

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Case No. 13-cv-325

(Removed From Dane County Circuit
Court – No. 10 CV 1576)

**COMMISSIONER’S MOTION FOR REIMBURSEMENT OF LEGAL EXPENSES
PURSUANT TO COURT’S REMAND ORDER OF JULY 8, 2013**

Pursuant to this Court’s July 8, 2013 order remanding the above-captioned matter and ordering under 28 U.S.C. § 1447(c) that OneWest Bank, FSB (“OneWest”) reimburse the Commissioner of Insurance for the State of Wisconsin (the “Commissioner”), as court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation, for legal expenses incurred as a result of OneWest’s removal of this action from state court, the Commissioner submits the following motion seeking reimbursement of fees and costs.

RELEVANT BACKGROUND

1. On March 24, 2010, the Commissioner petitioned the Dane County Circuit Court (the “State Rehabilitation Court”) for the rehabilitation of the Segregated Account of Ambac Assurance Corporation (the “Segregated Account”). The State Rehabilitation Court entered a first-day injunction that was immediately delivered to OneWest, and approved the Commissioner’s Plan of Rehabilitation for the Segregated Account on January 24, 2011.

2. On May 9, 2013, OneWest purported to remove a motion filed in the State Rehabilitation Court (the “Servicing Motion”) to this Court, on the ground that the Servicing Motion presented an independent controversy that could be separated from the rehabilitation proceedings and adjudicated in a different forum. (Dkt. 1.)

3. Because the grounds for removal asserted by OneWest could be raised by other parties-in-interest to the rehabilitation in future motions before the State Rehabilitation Court, OneWest's removal threatened to undermine the viability and comprehensiveness of the rehabilitation proceedings generally. (*See* Dkt. 5 at 3-4, 16-20, 40-41; Dkt. 15 at 5-6, 18-25.) Moreover, removal created jurisdictional uncertainty for other matters in the State Rehabilitation Court. While OneWest purported to remove only the Servicing Motion from the rehabilitation proceeding, it presented an inadequate legal basis for carving out the Servicing Motion from the larger proceeding. Given the significant stakes for the future success of the rehabilitation, it was important for the Commissioner to seek and obtain remand in this matter.

4. The Commissioner moved to remand this matter on May 21, 2013. While the Commissioner believed the law to be clearly established that OneWest's removal was inappropriate, the application of that law to the extensive procedural history of the rehabilitation and the factual context of the Servicing Motion under each of the four different grounds for remand required significant explanation and legal discussion. In addition, OneWest's notice of removal raised multiple creative (though unpersuasive) arguments for avoiding remand, which required detailed factual and legal analysis to fully dispel. For those reasons, the Commissioner supported his motion for remand with a thorough 41-page brief and supporting declaration, including relevant exhibits from the State Rehabilitation Court record. (Dkt. 4-6.)

5. OneWest responded with a 41-page brief of its own, together with a declaration attaching multiple additional exhibits. (Dkt. 11-12.) As noted throughout the Commissioner's reply brief, OneWest's opposition raised a number of novel theories for avoiding remand that were not supported by the facts or the authorities it cited, but nevertheless required significant

effort to rebut. The Commissioner therefore filed a 30-page reply brief setting forth multiple legal and factual flaws in OneWest's arguments (with a supplemental declaration). (Dkt. 15.)

6. As a result of OneWest's removal, OneWest and the Commissioner were required to confer under Federal Rule of Civil Procedure 26(f), draft and submit a preliminary pretrial report (Dkt. 10), and participate in a Rule 16 conference before Magistrate Judge Crocker. Such steps are not required in insurer delinquency proceedings in state court, and therefore would not have occurred absent OneWest's removal. (Declaration of Michael B. Van Sicklen ("Van Sicklen Decl.") ¶ 6-a; *see also* Wis. Stat. Ann. § 645.32 cmt.) In addition, due to the parties' fundamental disagreement regarding the applicability of Wisconsin's particular practices for rehabilitations following removal to this Court, the parties' preliminary pretrial report was in essence two competing reports.

7. On July 8, 2013, this Court remanded this action, finding that remand was appropriate under each of the four grounds raised by the Commissioner. (Dkt. 17, at 7-14.) In addition, this Court found that OneWest lacked an objectively reasonable basis for removing the case in light of the facts and law applicable to each of those four grounds for remand, and therefore ordered OneWest to reimburse the Commissioner for costs and attorney fees incurred as a result of the removal. (*Id.* at 14-15.) This Court granted the Commissioner until July 31, 2013 to submit an itemized request for fees and costs. (*Id.* at 15.)

**THE COMMISSIONER SEEKS RECOVERY OF \$78,107.50 IN LEGAL EXPENSES
INCURRED AS A RESULT OF THE IMPROPER REMOVAL**

8. As set forth in the Declaration of Michael B. Van Sicklen and the accompanying itemization attached as Exhibit A to that declaration, the Commissioner seeks reimbursement of \$78,107.50 in legal expenses incurred as a result of OneWest's improper removal. Though Section 1447(c) authorizes the reimbursement of "actual expenses, including attorney fees,

incurred as a result of the removal,” in the interest of avoiding further dispute (and further distraction and legal expense), the Commissioner’s request excludes certain billing entries from the itemization, including fees that were caused by the removal but did not relate directly to the remand (such as fees incurred in addressing the practical complications from the jurisdictional uncertainty arising from the removal), fees incurred in negotiations with OneWest regarding servicing, and billing entries from timekeepers who performed discrete tasks related to the removal but were not principally involved in the legal work required. (Van Sicklen Decl. ¶ 6-a.)

9. All of the fees included in the itemization were incurred as a direct result of OneWest’s improper removal. (*Id.*) As the billing narratives accompanying those time entries reflect, the vast majority of those fees were incurred in researching, drafting, and revising the briefs and declarations in support of the Commissioner’s motion for remand. A smaller portion of the fees (totaling \$1,517) were incurred with regard to the Rule 26(f) conference, preliminary pretrial report, negotiation of a stipulation about a response deadline and the preliminary pretrial conference required as a result of OneWest’s removal. (*Id.*)

10. The three attorneys who undertook the bulk of the work pertaining to OneWest’s removal (and all of the work sought in the Commissioner’s fee request) were well-suited to perform it.

- a. Attorney Michael B. Van Sicklen is a partner with 34 years of legal experience, and has been the lead litigation counsel for the Commissioner in all matters pertaining to the rehabilitation since Foley & Lardner LLP (the “firm”) was first engaged to represent the Office of the Commissioner of Insurance in regard to Ambac Assurance Corporation in 2008. (Van Sicklen Decl. ¶¶ 3, 6-b.) Attorney Van Sicklen has had direct involvement in all

litigation-related aspects of the rehabilitation, including the prior removal attempt by the United States Internal Revenue Service (“IRS”), and has acquired firsthand knowledge of virtually all aspects of the complex, multi-faceted rehabilitation. (*Id.* ¶ 6-b.) Given the high stakes raised by OneWest’s attempted removal and the downstream consequences on the administration of the rehabilitation proceeding if it were not remanded, his involvement in the remand briefing was necessary and appropriate.

- b. Attorney Jeffrey A. Simmons is a partner with 15 years of legal experience, and has worked as litigation counsel on various matters pertaining to the rehabilitation since the summer of 2010. (*Id.*) Attorney Simmons has been the point person on the Commissioner’s team in handling servicing-related issues on various residential mortgage-backed securities transactions insured by the Segregated Account, and has been actively involved in the disputes with OneWest that formed the basis of the Servicing Motion. (*Id.*) His knowledge of the rehabilitation generally and the servicing issues specifically were crucial to providing the factual and legal context necessary for the remand motion.
- c. Attorney Matthew R. Lynch is a senior associate (referred to by the firm as a “senior counsel”) with seven years of legal experience, and has served as the primary litigation associate on all matters pertaining to the rehabilitation since late 2009. (*Id.*) In that role, Attorney Lynch was heavily involved in the prior briefing in this Court relating to the IRS, as well as the subsequent appellate briefing of those issues before the Seventh Circuit. (*Id.*) The remand briefing

here utilized his knowledge of the relevant case law pertaining to rehabilitation proceedings, the McCarran-Ferguson Act, and related matters.

11. The rates reflected in the itemization constitute those attorneys' present "floor rates" normally reserved for local, non-specialized matters in this district. (*Id.* at ¶ 6-d.) All of the amounts included in the itemization have been (or will be) charged to the Commissioner, in his role as Rehabilitator of the Segregated Account, to be paid as an administrative expense of the rehabilitation. (*See* Order for Rehabilitation¹ at 3 (¶ 7); Van Sicklen Decl. ¶ 6-d.) Therefore, the rates are reasonable. *See Balcors Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996) ("Courts award fees at the market rate, and the best evidence of the market value of legal services is what people pay for it. Indeed, this is not 'evidence' about market value; it is market value."); *Cintas Corp. v. Perry*, 517 F.3d 459, 469 (7th Cir. 2008) (same); *Foskett v. Great Wolf Resorts, Inc.*, No. 06-cv-503-bbc, 2008 U.S. Dist. LEXIS 88541, at *9-*10 (W.D. Wis. Oct. 29, 2008) (same).

12. The hours encompassed in the itemization were also reasonable in light of the actual and potential consequences of OneWest's attempted removal upon the larger rehabilitation (Van Sicklen Decl. ¶ 6-c), OneWest's vigorous opposition to remand, and the factual and legal complexity of the rehabilitation and some of the issues involved in the remand briefing. *See Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 200 F.3d 518, 521 (7th Cir. 1999) (finding amount of fees reasonable "in relation to the stakes of the case and [the] litigation strategy"); *Third Wave Techs., Inc. v. Stratagene Corp.*, No. 04-C-0680-C, 2006 U.S. Dist. LEXIS 6575, at *8 (W.D. Wis. Feb. 21, 2006) ("Moreover, it hardly becomes defendant to attack the number of

¹ Available at <http://ambacpolicyholders.com/storage/courtfilings/Ambac%20-%20Order%20for%20Rehabilitation%203-24-10.pdf>.

hours that plaintiff's attorneys spent in prosecuting the case, when defendant was responsible for much of the time plaintiff's attorneys were required to expend."").

13. The Commissioner's attorneys sought to economize their efforts. They primarily involved the three attorneys with case-specific experience relevant to the issues raised by OneWest's removal and, as indicated in the itemization, delegated a significant portion of the work on the remand briefing to the most junior of those attorneys, at a lower billing rate.

14. The value of the legal services provided in obtaining the remand extends well beyond the specific results obtained in this case. As noted in the remand briefing, OneWest's asserted grounds for removal could apply with equal force to many litigants involved in the rehabilitation, and, if upheld, may have led to a balkanization of the rehabilitation that would undermine the objectives of the Wisconsin Statutes, dramatically increase the cost of the rehabilitation, and jeopardize its ultimate success.

CONCLUSION

15. For the foregoing reasons, the Commissioner respectfully requests that this Court grant his request for reimbursement of \$78,107.50 in legal expenses incurred as a direct result of OneWest's removal, and to permit the Commissioner to supplement this fee request with additional fees associated with the preparation of this request and any reply brief should OneWest oppose this request.

Dated this 30th day of July, 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*