removal. *See* 28 U.S.C. § 1447(c).

Dated this 19th day of June, 2013.

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

Michael B. Van Sicklen, SBN 1017827
Jeffrey A. Simmons, SBN 1031984
Matthew R. Lynch, SBN 1066370

150 East Gilman Street
Madison, WI 53703
(608) 257-5035 (phone)
(608) 258-4258 (fax)

*Attorneys for the Wisconsin Commissioner of Insurance, as Court-Appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation*