No. _____

IN THE

Supreme Court of the United States

In the Matter of

HARBORVIEW MORTGAGE LOAN TRUST 2005-10

AMBAC ASSURANCE CORPORATION,

Petitioner,

—v.—

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause prohibits the exercise of *in rem* jurisdiction unless the property at issue is located within the jurisdiction of the forum State *and* the persons whose interests are to be adjudicated have purposefully availed themselves of the benefits of the State.

The question presented is:

Whether a court may exercise *in rem* jurisdiction over a trust where the trust's primary, tangible assets are located outside of the forum State; the trust beneficiaries have not engaged in any conduct directed at or connected with the forum State and in fact were notified that trust administration issues are subject to jurisdiction in a different State; and the only basis for jurisdiction is the trustee's presence in the forum State.

PARTIES TO THE PROCEEDING

Ambac Assurance Corporation, petitioner on review, appeared in the district court as an objector and was the appellant below.[1]

U.S. Bank National Association, as Trustee for the HarborView Mortgage Loan Trust 2005-10 and respondent on review, was the petitioner in the district court and the respondent below.

The National Credit Union Administration Board, in its capacity as Liquidating Agent for U.S. Central Federal Credit Union; Athene Annuity & Life Assurance Company; and Athene Annuity & Life Assurance Company of New York were interested parties in the district court and were not parties to the proceeding below.

Bonitas, LLC was an objector in the district court and was not a party to the proceeding below.

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[1] At the commencement of this action, Ambac Assurance Corporation was subject to statutory rehabilitation in the Circuit Court for Dane County, Wisconsin, and the Segregated Account of Ambac Assurance Corporation, originally an objector in the action, was a separate Wisconsin insurer created by the Wisconsin Office of the Commissioner of Insurance pursuant to Wisconsin Statutes § 611.24 in March 2010. Pursuant to the Second Amended Plan of Rehabilitation, confirmed on January 22, 2018 and effective February 12, 2018, the Segregated Account of Ambac Assurance Corporation was merged with and into Ambac Assurance Corporation and ceased to maintain a separate existence.

RULE 29.6 STATEMENT

Ambac Assurance Corporation is wholly owned by Ambac Financial Group, Inc., a public corporation whose stock trades on the NASDAQ. Ambac Assurance Corporation is aware of no corporation or person owning 10% or more of the common stock of Ambac Financial Group, Inc.

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PETITION FOR WRIT OF CERTIORARI

This petition seeks review of a decision that assumes *in rem* jurisdiction under the precise jurisdictional theory rejected by this Court almost forty years ago in *Rush v. Savchuk*, 444 U.S. 320 (1980). In *Rush*, a Minnesota court purported to exercise *in rem* jurisdiction over an insurer's obligation to the defendant based on the fiction that the obligation was located wherever the insurer could be found, and the insurer was found wherever it did business. This Court reversed, reasoning that the "fictitious presence" of the obligation had "no jurisdictional significance" because the insurer did business in every State, and the insurer's contacts with Minnesota were unrelated to whether the defendant had purposefully availed himself of the benefits of the forum State. *Id.* at 329-30. Due process prohibited the assertion of *in rem* jurisdiction under such circumstances.

In this case, the Minnesota Court of Appeals resurrected the jurisdictional theory repudiated in *Rush* for a new era of litigation involving securitization trusts. U.S. Bank National Association (U.S. Bank or the Trustee) commenced the trust instruction proceeding below pursuant to the recently enacted Minnesota Trust Code, seeking an order that it may settle litigation pending in New York on behalf of the HarborView Mortgage Loan Trust 2005-10 (the Trust) consistent with its obligations as Trustee. The Trust is a residential mortgage-backed securities (RMBS) trust, the primary assets of which are mortgage loans that

generate cash flow to investors based on borrowers' payments. There is no dispute that the mortgage loans are located outside of Minnesota. There is also no indication that a single Trust beneficiary has engaged in conduct connected with the State and no reason for any beneficiary to have been expected to know that the Trust would be managed in Minnesota. To the contrary, the Trust instrument requires that the Trust be administered from U.S. Bank's corporate trust office in Massachusetts, rather than another of its fifty offices across the nation.

Despite the fact that the Trust's primary, tangible assets are located outside of Minnesota and that the Trust beneficiaries have done nothing to avail themselves of the benefits of the State, the Court of Appeals held that Minnesota may exercise *in rem* jurisdiction over the Trust. It reasoned that although the mortgage loans are not subject to jurisdiction in Minnesota, the Trust also possesses intangible contract rights that are intertwined with the loans—including those rights that are the subject of the lawsuit in New York—and that "chose in action" is located in Minnesota by virtue of *U.S. Bank's* connection to the State. The court relied on the same fiction to satisfy minimum contacts. The decision below did not cite a single authority that would locate the Trust's intangible rights in Minnesota. And it did not even mention *Rush*, let alone attempt to distinguish away that dispositive precedent.

Minnesota's theory of *in rem* jurisdiction cannot be reconciled with the requirements of due

process. This Court has held time and again that the exercise of *in rem* jurisdiction is contingent upon the presence of the property in the State. *See, e.g.*, *Hanson v. Denckla*, 357 U.S. 235 (1958). Moreover, even as this Court has expanded *in personam* jurisdiction—making physical presence in the State unnecessary—it has narrowed *in rem* jurisdiction, holding that the presence of property within the State is not enough to confer jurisdiction, and the contacts of the parties being haled into court must create a substantial connection with the forum State. *Rush*, 444 U.S. at 327-28. The reason? Unlike jurisdiction *in personam*, which binds only the parties who have appeared or were properly served, an order *in rem* binds the interests of *everyone, everywhere* in the property, to the exclusion of the jurisdiction of other States.

The decision below flouts these principles, ignores *Rush*, and renders due process a virtual dead letter in this context. Indeed, under the Court of Appeals' decision, courts of one State may control the assets of thousands of trusts involving securities issued by corporate and governmental entities throughout the world, regardless of the actual location of the assets, based on nothing more than the trustee's unilateral and undisclosed decision to oversee the administration of the trust from that State. The courts of any State in which corporate trust services are provided may issue orders that bind property, and the interests of persons therein, well beyond its territorial jurisdiction. With the continued proliferation of corporate trusts, and of national bank trustees that are simultaneously

present in every State, this jurisdictional framework is a recipe for disaster.

This Court should not let Minnesota's extreme assertion of jurisdiction stand. The refusal of the court below to adhere to clear and heretofore unquestioned precedent of this Court diminishes the primacy of this Court's holdings on matters of federal constitutional law and should be reviewed and reversed. *See* Sup. Ct. Rule 10(c). Moreover, this case is an ideal vehicle for the Court to reaffirm that there are limits on the exercise of *in rem* jurisdiction and to clarify, four decades after *Rush*, that those limits do not permit State courts to assert *in rem* jurisdiction over intangible property based on nothing more than their connection to the party invoking the court's jurisdiction. The petition for certiorari should be granted.

OPINIONS BELOW

The revised opinion of the Minnesota Court of Appeals (Pet. App. 1a-18a) is unofficially reported at 2018 Minn. App. Unpub. LEXIS 767. The order of the Minnesota Supreme Court denying Ambac's Petition for Review (Pet. App. 19a) is unofficially reported at 2018 Minn. LEXIS 669. The memorandum and order of the Minnesota District Court (Pet. App. 20a-42a) is not reported.

JURISDICTION

The Minnesota Supreme Court denied Ambac's Petition for Review by order dated November 13, 2018. Pet. App. 19a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The

Minnesota Attorney General is being served with this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Relevant provisions of the Minnesota Trust Code, Minn. Stat. § 501C.0101 *et seq.*, are set forth at Petitioner's Appendix 42a-47a.

STATEMENT

I. The Trust and the Parties

The Trust is an RMBS trust whose "primary assets," according to the Pooling Agreement establishing the Trust, are more than 4,000 mortgage loans with a combined original principal balance of approximately $1.75 billion. Pet. App. 2a, 48a § 1.01.[2] The Trust was created through a series

[2] The designation of the mortgage loans as the "primary assets" of the Trust is consistent with federal tax law, which requires that this type of trust, known as a real estate mortgage investment conduit, or REMIC, be an entity "substantially all of the assets of which consist of qualified mortgages and permitted investments." 26 U.S.C. § 860D(a)(4).

The Pooling Agreement is publicly available on the website of the U.S. Securities and Exchange Commission, Edgar.gov. *See* https://bit.ly/2HZ2PRe.

of contracts transferring the mortgage loans from their originator, Countrywide Home Loans, Inc. (Countrywide), to an intermediary and, ultimately, to an express New York trust governed by New York law. Pet. App. 2a-3a. The mortgage loans are embodied in the "Mortgage File": mortgages, mortgage notes, and assignments necessary to show chain of title. Pet. App. 28a, 49a § 1.01. Those documents are held outside of Minnesota by the Custodian, the Bank of New York Mellon. Pet. App. 3a, 22a, 29a, 49a. In addition to the mortgage loans, the Trust possesses related contract rights under the Pooling Agreement, including the right to require Countrywide to repurchase loans that do not comply with its representations and warranties concerning the loans' characteristics. *See* Pet. App. 3a, 12a-13a, 22a-23a. *Cf. Blodgett v. Silberman*, 277 U.S. 1, 12 (1928) (recognizing that the right to receive money is a "chose in action, and an intangible").

Similar to all RMBS transactions, the Trust aggregated the mortgage loans and issued securities (*i.e.*, certificates) backed by cash flows from the loans, which it sold to investors (*i.e.*, certificateholders). *See* Pet. App. 3a. By purchasing certificates in the Trust, the certificateholders acquired rights to the cash flow generated by borrowers' payments of principal and interest on the loans. *See id.* The certificates are freely traded financial products and the certificateholders, who are generally unknown, "could reside in any state or even outside the United States." Pet. App. 13a-14a. There is no allegation, much less evidence, that a single certificateholder has engaged in conduct directed at or connected with Minnesota.

Ambac Assurance Corporation (Ambac) is a Wisconsin-domiciled financial guaranty insurer with its principal place of business in New York. Ambac issued a financial guaranty insurance policy to the Trust for the benefit of two classes of certificateholders, thereby guaranteeing payment to those holders in the event that the cash flow from the loans is inadequate. *See* Pet. App. 3a. As such, Ambac has an economic interest in safeguarding the Trust's assets as subrogee of the certificateholders and as an express third-party beneficiary of the Pooling Agreement. Pet. App. 49a-54a §§ 4.05(d), 12.01, 12.03. Like the certificateholders, Ambac has not engaged in any conduct directed at or connected with Minnesota.

The Trustee, U.S. Bank, is a national banking association with its main office as designated in its articles of association in Ohio, its principal place of business in Minnesota, and fifty corporate trust offices throughout the country, including offices in Illinois, Massachusetts, and Minnesota. Pet. App. 2a-3a, 10a, 39a; U.S. Bank, "Corporate Trust Expertise," https://bit.ly/2UHsC1Z. Pursuant to the Pooling Agreement, U.S. Bank administers the Trust from its corporate trust office in Massachusetts. Pet. App. 3a, 22a, 33a, 39a, 48a § 1.01 (defining "Corporate Trust Office" and identifying U.S. Bank's Boston, Massachusetts office as "the principal corporate trust office at which at any particular time its corporate trust business in connection with this Agreement shall be administered . . . ."); *see also* Pet. App. 56a-57a § 12.05 (requiring that all "directions, demands, and notices" be sent to the Trustee in its Boston office). That designation is subject to change

only upon notice to the parties to the Pooling Agreement and the certificateholders. Pet. App. 48a § 1.01. U.S. Bank has never provided any such notice.

II. The Proceedings Below Under the New Minnesota Trust Code

Since 2011, U.S. Bank has been prosecuting a lawsuit in New York state court on behalf of the Trust against Countrywide and its successor in interest, Bank of America, N.A., seeking to enforce Countrywide's obligation to repurchase defective loans and recover more than $300 million in damages. Pet. App. 3a; *U.S. Bank Nat'l Ass'n, as Trustee for HarborView Mortgage Loan Trust 2005 - 10 v. Countrywide Home Loans, Inc. (d/b/a Bank of America Home Loans), et al.*, No. 652388/2011 (Sup. Ct. N.Y. Cty.). In 2016, U.S. Bank received an offer to settle the Trust's claims, Pet. App. 3a, for a fraction of their value. Ambac sued U.S. Bank in New York federal court, claiming that it could not accept such a low settlement consistent with its obligations as Trustee. Pet. App. 3a-4a; *Ambac Assur. Corp. and The Segregated Account of Ambac Assur. Corp. v. U.S. Bank Nat'l Ass'n*, No. 17-cv-446 (S.D.N.Y.).

Six weeks later, in a transparent effort to pretermit the New York litigation, U.S. Bank commenced this trust instruction proceeding pursuant to the new Minnesota Trust Code to obtain an order approving its conduct with respect to the proposed settlement. Pet. App. 24a. The Minnesota Trust Code, enacted in 2015, is based in some ways on the Uniform Trust Code (UTC). Unlike the UTC,

however, the Minnesota Trust Code allows a petitioner to proceed either *in personam* or *in rem*. *Compare* Minn. Stat. § 501C.0204(1) (allowing petitioner to designate jurisdiction), *with* Uniform Trust Code § 202 (establishing only *in personam* jurisdiction).[3] By proceeding *in rem*, the petitioner may rely on the presence of the trust property alone to obtain an order that is "binding in rem upon the trust estate and upon the interests of all beneficiaries." Minn. Stat. § 501C.0204(1). By contrast, an order *in personam* is binding only upon "a party who is served with notice of the judicial proceeding," "appears in the judicial proceeding," or is subject to certain provisions concerning adequate representation. *Id.* § 501C.0204(2).

Seeking to bind the interests of everyone, everywhere with an interest in the Trust based solely on the presence of Trust property, U.S. Bank invoked the District Court's *in rem* jurisdiction over the Trust and opted not to proceed *in personam*. *See* Pet. App. 4a. Ambac moved to dismiss the Petition on the ground, *inter alia*, that the District Court could not exercise *in rem* jurisdiction over the Trust consistent with due process. Pet. App. 4a; Minn. R. Civ. P. 12.02.[4] U.S. Bank responded by filing an Amended Petition in which it removed any reference

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[3] *See* Uniform Trust Commission, Uniform Trust Code, https://bit.ly/2GjxNBK.

[4] Ambac also moved to dismiss on the grounds that the District Court did not have subject-matter jurisdiction under the Trust Code and did not have personal jurisdiction under Minnesota common law. Neither ground is raised here.

to *in rem* jurisdiction but continued to invoke such jurisdiction by default under the Trust Code. Minn. Stat. § 501C.0201(c)(1); *see also* Pet. App. 10a-11a (recognizing that U.S. Bank is proceeding *in rem*).

Ambac again moved to dismiss on materially identical grounds. Pet. App. 4a. In an effort to demonstrate the Trust's ties to Minnesota, U.S. Bank submitted a declaration from an employee in its offices in Chicago, Illinois. That employee stated that while some aspects of Trust administration occurred in Massachusetts—the location specifically designated in the Pooling Agreement for such activities—other aspects occurred in Illinois (where the employee was based) and elsewhere. Pet. App. 32a-34a. He further stated that agents in those locations "report to the Trustee's principal place of business in Minnesota, which ultimately controls and oversees the Trust." Pet. App. 32a-33a (citation omitted). Notably, U.S. Bank's Chicago-based declarant did *not* state that U.S. Bank ever notified certificateholders that, contrary to the designation in the Trust instrument, matters of Trust administration were being handled anywhere other than Massachusetts.

In a Memorandum and Order dated November 9, 2017, the District Court denied Ambac's motion to dismiss. Pet. App. 20a. The District Court acknowledged that "[t]he physical documents constituting the Mortgages are not and never were located in Minnesota." Pet. App. 29a. Nonetheless, it concluded that "[t]he New York Action to enforce the Trust's contractual rights is an intangible trust asset," and those "intangible rights emanating from

the mortgage loans" are located in Minnesota because they "have been directed and approved from U.S. Bank's [Minnesota] trust services office." Pet. App. 32a. The District Court disregarded the Pooling Agreement's requirement that the Trust be administered from Massachusetts, finding that "because of U.S. Bank's readily apparent presence in Minnesota, all of the relevant parties could reasonably anticipate the possibility of an action concerning the Trust being brought in the state's courts." Pet. App. 40a.

In an Opinion dated September 4 and revised September 12, 2018, the Minnesota Court of Appeals affirmed.[5] Pet. App. 2a. Like the District Court, the Court of Appeals accepted that the mortgage loans are located outside of Minnesota but held that the exercise of *in rem* jurisdiction was proper based upon the fictional presence of the Trust's intangible contract rights. Pet. App. 12a-13a. To locate those rights in Minnesota, the court relied on a single case—*Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951)—and reasoned that since the Trustee has "control" over those rights and is subject to jurisdiction in the State, where it "administers the trust and where decisions regarding the action against Countrywide are made," "the intangible property created by the mortgage-loan and trust documents is located in Minnesota" as well. Pet. App. 13a-14a (citing 341 U.S. at 439-40). The court further reasoned that "[t]his contact between the

[5] The revised Opinion corrected the listing of counsel and did not make any changes to the substance of the decision.

trust property and Minnesota satisfies the minimum-contacts standard" in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. Pet. App. 17a-18a. The court did not identify any contacts by Ambac or a single Trust beneficiary that were purposefully directed at or connected with Minnesota. *See id.*

The Minnesota Supreme Court denied Ambac's petition for review on November 13, 2018. Pet. App. 19a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Negates This Court's Precedents Defining the Constitutional Limits of *In Rem* Jurisdiction

This Court has recognized two prerequisites to the exercise of *in rem* jurisdiction. The Court of Appeals disregarded both and rendered them essentially meaningless in the context of intangible property.

A. *In Rem* Jurisdiction Requires the Presence of Property and Minimum Contacts

First, it is axiomatic that the basis of *in rem* jurisdiction is "the presence of the subject property within the territorial jurisdiction of the forum State." *Hanson*, 357 U.S. at 246-47. As Chief Justice Marshall recognized more than two centuries ago, "It is repugnant to every idea of proceeding in rem to act against a thing which is not in the power of the sovereign under whose authority the court proceeds[.]" *Rose v. Himely*, 8 U.S. 241, 277 (1807).

The rationale for this principle is straightforward: *in rem* jurisdiction is predicated upon the State's power over property, and a judgment *in rem* "affects the interests of all persons" in the property, wherever they may be located, to the exclusion of the jurisdiction of the other States. *Hanson*, 357 U.S. at 246 n.12. A court's *in rem* jurisdiction is thus "limited by the extent of its power and by the coordinate authority of sister States." *Id.*; *see also Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (due process limitations are "a consequence of territorial limitations on the power of the respective States").

Second, because "[a]ll proceedings, like all rights, are really against persons," the assertion of *in rem* jurisdiction "must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer v. Heitner*, 433 U.S. 186, 207 n.22, 212 (1977) (citation and quotation marks omitted). To satisfy minimum contacts, "the relationship among the *defendant*, the forum, and the litigation" must be such that "the *defendant's* suit-related conduct . . . create[s] a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)) (emphases added). Moreover, minimum contacts "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, 444. U.S. at 322.

Where *tangible* property is within the forum State and "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for

the State where the property is located not to have jurisdiction." *See Shaffer*, 433 U.S. at 207. Because the property's situs is readily identifiable, "the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest." *Id.* at 207-08.

The same assumption does not necessarily hold for *intangible* property, the situs of which "is about as intangible a concept as is known to the law" and fluctuates depending on the purpose for which jurisdiction is asserted. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir. 1968). Quite the opposite: the fictional situs of intangible property does not "without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense" between the forum State and the respondent. *Rush*, 444 U.S. at 329-30 (emphasis in original); *see also Shaffer*, 433 U.S. at 212 (rejecting as "an ancient form without substantial modern justification" the notion that the situs of property—there, the alleged fictional situs of intangible property—could, without more, justify the assertion *in rem* jurisdiction).

B. The Decision Below Conflicts with *Rush* and This Court's Other *In Rem* Jurisdiction Decisions

In the decision below, the Court of Appeals paid lip service to these constitutional requirements before disregarding them. The court did not dispute that the Trust's primary assets, the mortgage loans that generate cash flow to Trust beneficiaries, are located outside of Minnesota and therefore not

subject to *in rem* jurisdiction in the State. *See* Pet. App. 12a-13a. It sidestepped that fact by focusing on the Trust's intangible rights that are the subject of the lawsuit in New York, which it deemed the "relevant trust property." Pet. App. 12a-13a, 17a-18a.

The court did not offer any justification for ignoring the loans themselves, the value of which the Trust seeks to recover through the exercise of its intangible rights in the New York lawsuit. The court also did not cite a single decision for its selective approach to locating the Trust *res*. Nor could it, given that this Court held long ago in *Hanson* that the exercise of *in rem* jurisdiction over a trust offends due process when the trust corpus is located outside of the State. 357 U.S. at 247-48 & n.16.

As the basis for finding that both due-process requirements were satisfied, the court reasoned that Minnesota is "where [U.S. Bank] administers the trust and where the decisions regarding the action against Countrywide are made," and U.S. Bank's "decision-making processes in the State provide a sufficient contact between the trust property and Minnesota." Pet. App. 17a. That approach is fundamentally at odds with this Court's instruction that "such a 'contact' can have no jurisdictional significance" to the due process analysis. *Rush*, 444 U.S. at 330. Indeed, in finding that the Trust's intangible rights are located with the Trustee in Minnesota as opposed to another of its fifty offices throughout the country, the court relied on the declaration of a U.S. Bank employee in *Chicago*, who attested that Trust administration occurred in

Illinois, Massachusetts, and elsewhere. The most he could say is that those activities had been "oversee[n]" from U.S. Bank's office in Minnesota. Pet. App. 33a, 40a.

As in *Rush*, that "contact" could just as easily have been located in any of U.S. Bank's trust offices throughout the country, depending on its preferences in a particular litigation, and has no bearing on whether Ambac or any Trust beneficiary engaged in conduct connected with Minnesota. *Rush*, 444 U.S. at 330 (where insurer was "'found' in the sense of doing business, in all 50 States and the District of Columbia," it was "apparent that such a 'contact' can have no jurisdictional significance"). And by relying on nothing more than *U.S. Bank's* presence and conduct in Minnesota, the court improperly "shift[ed] the focus of the inquiry from the relationship among the *defendant*, the forum, and the litigation to that among the *plaintiff*, the forum, . . . and the litigation." *Id.* at 332 (emphases added).

The exercise of jurisdiction also cannot be justified based on the Trust beneficiaries' purported awareness of U.S. Bank's connection with Minnesota—a theory relied on by the District Court but not the Court of Appeals based, apparently, on the District Court's own familiarity with U.S. Bank. *See* Pet. App. 40a. "[T]he relationship must arise out of contacts that the '[defendant] *himself*' creates *with the forum State*," and it may not rest on the defendant's purported "knowledge of [the plaintiff's] strong forum connections." *Walden*, 571 U.S. at 284, 289 (citations and quotation marks omitted) (second emphasis added).

Here, the only contact created *by Ambac and the Trust beneficiaries* was with *Massachusetts* (not Minnesota), given the requirement in the Pooling Agreement that the Trust be administered from U.S. Bank's trust office in Massachusetts. Pet. App. 3a, 22a, 33a, 48a § 1.01. That designation not only placed anyone with an interest in the Trust on notice that they might be haled into Massachusetts with respect to matters of Trust administration, but also served as consent to jurisdiction under Massachusetts law. *See* Mass. L. 203E § 202(b) (statutory consent providing that all persons with an interest in a trust whose principal place of administration is in the State submit to that State's jurisdiction to resolve trust administration issues). Minnesota law provides for statutory consent in like circumstances. *See* Minn. Stat. § 501C.0206(b).[6]

Although U.S. Bank could have changed the designation of Trust administration to Minnesota, it was required to first give notice of the change to

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[6] Indeed, Minnesota law recognizes the importance of this designation. Under the Minnesota Trust Code, "terms of a trust designating the initial principal place of administration are valid and controlling" so long as some portion of trust administration occurs in the designated jurisdiction. Minn. Stat. § 501C.0108(a). That designation is subject to change only upon notice, 60 days prior to initiating the transfer, and the change in designation must be obtained by court approval if any beneficiary objects. *Id.* § 501C.0108(d)-(e). The comment to the Uniform Trust Code on which this provision is based explains that this rule avoids the complexities that arise where "a single institutional trustee has trust operations in more than one state." Uniform Trust Code § 108 cmt.

provide Trust beneficiaries with an opportunity to consent to such jurisdiction or release their interest. *Id.*; *see also* Pet. App. 48a § 1.01 (requiring notice to change principal place of administration). U.S. Bank never gave the required notice, and to the extent it actually administered the Trust from Minnesota, it did so unilaterally and contrary to its stated intentions in the Pooling Agreement. Having end-run around these contractual requirements, U.S. Bank now seeks to proceed *in rem* based on nothing more than its own unilateral and undisclosed decision. Such circumstances cannot give rise to purposeful availment by Ambac or a single Trust beneficiary.

C. The Decision Below Conflicts with *Standard Oil*

The decision below is also contrary to *Standard Oil Co. v. New Jersey*, the sole case relied upon by the Court of Appeals to find that the Trust's intangible rights are located in Minnesota and that its courts therefore may exercise jurisdiction over anyone, anywhere, regardless of their connection to the State. In *Standard Oil*, the State of New Jersey sued a New Jersey corporation in its courts to escheat unpaid dividends and shares of common stock in the company. 341 U.S. at 429-30. This Court observed that because "choses in action have no spatial or tangible existence, control over them can 'only arise from control over the *persons* whose *relationships* are the source of the rights and obligations.'" *Id.* at 439 (quoting *Estin v. Estin*, 334 U.S. 541, 548 (1948)) (emphases added). Since New Jersey had jurisdiction over both the debtor *and* the

creditor, it could exercise jurisdiction over the debt. *Id.* ("We see no reason to doubt that, where the debtor *and* creditor are within the jurisdiction of the court, that court has constitutional power to deal with the debt.") (emphasis added). *Standard Oil* thus stands for the unremarkable proposition that jurisdiction over intangible property may be effected by jurisdiction over the persons whose interests therein will be bound. *See Shaffer*, 433 U.S. at 207 ("The phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.") (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

Here, the Court of Appeals reasoned that *Standard Oil* justified the exercise of *in rem* jurisdiction over the Trust's intangible rights because Minnesota has jurisdiction over the *Trustee alone*. *See* Pet. App. 13a. But that is not what *Standard Oil* held, nor does it make sense as a basis for *in rem* jurisdiction. A court cannot assert jurisdiction over all persons with an interest in property simply because *one* person is within the court's reach. *Standard Oil* is inapposite and, if anything, demonstrates why jurisdiction was lacking below.

Indeed, in *Estin*, the case cited in *Standard Oil* on this point, this Court said it was "aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding." 334 U.S. at 548-49 (holding Nevada "had no power to

adjudicate respondent's rights in [a] New York judgment" establishing alimony obligation because it did not possess jurisdiction over both parties to the judgment). So too, here, *Standard Oil* provides no basis for Minnesota courts to adjudicate the rights of Ambac and the Trust beneficiaries in intangible Trust property when they are not already subject to *in personam* jurisdiction in the State. *See also Hanson*, 357 U.S. at 249 (rejecting argument that *in rem* jurisdiction over a trust could be premised on the "fact that the owner is or was domiciled within the forum State").[7]

The jurisdictional theory advanced by the Court of Appeals renders irrelevant this Court's oft-stated limitations on *in rem* jurisdiction. In every case, a trustee who petitions a court for review of its conduct can point to its connection to the forum State to support the exercise of jurisdiction over the trust's intangible *res*, regardless of the presence of the trust's tangible property or the conduct of the trust beneficiaries across the world whom it seeks to bind. Under this rule, state courts will necessarily find that the presence of the trust's intangible rights with the trustee justifies the exercise of jurisdiction

[7] A simpler and more common-sense approach to locating the Trust's intangible rights for purposes of jurisdiction would have been to ask where they are currently subject to jurisdiction. Unlike many intangible rights, the Trust's "chose in action" has a readily identifiable and discrete location—New York—where those rights are *sub judice*. *E.g.* Joseph H. Beale, *Situs of Things*, 28 YALE L.J. 525, 540 (1919) (recognizing the principle of property *in gremio legis*, under which "[p]roperty which is within the control of a court has a situs . . . where the court is").

in the trustee's chosen forum, and on that basis will exercise jurisdiction to the exclusion of other States where the trust property is actually located, and to the exclusion of other States from which the trust is to be administered.

In short, there was no basis to find that the exercise of *in rem* jurisdiction was consistent with due process, and the court below made no real effort to show otherwise. Under the rule advanced in the decision below, the Trustee's contacts with the forum are "decisive in determining whether [Ambac and Trust beneficiaries'] due process rights are violated," *Rush*, 444 U.S. at 332, and due process becomes a dead letter.

II. The Issue Presented Is Important and Wide-Reaching and This Case Is an Ideal Vehicle for its Resolution

It has been four decades since this Court squarely addressed the exercise of *in rem* jurisdiction over intangible property in *Rush*.[8] In that time, the significance of intangible rights has grown exponentially, and the issue of where they are to be litigated has become increasingly significant and contested.

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[8] To be sure, the Court has issued several decisions concerning escheat, *see, e.g.*, *Delaware v. New York*, 507 U.S. 490 (1993), admiralty jurisdiction, *see, e.g.*, *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013), and bankruptcy, *Marshall v. Marshall*, 547 U.S. 293 (2006). None of those decisions, however, has addressed the issues presented here.

The Trust is an RMBS trust, a creature virtually unheard of at the time of *Rush*, whose corpus consists of securities backed by thousands of individual mortgages. RMBS trusts are not unique. During the 40 years since *Rush*, financial markets have created a broad array of securitization trusts extending to all manner of economic activity, including not only residential and commercial mortgages, but also automotive loans, credit cards, and student loans. Jonathan C. Lipson, *Defining Securitization*, 85 S. CAL. L. REV. 1229, 1248 (2012); Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on Risk Retention* (2010) at 28 fig. 2, *available at* https://bit.ly/2nrQUwv. They have also created an array of new financial instruments, such as collateralized debt obligations (CDO)—structured financial products that pool other financial assets like RMBS and commercial mortgage-backed securities (CMBS)—synthetic CDOs, and collateralized loan obligations, among others. *See* Financial Crisis Inquiry Commission, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 127-29, 142, 174 (2011), https://bit.ly/2Qip6wi. These intangible financial assets constitute a significant portion of the United States economy. *See, e.g.*, The Secretary-General of the Organisation for Economic Co-operation and Development, *Financial Markets Highlights*, 93 FINANCIAL MARKET TRENDS vol. 2007/2 at 19 (Nov. 2007), https://bit.ly/2GDoaxt (observing as of June 2006 that "the volume of US asset-backed securities outstanding amounted to about USD 4.2 trillion,

some 56% of which are backed by residential mortgages (RMBS)").

The trend towards securitization, and the use of trust services to administer such financial assets, continues today. U.S. structured finance issuance in 2017 was $510 billion, a 37% increase over 2016 volume. Allison Bisbey, "Busy December pushes 2017 U.S. ABS issuance to $510B," Asset Securitization Report (Jan. 3, 2018), https://bit.ly/2SBWVcQ. Student loan securitizations have grown in volume since the financial crisis. *See, e.g.*, Ruth Simon et al., *Student-Loan Securities Stay Hot: Investors' Hunger for Returns is Driving Demand Even as More Borrowers Fall Behind on Their Payments*, WALL ST. J. (Mar. 3, 2013), *available at* https://on.wsj.com/2RCd2m0; Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 418 n.582 (2013) (noting student loan asset-backed securities currently trade over $240 billion annually, with new student loan asset-backed securities in 2011 of $12 billion) (citation omitted). Auto lease securitizations have rebounded to their pre-financial crisis levels. *Report to the Congress on Risk Retention* at 34. And as of 2017, the global securitized market was $9.8 trillion, with the U.S. securitized market representing 86%. Greg Finck & Neil Stone, *An Overview of the Global Securitized Markets*, Morgan Stanley (2017), https://mgstn.ly/2RPyNio.

These financial assets, and other forms of intangible wealth, form the primary corpus of trusts in the United States today. *See, e.g.*, 2 SCOTT &

ASCHER ON TRUSTS § 10.6, at 565 (4th ed. 1998) ("[T]rust assets typically consist primarily, or even exclusively, of intangible personal property, such as bonds and shares of stock."); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638 (1995) ("Modern wealth takes the form of financial assets . . . . The modern trust typically holds a portfolio of these complex financial assets, which are contract rights against the issuers."). The utilization of trusts to hold and maintain financial assets has in turn resulted in the development of a corporate trust industry, in which institutional actors—often national banks like U.S. Bank with locations throughout the country—provide trust services. *See, e.g.*, John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997) (observing that "well over 90% of the money held in trust in the United States is in commercial trusts as opposed to personal trusts"); Langbein, *Contractarian Basis*, 105 YALE L.J. at 638-39 (describing the rise of the corporate fiduciary).

The increased use of trusts to power the securitization of financial obligations raises significant jurisdictional issues. "[A]s the barriers to multistate banking have fallen, large banks have found themselves doing trust business in many states," giving rise to the need for uniformity in state law to prevent unworkable conflicts. John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1079 (2007). Minnesota's unbridled assertion of *in rem* jurisdiction threatens not only to upend the trust industry but also to undermine the economic

activities that the industry facilitates. Under the Court of Appeals' theory, a financial institution need only point to its own business presence in a State to obtain jurisdiction over any and every interest in property throughout the world. And while only Minnesota has asserted such vast power over intangible property held in trust, there is a grave risk that other States may follow suit unless this Court reasserts the continuing vitality of *Rush*. Far from the clear demarcation of power that is necessary for *in rem* jurisdiction to function, "the regulation of intangible properties is likely to become a free-for-all endeavor in which economic might is right." S. Nathan Park, *Equity Extraterritoriality*, 28 DUKE J. COMP. & INT'L L. 99, 144-45 (2017) (observing that the "ethereal nature of intangible properties allows multiple states to make plausible claims of plenary jurisdiction over them").

Even if Minnesota's expansive assertion of *in rem* jurisdiction is not adopted by other States, the effect on the trust industry will be substantial. U.S. Bank is the fifth largest bank in the United States. Federal Reserve, *Federal Reserve Statistical Release*, https://bit.ly/2GAKTaR (as of September 30, 2018). It is also a self-described "leading provider of corporate trust services in the United States," and, indeed, was "appointed trustee on municipal, and structured issuance more than any other firm in 2015." U.S. Bank, "Corporate Trust Expertise," https://bit.ly/2UHsC1Z; BusinessWire, "U.S. Bank Global Corporate Trust Services Finishes 2015 as Top U.S. Trustee" (Feb. 19, 2016), https://bit.ly/2E03Gx3. For 2018, U.S. Bank reported $1.6 billion in trust and investment

management fees. BusinessWire, "U.S. Bancorp Reports Fourth Quarter and Full Year 2018 Results" (Jan. 16, 2019), https://bit.ly/2I1aoXC. Under the decision below, U.S. Bank will have every incentive to take advantage of Minnesota courts to obtain orders *in rem* that bind the property (and interests therein) outside of the State that make up its vast corporate trust business.

Nor is there any reason to believe that the court's novel theory will be limited to intangible financial assets, important as they are. Trusts can and do hold various other forms of intangible property. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 82 (observing that a trust corpus may consist of various "intangible things," such as choses in action, life insurance policies, patents, copyrights, good will, or trademarks). Any of these properties—and even tangible properties with a clear situs in other States—can be subjected to plenary jurisdiction in Minnesota (or other States that may emerge as competitors for this type of banking service) by virtue of the trustee's presence in the State.

This Court should not allow the Minnesota courts' radical expansion of *in rem* jurisdiction to stand. The decision below provides an excellent vehicle for the Court to consider, and reaffirm, due-process limits on *in rem* jurisdiction in the new century. The purely legal issues are outcome-determinative: if there are no minimum contacts, the case should be dismissed. There are no disputed material facts: the Trust's primary, tangible assets are not within the jurisdiction of Minnesota, and

there is no suggestion that Ambac or any Trust beneficiary engaged in any conduct with respect to Minnesota. The only "contacts" arise out of the Trustee's unilateral decision to administer the Trust from Minnesota, and the Pooling Agreement required that the Trust will be administered from Massachusetts. And the decision below unabashedly rests on a single criterion: the Trustee's decision to do business and administer the Trust from Minnesota. The case thus provides the Court with a clear opportunity to address these important issues.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

February 11, 2019 Respectfully submitted,

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APPENDIX

Appendix A

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0043

_____

In the Matter of:
HarborView Mortgage Loan Trust 2005-10.

Filed September 4, 2018
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-TR-CV-17-32

_____

Gregg M. Fishbein, Kate M. Baxter-Kauf, Lockridge Grindal Nauen P.L.L.P., Minneapolis, Minnesota; and

Peter W. Tomlinson (pro hac vice), Patterson Belknap Webb & Tyler LLP, New York, New York (for appellants Ambac Assurance Corporation, et al.)

Michael C. McCarthy, James F. Killian, Ana Chilingarishvili, Jesse D. Mondry, Michael

Sheran, Maslon LLP, Minneapolis, Minnesota (for respondent U.S. Bank National Association)

Considered and decided by Florey, Presiding Judge; Peterson, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this proceeding brought under the Minnesota Trust Code, Minn. Stat. §§ 501C.0201-.0208 (2016), appellant trust insurers challenge the district court's exercise of jurisdiction over the trust. We affirm.

FACTS

Respondent U.S. Bank National Association (the bank) is the trustee for the HarborView Mortgage Loan Trust 2005-10 (the trust). The bank is a national banking association incorporated under the National Bank Act, 12 U.S.C. §§ 1 *et seq*. The bank's articles of association state that the main office of the bank shall be in Cincinnati, Ohio. The bank's principal place of business is in Minnesota.

In 2003, Countrywide Home Loans, Inc., a mortgage lender, originated more than 4,000 residential mortgage loans with a total principal balance of approximately $1.75 billion. Countrywide sold the loans to Greenwich Capital Financial Products, Inc. (GCFP), which sold the loans to Greenwich Capital Acceptance, Inc. (GCA). GCFP, GCA, and the bank aggregated the loans into a securitization trust through a pooling

and servicing agreement, with the bank serving as trustee. On the date that the pooling and servicing agreement was executed, the bank's principal corporate trust office at which trust business in connection with the pooling agreement was administered was in Boston, Massachusetts. The pooling agreement designated The Bank of New York as the custodian of the original documents for individual mortgage loans and provided that the agreement would be governed by New York law.

Certificates were created based on the trust assets and then sold to investors. Appellants Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation (collectively, Ambac) insured some of the trust certificates by guaranteeing payment if the cash flow from the mortgage-loan payments was inadequate.

Eventually, it became clear that the underlying mortgage loans would not support the represented income. In 2011, the bank sued Countrywide and its successor, Bank of America Corporation, in the New York Supreme Court, alleging breaches of contract and seeking to enforce Countrywide's obligation under the pooling and servicing agreement to repurchase defective loans. In December 2016, the bank received a settlement offer of $56,961,881 and up to $10,000,000 to cover litigation expenses. Some certificate holders notified the bank that they viewed the settlement offer as inadequate. Ambac and a certificate holder, Bonitas LLC, sued the bank in federal court in New York, seeking to block the

settlement. The bank filed a petition in Minnesota under the Minnesota Trust Code seeking instruction from the court regarding interpretation and application of trust provisions related to the bank's acceptance or rejection of the proposed settlement and approval from the court of the bank's decision to accept or reject the proposed settlement. The bank asserted that the Minnesota court had in rem jurisdiction.

In April 2017, Ambac moved to dismiss the bank's petition for lack of subject-matter and personal jurisdiction. In June 2017, the bank filed an amended petition asserting that the district court had jurisdiction because the bank's principal place of business is in Minneapolis and, therefore, the bank is a trustee located in Minnesota. Because the bank's retained experts had advised the bank that the settlement offer was inadequate, the bank sought an order authorizing and instructing the bank not to accept the offer. Ambac filed an amended motion to dismiss for lack of subject-matter and personal jurisdiction. After a hearing on the motion to dismiss, the district court issued an order denying the motion. Ambac appeals from this order.

D E C I S I O N

1. Subject-matter jurisdiction under the Minnesota Trust Code

Ambac argues that the district court lacked subject-matter jurisdiction over the bank's instruction petition. We review subject-matter

jurisdiction as a question of law. *Nelson v. Schlener*, 859 N.W.2d 288, 291 (Minn. 2015). "Subject-matter jurisdiction refers to a court's authority to hear and determine a particular class of actions and the particular questions presented to the court for its decision." *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 608 (Minn. 2016) (quotations omitted). "Whether a court has subject-matter jurisdiction to hear and determine a particular class of actions and the particular questions presented generally depends on the scope of the constitutional and statutory grant of authority to the court." *McCullough & Sons, Inc. v. City of Vadnais Heights*, 883 N.W.2d 580, 585 (Minn. 2016) (quotation omitted).

District courts in Minnesota have original jurisdiction over criminal and civil cases, Minn. Const. art. VI, § 3, but the question of subject-matter jurisdiction extends beyond general classes or categories of cases. *Bode v. Minn. Dep't of Nat. Res.*, 594 N.W.2d 257, 259 (Minn. App. 1999), *aff'd* 612 N.W.2d 862 (Minn. 2000). A court does not have authority to hear and determine a matter that "exceed[s] statutory authority, contain[s] procedural irregularities, or [was] entered erroneously after the expiration of a time period." *Id.*

Generally, the Minnesota Trust Code does not apply to corporate trusts. Minn. Stat. § 501C.0102(c).But, under an exception from this general rule, Minnesota Statutes, "sections 501C.0201 to 501C.0208 apply to corporate trusts that are administered by *a trustee located in this*

state." Minn. Stat. § 501C.0208 (emphasis added). For purposes of applying this exception,

> (1) "Corporate trust" means any trust created pursuant to a corporate trust agreement; and
>
> (2) "Corporate trust agreement" means any indenture, pooling and servicing agreement, collateral agency agreement, or other contractual arrangement that establishes an express trust either before or upon the occurrence of an event of default and was entered into with a trustee as a party to facilitate a commercial transaction for the issuance of debt or equity securities or for the creation of other similar rights or interests, whether or not the securities are subject to any securities laws, including but not limited to the Trust Indenture Act of 1939, as amended.

Id. It is undisputed that the trust is a "corporate trust." Therefore, sections 501C.0201 to 501C.0208 apply to the trust if the bank is a trustee located in Minnesota.

The parties dispute whether the bank is a trustee located in Minnesota. The trust code does not define "located." Thus, whether the bank is "located" in Minnesota presents a question of statutory interpretation. This court reviews the interpretation of a statute as a question of law subject to de novo review. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). Statutory interpretation seeks "to ascertain and effectuate

the intention of the legislature." Minn. Stat. § 645.16 (2016). The legislature has instructed:

> When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:
>
> (1) the occasion and necessity for the law;
>
> (2) the circumstances under which it was enacted;
>
> (3) the mischief to be remedied;
>
> (4) the object to be attained;
>
> (5) the former law, if any, including other laws upon the same or similar subjects;
>
> (6) the consequences of a particular interpretation;
>
> (7) the contemporaneous legislative history; and
>
> (8) legislative and administrative interpretations of the statute.

Id.

The bank argues that, because its principal place of business is in Minnesota, it is a trustee located in Minnesota. Ambac cites *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 126 S. Ct. 941 (2006), and argues that, because the bank's articles of association state that the bank's main office is in Cincinnati, Ohio, the bank is located in Ohio.

In *Wachovia*, the Supreme Court held that, for federal diversity-jurisdiction purposes, a national bank "is a citizen of the State in which its main

office, as set forth in its articles of association, is located." 546 U.S. at 307, 126 S. Ct. at 945. The Supreme Court explained that "located" "is a chameleon word; its meaning depends on the context in and purpose for which it is used." *Id*. at 318, 126 S. Ct. at 951. The context in and purpose for which "located" was used in *Wachovia* was a federal banking law that defined the citizenship of national banks for federal diversity-jurisdiction purposes. *Id*. at 306, 126 S. Ct. at 944-45. The statute provided that, for diversity-jurisdiction purposes, "national banks 'shall . . . be deemed citizens of the States in which they are respectively located.'" *Id*. (omission in original) (quoting 28 U.S.C. § 1348).

The Supreme Court considered the context and purpose of the statute and concluded:

> An individual who resides in more than one State is regarded, for purposes of federal subject-matter (diversity) jurisdiction, as a citizen of but one State. Similarly, a corporation's citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. § 1332(c)(1). It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal juris- diction. Reading § 1348 in this context, one would sensibly "locate" a national bank for the very same purpose, *i.e.,* qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.

Id. at 318, 126 S. Ct. at 951-52 (citations omitted).

This rationale for the Supreme Court's decision in *Wachovia* demonstrates that Ambac's reliance on *Wachovia* is misplaced.Federal diversity jurisdiction and the Minnesota Trust Code do not share either a context or a purpose, and the meaning of "located" in the diversity-jurisdiction statute at issue in *Wachovia* provides little guidance on its meaning in the trust code.Consequently, the Supreme Court's conclusion in *Wachovia* does not aid our analysis. Instead, we will consider the context in and purpose for which "located" is used in the trust code, which is consistent with the legislature's instruction that we may consider the occasion and necessity for the law, the circumstances under which the law was enacted, the mischief to be remedied, and the object to be attained.

Minnesota's current trust code was adopted in 2015 and replaced an earlier version of the code. The predecessor trust code, Minn. Stat. ch. 501B, did not refer to corporate trusts, and only one part of the current code applies to corporate trusts. That part, sections 501C.0201 to 501C.0208, provides a procedure that an interested person, including a trustee, may use to petition the district court and invoke its jurisdiction for specific matters involving a trust. *See* Minn. Stat. § 501C.0201(a) (providing that interested person may petition district court and invoke its jurisdiction for specific matters involving a trust); Minn. Stat. § 501C.0201(b) (stating that "interested person" includes, among others, acting trustee, successor trustee, and any person seeking

court appointment as trustee). The matters that the procedure may be used to address include several specifically identified matters directly related to trust administration.*See* Minn. Stat. § 501C.0202 (listing matters to which judicial proceeding under Minn. Stat. §§ 501C.0201 to .0208 may relate).

An apparent purpose of Minn. Stat. §§ 501C.0201-.0208 is to enable a trustee to obtain judicial rulings on a wide variety of matters related to trust administration. Because obtaining these judicial rulings is a function of trust administration, we conclude that when used in Minn. Stat. § 501C.0102(c), the phrase "a trustee located in this state" means a trustee of a corporate trust that is performing the functions of trust administration in this state.

The bank claims Minnesota as its principal place of business; although some trust functions are carried out in other states, the bank's decision-making officers are located in Minnesota, and employees in other states seek approval of actions from the officers in Minnesota. Because the bank performs the functions of administering the trust in this state, the district court did not err by determining that the bank is a trustee located in Minnesota and that the district court has subject-matter jurisdiction over the instruction petition.

2. In rem jurisdiction over the trust

Ambac argues that the district court erred by "holding that it may assume in rem jurisdiction over the Trust consistent with Minnesota law."

"Personal jurisdiction is commonly thought to encompass jurisdiction in personam and in rem." *Nagel v. Westen*, 865 N.W.2d 325, 330 (Minn. App. 2015), *review denied* (Minn. Sept. 15, 2015). "'A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property.'" *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 1235 n.12 (1958)).

The district court found that it has in rem jurisdiction over the trust. This court has identified seven factors to be considered when determining whether a district court has jurisdiction over a multi-state trust:

> (1) the location of the trust property (the situs of the trust assets), (2) the domicile of the trust beneficiaries, (3) the domicile of the trustees, (4) the location of the trust administrator, (5) the extent to which the litigation has been resolved, (6) the applicable law, and (7) an analysis of *forum non conveniens* principles.

In re Trusteeship Created by City of Sheridan, 593 N.W.2d 702, 705 (Minn. App. 1999)

Considering all of these factors in light of this court's decision in *Sheridan*, we agree with the district court's conclusion that it has in rem jurisdiction over the trust.

(1) The location of the trust property

In *Sheridan*, the trust property was primarily real estate in Colorado, and its location was not an issue. *Id.* at 706. Here, the trust property is primarily mortgage loans and contract rights under the trust documents. The settlement offer that is the subject of the bank's petition arose in the bank's action claiming a breach of Countrywide's contract obligations under the trust documents. Ambac argues that because the mortgage-loan documents are not in Minnesota, the trust property is not in Minnesota.

But the property that the trust possesses is not simply physical documents; the trust also possesses rights created by the language that appears in the documents. These rights are intangible property, and the Supreme Court has addressed how the location of intangible property may be determined in the context of stock certificates and dividends. The Supreme Court said:

> It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction, however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property. Whether such property has its situs with the obligor or the obligee or for some purposes with both has given rise to diverse views in this Court.
>
> We see no reason to doubt that, where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt.

> Since choses in action have no spatial or tangible existence, control over them can only arise from control or power over the persons whose relationships are the source of the rights and obligations. Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible.

Standard Oil Co. v. New Jersey, 341 U.S. 428, 439-40, 71 S. Ct. 822, 829 (1951) (footnotes omitted) (quotation omitted). Like the intangible property in *Standard Oil*, control over the rights and obligations created by the mortgage-loan and trust documents can only arise from control or power over the persons who acquired rights or obligations under the documents. Because the parties do not dispute that the parties in the relationships created by the trust documents are within the jurisdiction of the district court, we conclude that the intangible property created by the mortgage-loan and trust documents is located in Minnesota. This factor weighs more strongly in favor of jurisdiction in this case than it did in *Sheridan*.

(2) The domicile of the trust beneficiaries

In *Sheridan*, Colorado was the domicile of most of the trust beneficiaries. 593 N.W.2d at 706. Here, the domiciles of the certificate holders are generally not known, and certificate holders could reside in any state or even outside the United States. Although some certificate holders may live

in Minnesota, this case is comparable to *Sheridan* with respect to this factor, in that the record does not show that Minnesota is the domicile of the trust beneficiaries.

(3) The domicile of the trustee

Commentators have stated that "the domicile of a corporate trustee normally refers to the state in which the trustee has its principal place of business, which, in the case of a corporate trustee, may or may not be the same as the state of its incorporation." Norman M. Abramson, et al., *The Law of Trusts and Trustees* § 291, at 8 (3rd ed. 2014). As we stated above, the bank's principal place of business is in Minnesota. Thus, we conclude that, as in *Sheridan*, 593 N.W.2d at 706, the domicile of the trustee is in Minnesota.

(4) The location of the trust administrator

As already discussed, the bank administers the trust in Minnesota, as was the case in *Sheridan*. *Id.*

(5) The extent to which the litigation has been resolved

Unlike *Sheridan*, where the issues raised regarding the administration of the trust had, for the most part, been resolved, and the district court had exercised jurisdiction over the trust for five years, *id.*, the bank's action in New York has not been resolved, and the district court has played no role in the action. Thus, this factor does not favor the district court's exercise of jurisdiction as strongly as it did in *Sheridan*.

(6) The applicable law

The pooling and servicing agreement provides that the agreement is governed by New York law. This factor provides no basis for distinguishing this case from *Sheridan*, where the trust instrument's choice-of-law provision made Colorado law applicable. *Id.* Minnesota courts routinely apply the law of other states. Addressing the bank's petition requesting an instruction regarding the bank's decision not to accept a settlement offer in the bank's New York lawsuit will likely involve analysis of New York law, but it is not apparent that the petition presents a novel issue for the district court.

(7) Forum non conveniens

"The doctrine of forum non conveniens allows a district court with jurisdiction over the subject matter and the parties discretion to decline jurisdiction over a cause of action when another forum would be more convenient for the parties, the witnesses, and the court." *Paulownia Plantations de Panama Corp. v. Rajamannan*, 793 N.W.2d 128, 133 (Minn. 2009). "Generally, a strong presumption exists in favor of the plaintiff's choice of forum." *Id.* at 137. Ambac does not identify reasons why this presumption is overcome, and, although another forum may be available, we find no basis to conclude that another forum would be more convenient. As in *Sheridan*, this factor does not disfavor exercise of jurisdiction by a Minnesota court.

With respect to these seven factors, the most significant difference between *Sheridan* and this case is that the trust property in this case is intangible property located in Minnesota, instead

of real estate located in Colorado. This difference makes this a stronger case than *Sheridan* for exercising jurisdiction in Minnesota. The other difference is that, in *Sheridan*, the issues were closer to resolution, which weakened the case for exercising jurisdiction in Minnesota. But, because that difference is less significant than the location of the trust property, the case for exercising jurisdiction in Minnesota is greater here than in *Sheridan*.

3. Due Process

But our analysis does not end here. The United States Supreme Court has explained that the Due Process Clause of the United States Constitution requires that, in order to exercise in personam jurisdiction over a defendant that is not within the territory of the forum, the defendant must have certain minimum contacts with the forum such that maintaining the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). The Supreme Court has extended this principle to all assertions of state-court jurisdiction and has explained that

> in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing. The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause

> is the minimum-contacts standard elucidated in *International Shoe*.

Shaffer v. Heitner, 433 U.S. 186, 207, 97 S. Ct. 2569, 2581 (1977) (footnote omitted) (quotation omitted).

In rem jurisdiction is predicated on the presence of the subject property, either tangible or intangible, within the forum state. *Hanson*, 357 U.S. at 246, 78 S. Ct. at 1236. The district court's basis for exercising in rem jurisdiction is that the relevant trust property, the right to pursue litigation against Countrywide, is located in Minnesota where the bank administers the trust and where decisions regarding the action against Countrywide are made.

The instruction proceeding was not initiated to provide a basis for the bank to pursue litigation against Countrywide; the bank brought the action against Countrywide in New York before it initiated the instruction proceeding. *See Shaffer*, 433 U.S. at 209, 97 S. Ct. at 2582 (stating that due process would be compromised if only role played by property that serves as basis for state-court jurisdiction is to provide basis for bringing defendant into court). The bank later initiated the instruction proceeding to obtain instructions from the court regarding the bank's participation in the New York action.

And the district court did not rely on the presence of the trust property alone as a basis for jurisdiction. *See id*. (stating that presence of property alone would not support state's jurisdiction). The heart of the district court's

decision is that the trust's intangible right to pursue litigation against Countrywide is inextricably connected with the bank's decision-making processes, which determine whether the right will be asserted and how it will be asserted. Those decision-making processes occur in Minnesota and potentially affect any interest a person may have in the New York action. This contact between the trust property and Minnesota satisfies the minimum-contacts standard in *International Shoe*. The inextricable connection between the trust's right to pursue litigation and the bank's authority as trustee to assert that right is sufficient to justify the district court's exercise of jurisdiction over the interests of persons in the litigation. Maintaining the instruction proceeding and exercising jurisdiction over the trust in the state where the bank exercises the right to pursue the litigation does not offend traditional notions of fair play and substantial justice.

Affirmed.

Appendix B

FILED
November 13, 2018
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA
IN SUPREME COURT
A18-0043

In the Matter of: HarborView Mortgage Loan Trust 2005-10.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Ambac Assurance Corporation, et al., for further review be, and the same is, denied.

Dated: November 13, 2018

BY THE COURT:

/s/
G. Barry Anderson
Associate Justice

Appendix C

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
	Case Type: Trust

IN THE MATTER OF:	
HARBORVIEW MORTGAGE LOAN TRUST 2005-10,	ORDER DENYING THE MOTION TO DISMISS
	27-TR-CV-17-32
	Judge: Ronald L Abrams

The above-entitled matter came before the Honorable Ronald L. Abrams at 1:30 p.m. on August 10, 2017, in Courtroom 1659 of the Hennepin County Government Center. Michael McCarthy, Esq., appeared on behalf of Petitioner U.S. Bank National Association. Gregg Fishbein, Esq., and Peter Tomlinson, Esq., appeared on behalf of Objectors Ambac Assurance Corporation and Segregated Account of Ambac Assurance Corporation.

Based upon the pleadings, memoranda, affidavits, and arguments of Counsel, the Court enters the following:

ORDER

1. Objectors' Motion to Dismiss the First Amended Petition for Lack of Jurisdiction is **DENIED**
2. The attached Memorandum is incorporated herein.

Dated: November 9, 2017

BY THE COURT

/s/

Ronald L. Abrams
Judge of District Court
300 South Sixth Street
Minneapolis, MN 55487

MEMORANDUM

This action arises out a trust created in 2005 by Greenwich Capital Acceptance, Inc., Greenwich Capital Financial Products, Inc., and U.S. Bank. Greenwich Capital Acceptance, Inc. and Greenwich Capital Financial Products, Inc. established the Harborview 2005-10 Trust (the "Trust"), a residential mortgage-backed securitization trust, as a means of transferring a number of mortgage loans originally created by Countrywide Home Loans, Inc. The parties entered into a Pooling Agreement detailing the terms of the Trust and selecting U.S. Bank as the trustee. The Pooling Agreement specified that the Trust would be administered through U.S. Bank's office located at One Federal Street in Boston, Massachusetts. (Pooling Agreement page 20.) Additionally, the parties designated the Bank of New York as the custodian of the Trust's physical assets, and agreed that the Pooling Agreement would be governed by New York law. (Pooling Agreement page 58; 129)

The Trust issued a number of Mortgage Loan Pass-Through Certificates ("Certificates") to investors, granting them an interest in the mortgage loans and making them beneficiaries of the Trust. Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation (together "Ambac") were two such investors.

Pursuant to the Pooling Agreement, Countrywide Home Loans, Inc. and Greenwich Capital Financial Products, Inc. entered into a related contract, wherein Countrywide agreed to repurchase

certain mortgage loans from the Trust under "certain circumstances". (Complaint ¶ 10.) The right to enforce that obligation was granted to U.S. Bank, for the benefit of the Trust's certificate-holders. (U.S. Bank may be referred to as "Trustee" in this Memorandum).

In 2011, the Trustee received written directions executed by a group of certificate-holders directing the Trustee to commence and prosecute litigation in order to enforce Countrywide's obligation to repurchase the mortgage loans. Accordingly, U.S. Bank initiated an action against Countrywide and Bank of America, N.A[1] in the Supreme Court of the State of New York in New York County (the "New York Action").

In December of 2016, U.S. Bank received a settlement offer from the Defendants in the New York Action.[2] In response, U.S. Bank circulated a vote solicitation form to certificate-holders seeking their views and advice on the proposed settlement. The forms included a clause stating that, by responding, a certificate-holder forfeited any and all claims against U.S. Bank arising from any action taken regarding the settlement offer. None of the Trust's certificate-holders have responded

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[1] Bank of America, N.A. is Countrywide's successor in interest to the agreement establishing Countrywide's repurchase obligation.

[2] An amended Settlement Offer was made in February, 2017. The current Settlement Offer is approximately $67 million to settle the litigation brought by the Trustee on behalf of the Trust. The Settlement Offer consisted of an aggregate cash payment of $56,961,881, plus up to $10,000,000 to reimburse the Trust for previously paid litigation fees.

to the vote solicitation form or provided any formal demands with respect to the New York Action or the settlement offer therein. Counsel for Ambac did, however, indicate to U.S. Bank that the settlement offer was inadequate and should be rejected. U.S. Bank subsequently circulated a vote solicitation without the clause relating to forfeiting claims.

Ambac commenced an action against U.S. Bank in the United States District Court for the Southern District of New York on January 20, 2017. The litigation was brought for the purpose of compelling U.S. Bank to reject the proposed settlement in the New York Action and seeking an injunction prohibiting U.S. Bank from accepting it. (Complaint at ¶ 25.) This litigation is ongoing.

On March 6, 2017, U.S. Bank filed a petition with this Court for the purpose of seeking direction regarding the settlement offer. The original Petition, and the amended Petition, seek instruction relating to the offer presented by the Settlement Agreement.[3] Ambac subsequently filed this motion to dismiss on April 5, 2017, alleging that this Court lacks personal jurisdiction over the Trust and subject matter jurisdiction over this action.

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[3] The Trustee informed certificate-holders of the Amended Settlement officer in February 2017 and also informed the certificate-holders that the Trustee intended to commence this proceeding. As previously stated the Trustee sent a second solicitation package to seek directions to either accept or reject the Settlement Offer. The Trustee disseminated the results of the solicitation to certificate-holders. The Trustee has retained a valuation expert. The valuation expert has advised that its valuation of the claims asserted in the New York litigation is above the Settlement Offer and has recommended that the Trustee reject the Settlement Offer.

U.S. Bank is a national banking association with its principal place of business located in Minneapolis, Minnesota. U.S. Bank's principal Corporate Trust Services headquarters is located in St. Paul, Minnesota. U.S. Bank has been administering trusts from its offices in Minnesota for more than twenty years. The decision to commence the New York Action, to commence this proceeding, to conduct a solicitation of certificate-holders regarding the proposed Settlement were all made or approved in Minnesota.

I. This Court has Subject Matter Jurisdiction.

The threshold issue raised by Ambac is that this Court lacks subject matter over this proceeding. Subject-matter jurisdiction is a "court's power to hear and determine cases of the general class or category to which proceedings in question belong." *Black's Law Dictionary* 1425 (6th ed.1990). A court's lack of subject-matter jurisdiction is a threshold issue that may be raised at any time. *Mangos v. Mangos*, 264 Minn. 198, 202 (1962). Once questions of subject matter jurisdiction are raised, they must be answered immediately before a matter can proceed. *Id.* This Court is a court of general jurisdiction. Its authority to preside over trust matters is determined by the Minnesota Trust Code. The statute does explicitly authorize Minnesota courts to exercise *in rem* jurisdiction over "corporate trusts that are administered by a trustee located in this state."[4] Minn. Stat. § 501C.0102(c).

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[4] All parties agree that the Trust is a corporate trust within the meaning of the Minnesota Trust Code.

U.S. Bank, as trustee, is located in Minnesota for purposes of the Trust Code. Minn. Stat. § 501C.0102 does not provide a definition of "located" within the context of the statute. The statute was enacted in 2015; thereby providing little precedential guidance as to the interpretation of the amended statutory language. In the absence of such guidance, the Court shall rely on the "common and approved usage" of the term. Minn. Stat. § 645.08(1). Merriam-Webster defines "locate" as "to establish oneself or one's business; to settle in a position or place." This broad definition accommodates U.S. Bank's assertion that it is located in Minnesota.

Ambac argues that U.S. Bank is not "located" in Minnesota for purposes of Minn. Stat. § 501C.0102 because U.S. Bank is incorporated in Ohio. Ambac argues that U.S. Bank is, therefore, located, for jurisdiction purposes under the Minnesota Trust Code, solely in Ohio. Ambac bases its argument primarily on the meaning of "located" as it is used in a federal statute. Ambac cites a number of cases related to "the citizenship, for purposes of federal court diversity jurisdiction, of national banks." *See eg: Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303 (2006). However, in *Wachovia,* the Supreme Court acknowledged that the term "located" has no fixed, plain meaning, even within banking laws. *Id.* at 313. Further, the Supreme Court stated that "located... is a chameleon word; its meaning depends on the context in and purpose for which it is used." *Id* at 318. The *Wacovia* Court, for purposes of interpreting 28 U.S.C. § 1348 found that a national bank is "located" in

the state a national's bank main offices are found as set forth in its articles of association.

The Minnesota Trust Code is separate and distinct from 28 U.S.C. § 1348. The Minnesota Supreme Court, in defining the word "located", held that it where a corporation exercises its corporate powers or the place where a corporation has its place of business. *Thomas v. Hector Constr. Co.,* 12 N.W.2d 769 (Minn. 1943). U.S. Bank has its principle place of business in Minneapolis, and the headquarters of its trust division is in St. Paul. As such, the Trustee is "located" in Minnesota. *In re Trusteeship Created by the City of Sheridan, Colo.,* 593 N.W.2d 702 (Minn. App. 1999). This Court has subject-matter jurisdiction over this proceeding.

II. Pursuant to the *Sheridan* Factors, this Court has *In Rem* Jurisdiction.

Ambac argues that this Court lacks *in rem* jurisdiction over the assets in the Trust. Further, Ambac argues that the exercise of *in rem* jurisdiction offends due process principles of fair play and substantial justice.

Whether jurisdiction exists is a question of law. *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 569 (Minn. 2004). "Jurisdiction over a trust involves both *in personam* and *in rem* jurisdiction." *Sheridan*, at 705. A court's jurisdiction over property, its *in rem* jurisdiction, is its power "over a thing so that its judgment is valid as against the rights of every person in the thing." *Black's Law Dictionary* 854 (6th ed.1990). In addition to the trust's property, trusts also consist

of the trust instrument, the trust's beneficiaries and trustees, and the trust administrator; all factors encompassed by the court's *in personam* jurisdiction. *Sheridan*, 593 N.W.2d at 705. Recognizing this, Minnesota courts have outlined a number of factors to determining whether they have jurisdiction over a trust, including (1) the location of the trust property (the situs of the trust assets), (2) the domicile of the trust beneficiaries, (3) the domicile of the trustees, (4) the location of the trust administrator, (5) the extent to which the litigation has been resolved, (6) the applicable law, and (7) an analysis of *forum non conveniens* principles. *Id*; *In re Trust of Florance*, 360 N.W.2d 626, 630–31 (Minn.1985); *In re Trust of Cary*, 313 N.W.2d 625, 628 (Minn.1981); *Doerr v. Warner*, 247 Minn. 98, 107, 76 N.W.2d 505, 513 (1956)

A. Location of the Trust Property

The property owned by the Trust consists almost exclusively of mortgage loans. These loans can be separated into two categories of "property": the physical mortgages, mortgage notes, and assignments (together, "the Mortgages") and the intangible rights to interest and dividends on those notes.

The physical location of the mortgage-backed securities is outside of Minnesota. Federal tax law, under which the Trust operates, requires a real estate mortgage conduit to be an entity in which substantially all of the assets of which consist of qualified mortgages and permitted investments." 26 U.S. C. § 860D(a)(4). The "intangible rights" are inextricably connected to the Mortgage Loans.

In resolving if a Minnesota court should exercise jurisdiction over these rights, a Minnesota court must look at the location of the trust's assets as a whole. In *Sheridan,* a clearer fact situation was presented. In *Sheridan,* a facility in the City of Sheridan, Colorado, was built. The City sold certificates totaling $3,535,000. The City leased back the facility and distributed the income from the lease payments to the certificate holders. In the case of *Sheridan,* the certificate holders were the trust beneficiaries. The predecessor of U.S. Bank was the trustee of the trust which held the certificates. While there are other facts which provided complications to that action, one simple fact remained – the actual physical facility which was the property that was central to the dispute was located in Sheridan, Colorado. The location of the trust properties, outside the State of Minnesota, was but one of the factors examined by the *Sheridan* Court.

The Pooling Agreement expressly states that the Mortgages are to be held either in New York or California. The physical documents constituting the Mortgages are not and never were located in Minnesota. Although U.S. Bank asserts that jurisdiction may not exist in New York or California, as the Mortgages might be held in more than one place and may be readily moved, the physical, tangible Trust assets, similar to *Sheridan,* are not located in Minnesota.

The Mortgages themselves are not physical, tangible assets. Rather, the Mortgages are intangible assets. The record does not reflect if the Mortgages are held in physical or electronic form. Regardless, the Mortgages are easily transportable.

The location of a piece of paper evidencing intangible property is not dispositive.[5] The intangible rights included in the Mortgages include the cash that is generated from real property in 37 states and the District of Columbia.

The Mortgages and the rights attached to them are not the only property encompassed by the Trust, however. The rights granted to the Trustee under the Trust's Governing Documents, including the Pooling Agreement, are also intangible property; they include not only the rights of the certificate holders, but contain other rights separate and distinct to the rights of the certificate holders. *See Standard Oil Co. v. State of N.J.* 341 U.S. 428 (1951). Ambac is correct when it asserts in brief that the right to receive money from the mortgages is a right that belongs to the certificate holders, not U.S. Bank. (Respondent's Reply Memorandum at 6.) But other rights outlined in the Governing Documents, including the right to

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[5] The cases cited by Ambac for the proposition that "courts have long recognized that the situs of intangible property such as the 'right, title and interest' in mortgage lons is the location of their 'embodiment in documents'" are inapposite. *Hanson v. Denckla,* 357 U.S. 235 (1958) dealt with the validity of the trust. The documents evidencing the trust property were held in Delaware, by a Delaware trustee who was the obligee of the credit instruments and the record owner of the stock. The Supreme Court did not that in fixing situs, none had to do with Florida. *Newhard, cook & Co. v. Inspired Life Centers, Inc.,* 895 F.2d 1226 (8th Cir. 1990) held that the location of stock certificates in Missouri was insufficient to confer personal jurisdiction in Missouri over a California resident. *Define v. Rayette-Fabrege, Inc.,* 285 F.Supp. 1006 (D.Minn. 1968) primarily determined the proper statute of limitations applied to an alleged conversion.

pursue litigation against Countrywide, belong exclusively to U.S. Bank as Trustee.

Ambac argues that U.S. Bank seeks to secure jurisdiction *in rem* based solely on the fact that the Court has jurisdiction over *it*. The Court views the argument by U.S. Bank differently than this broad sweep.

The question before this Court is, based upon the facts of this case and the motion before the Court, is if this Court has *in rem* jurisdiction over the HarborView Mortgage Loan Trust 2005-10. The Trust property consists of the right, title and interest in mortgage loans; all intangible property rights. U.S. Bank, pursuant to the Governing Documents creating the Trust, controls and directs the Trust for purposes of enforcing the collective right, title and interest in the intangible assets of HarborView. The Governing Documents list U.S. Bank's Boston office as the "principal", not exclusive, place of administration of the Trust. U.S. Bank is seeking instruction regarding the interpretation of the Governing Documents as applied to actions that it has or may take in the future as Trustee regarding enforcement of those collective rights. The intangible rights emanating from the mortgage loans, including the right of the Trustee to enforce remedies, as U.S. Bank has done with the New York Action, have been directed and approved by U.S. Bank's St. Paul trust services office.

The Amended Petition seeks this Court's instruction regarding the interpretation of the Governing Documents and the Trustee's fiduciary reponsibilities. The Trustee also seeks instruction

on actions it has taken or may take in the future pursuant to the Governing Documents of the Trust. These are intangible rights exercised in this proceeding as they relate to the administration of the Trust. Pursuant to the Governing Documents, and in response to requests by some certificate-holders, the Trustee commenced the New York Action. The New York Action to enforce the Trust's contractual rights is an intangible trust asset. The Trust's intangible assets, therefore, are located in Minnesota for purposes of this analysis.

B. Domicile of the Trust Beneficiaries

The parties agree that they do not know the domicile of the trust beneficiaries. Ambac argues that because it is unlikely that any material number of investors are based in Minnesota, U.S. Bank has not satisfied its burden to establish *in rem* jurisdiction.

In *Sheridan,* the Court found that a majority of the trust beneficiaries were domiciled in Colorado. While the two certificate holder parties who have appeared in this case, Ambac and Bonitas, are not domiciled in Minnesota, it is impossible to show where the trust beneficiaries in this case are domiciled. This factor is, therefore, is neutral for purpose of the *Sheridan* analysis.

C. Domicile of the Trustee

The Trustee's domicile is the State of Minnesota. The Trustee's principle place of business and the principle place of Trust Administration are in Minnesota. U.S. Bank and its trust services division have offices and personnel in several states. It is undisputed that certain matters related to this

Trust have been initially handled by offices and personnel outside of the State of Minnesota. However, those personnel deal only with routine administration duties and "out-of-the-ordinary events." (Declaration of Nicholas Valaperta ¶¶ 8-9.) U.S. Bank's agents in Boston and Chicago report to the Trustee's principle place of business in Minnesota, which ultimately controls and oversees the Trust. *Id*.

As discussed earlier, the predecessor of U.S. Bank was the Trustee in *Sheridan*. That court, in its analysis of the domicile factor, found that the trustee is located in Minnesota.

This factor is favorable to this Court exercising *in rem* jurisdiction.

D. Location of the Trust Administrator

The trust instrument states that the U.S. Bank trust office in Boston, Massachusetts is its "principal corporate trust office at which any particular time its corporate trust business in connection with this Agreement shall be administered." Pooling Agreement §1.01 (providing the definition of "Corporate Trust Office"). U.S. Bank, as it must, acknowledges that this provision is in the Pooling Agreement.

In response, U.S. Bank has provided the Affidavit of Nicolas Valaperta. Valaperta is an employee of the Trustee with his office in Chicago. Valaperta avers that Trust employees in Boston and Chicago report to senior managers in the St. Paul headquarters office. (Declaration of Nicholas Valaperta ¶¶ 7-8.) While ministerial and other routine duties are performed in the Boston office, substantive

decisions, including decisions concerning the New York Lawsuit as well as consideration of the Settlement Agreement, are made at the St. Paul office. (*Id* at ¶ 10.) Further, the decision to seek this instruction was made at the St. Paul office. (*Id*.)

Ambac cites to *Matter of Florance* for the proposition that the Pooling Agreement's designation of the U.S. Bank trust office in Boston is definitive as to the location of the Trust Administrator. In *Matter of Florance,* 360 N.W.2d. 626, 631 (Minn. 1985), the Minnesota Supreme Court stated that where the settler "expressly provided in his trust" for a particularly situs of administration, that instruction is "not to be lightly disregarded". However, the Minnesota Supreme Court did allow the lawsuit to continue in Minnesota, notwithstanding the express provision in the *Florance* trust that the situs of the trust was in Texas. *Id*. The Supreme Court reasoned that all the beneficiaries and two of the trustees resided in Minnesota; that decedent's probate estate was being administered in Minnesota; that Texas was only the location of the custodial, corporate trustee; and that the trust property itself is in neither Texas nor Minnesota. *Id* at 631-632.

In this case, when the Pooling Agreement was executed, it was well known that U.S. Bank had its principal place of business in Minneapolis and its trust administration had its principal place of business in St. Paul. The days when interstate banking was geographically prohibited and branch banking within states was limited are long past. The Boston office, according to the Valaperta Declaration, performs the routine administration

of the trust. It receives the notices required under the Pooling Agreement, prepares monthly remittance reports, and informs the Certificate Holders of the Trust's receipts and payments. However, for major decisions, such as commencing litigation, enforcing Certificate Holder rights and resolving disputes regarding the Pooling Agreement, it would be expected that those decisions would be made in Minnesota, notwithstanding the quoted provision in the Pooling Agreement.

Based upon the foregoing, the location of the Trust Administrator, for purposes of this litigation, is Minnesota.

E. Extent to Which the Litigation has Been Resolved

The fifth *Sheridan* factor, progression of the litigation, weighs against U.S. Bank. A key element of the decision in *Sheridan* was the fact that most of the controversies at issue had been resolved by the time that jurisdiction was challenged. The merits of the case had already been evaluated at the district court level, and a final judgment had been entered. Additionally, the district court had been exercising jurisdiction over the trust for five years, and had issued four other substantive orders before final judgment was entered. In essence, the district court demonstrated that personal jurisdiction was proper by successfully navigating and directing the case for such a time period.

The circumstances from *Sheridan* are in contrast to the facts here. First, this action, along with its companion case, were commenced in

March of 2017.[6] The eight months that this action has been pending is a significant departure from the five year time period in *Sheridan*. Additionally, no substantive action has been taken in this case past the pleading stage. This is the first substantive order issued in this case. Unlike the five substantive orders that established jurisdiction in *Sheridan*, this Court has not issued any rulings or direction to any party. There has been no meaningful progression in this litigation that might demonstrate the Court's authority over the Trust.

U.S. Bank argues that this factor is neutral, since neither the New York Action nor the Bonitas matter (see footnote 4) have resolved any issues either. The progression-of-the-litigation factor is not comparative, however. *Sheridan* merely dictates that jurisdiction may be proper if the Court has already substantially exercised jurisdiction over the trust, and whether it has significantly resolved the issues. *Id*; *See also Matter of Florance*, 260 N.W.2d 626 (1985). Here, the Court has done neither; the litigation has not progressed past the preliminary stages. As such, this *Sheridan* factor weighs against finding jurisdiction in Minnesota.

F. Applicable Law

The Pooling Agreement provides that it is governed by New York law. The Court agrees with U.S. Bank that this factor does not support the exercise of jurisdiction, but that it should be given little weight.

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[6] *Bonitas LLC v. U.S. Bank National Association*, Court File No. 27-CV-17-2229.

Minnesota Court routinely interpret law of foreign jurisdictions in trust actions. The Minnesota district court in *Sheridan* interpreted Colorado law. *Sheridan* at 706. In this case, as in *Sheridan,* no parties have asserted that they would not be bound by this court's decision.

Further, *Florance* involved the possible interpretation of Texas law. The Minnesota Supreme Court indicated to the district court that if deciding the remaining issues involved making new important precedent in fundamental or complex aspects of Texas property and trust law, then the district court should consider declining jurisdiction. *Florance at* 632. The issue in this case at this stage of the litigation is straightforward. The Trustee requests an instruction regarding the Trustee's decision not to approve a settlement of a lawsuit pending in New York.

This factor is neutral in determining whether jurisdiction is proper in Minnesota. *Sheridan* at 706.

G. *Forum Non Conveniens*

Ambac states that this factor is neutral. U.S. Bank states that this factor is neutral, if not supportive of jurisdiction. Minnesota is presumed to be a convenient forum to hear and determine issues brought by a domiciliary. *Bergquist v. Medtronic, Inc.,* 394 N.W.2d 508 (1986); *Florace* at 630-31. The location of the Trustee in Minnesota supports the conclusion that the doctrine of *forum non conveniens* disfavors the exercise of jurisdiction by a Minnesota court. *Sheridan* at 706.

The majority of the factors used to analyze *in rem* jurisdiction in this case favors the exercise of jurisdiction over the Trust in Minnesota. The location of the Trust assets, the domicile of the Trustee, and the location of the Trust Administrator all favor this Court exercising *in rem* jurisdiction. The extent to which the litigation has been resolved is against this Court exercising *in rem* jurisdiction. The location of the Trust beneficiaries, the applicable law and principles of *forum non conveniens* all are neutral and do not demonstrate that the exercise of jurisdiction by this Court seriously impairs the interest of justice. The Court finds that exercising jurisdiction over this action is proper.

III. Exercising Jurisdiction Over This Matter Will Not Violate Due Process

Finally, Ambac argues that exercising *in rem* jurisdiction over this proceeding would violate notions of constitutional due process.

The Due Process clause, as applied to state courts, restricts a court's ability to take jurisdiction over persons or property with an insufficient connection to the forum state. *See* U.S. Const. amend. XIV. In order to satisfy the due process requirement, the subject of the suit must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). In effect, the parties must be able to reasonably anticipate the possibility of being brought into the forum state's courts. *Nagel v. Westen*, 865 N.W.2d

325, 338 (Minn. Ct. App. 2015), *review denied* (Sept. 15, 2015). Though originally applied to the defendant in a suit under *in personam* jurisdiction, the minimum contacts standard also applies to all *in rem* proceedings. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). The presence of the relevant property in the forum state is not sufficient on its own to establish jurisdiction; presence in the forum may be a consideration, but such exercises of jurisdiction must comport with a holistic analysis of minimum contacts due process." *Id*; *Nagel* at 335.

U.S. Bank has demonstrated that this matter has sufficient minimum contacts with the State of Minnesota to satisfy any due process concerns. The Trust, and the specific litigation at issue, are appropriately connected with Minnesota such that exercising jurisdiction is proper. The most important contact with the forum, as has been discussed above, is the fact that the Trust is effectively located in Minnesota. Decisions regarding the New York Action were made or approved in Minnesota. Determinations regarding the Amended Settlement Offer were made in Minnesota. Throughout its existence, the Trust has been openly administered by a national corporation with its principle place of business in Minneapolis, Minnesota.

The Pooling Agreement does designate U.S. Bank's Boston, Massachusetts trust office as "the principal corporate trust office". Ambac also cites to the Affidavit of Nicolas Valaperta, who works out of a U.S. Bank office in Chicago, Illinois, as a frequent contact regarding Trust administration. However, Valaperta's Affidavit states that his

only involvement with the Trust is when "out-of-the-ordinary events occur," while the office in Boston controls routine administration duties. (Declaration of Nicolas Valaperta ¶¶ 7-8.) Further, Valaperta states that substantive supervision and control of the Trust is ultimately overseen by U.S. Bank's trust services offices in St. Paul, Minnesota. (*Id*.) From the outset, the administration of the Trust was overseen by U.S. Bank's Minnesota operations. In essence, because of U.S. Banks' readily apparent presence in Minnesota, all of the relevant parties could reasonably anticipate the possibility of an action concerning the Trust being brought in the state's courts.

The relevant Trust property by which U.S. Bank can establish *in rem* jurisdiction, the right to pursue litigation against Countrywide, is also located in Minnesota. As this Court's analysis of the *Sheridan* factors explains in more detail, the location of U.S. Bank's intangible right to pursue litigation follows U.S. Bank's location. The U.S. Supreme Court has noted certain specific circumstances that would indicate that due process is lacking in an *in rem* case. Most significantly, jurisdiction is not proper if the property that serves as the basis for jurisdiction is completely unrelated to the merits of the litigation, or if "the only role played by the property is to provide the basis for bringing the defendant into court." *Shaffer*, 433 U.S. at 209. This is not the case with this litigation, however. U.S. Bank's right to pursue the New York Action is at the heart of this case. U.S. Bank is seeking this Court's direction on its responsibilities as a fiduciary in pursuing or settling that litigation.

Ambac cites to a plethora of cases regarding a court's ability to issue orders regarding real property and personal property out of state. These cases are inapposite. The property issue in this case regards intangible property closely connected through decision-making which occurred in Minnesota.

When the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "notions of fair play and substantial justice." *Id* at 211. U.S. Bank and its predecessors have been located in Minnesota for decades. In this case, as Trustee, U.S. Bank trust services made substantive decisions regarding the New York Action as well as evaluated the Amended Settlement Offer in Minnesota. Given the contacts that the Trust, the trustee, and the relevant Trust property have with Minnesota, notions fair play and substantial justice are not offended by this Court exercising jurisdiction over this action. Minnesota is a foreseeable and reasonable forum to hear U.S. Bank's claims.

There is no due process violation for allowing this matter to proceed in Minnesota.

Conclusion

Based upon the forgoing, the Ambac's Motion to Dismiss the First Amended Petition for Lack of Jurisdiction will be denied.

R.L.A

Appendix D

Excerpts of the Minnesota Trust Code

Minn. Stat. § 501C.0108 – PRINCIPAL PLACE OF ADMINISTRATION.

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the initial principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by paragraph (b), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer; provided that the trustee may initiate the transfer at any time after the notice if all of the qualified beneficiaries agree in writing to an earlier effective date or

waive the right to object to the transfer in writing, or upon court approval. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) the address and telephone number at the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than 60 days after giving the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice. If the trustee receives an objection from a qualified beneficiary, the trustee shall not transfer the principal place of administration absent court approval.

(f) Notwithstanding paragraphs (a) to (e), a trustee may transfer some or all of the trust's assets to a successor trustee designated in the terms of the trust or appointed pursuant to section 501C.0704 even if the successor trustee has a principal place of business or residence in a

jurisdiction that is different from the trust's principal place of administration.

Minn. Stat. § 501C.0201 – ROLE OF COURT IN ADMINISTRATION OF TRUST AND NATURE OF JUDICIAL PROCEEDING.

(a) An interested person may petition the district court and invoke its jurisdiction as provided in sections 501C.0201to 501C.0208 for those matters specified in section 501C.0202.

(b) As used in sections 501C.0201 to 501C.0208, "interested person" includes an acting trustee, any person named as successor trustee under the trust instrument, any person seeking court appointment as trustee whether or not named in the trust instrument, a beneficiary, a creditor, and any other person having a property or other right in or claim against the assets of the trust. Interested person also includes a fiduciary representing an interested person and any other person acting in a representative capacity as provided in sections 501C.0301 to 501C.0305, any person who takes action with respect to a trust in the absence of an acting trustee or otherwise within the meaning of section 501C.0701, an agent to whom a trustee has delegated a duty or power within the meaning of section 501C.0807, and any person with a power to direct the trustee within the meaning of section 501C.0808. The meaning of interested person, as it relates to a particular person, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any petition.

(c) The petition shall specify whether the interested person is invoking the jurisdiction of the district court as an in rem proceeding or as an in personam proceeding. If the petition designates an in rem proceeding, the district court's in rem jurisdiction is invoked, and sections 501C.0203, subdivision 1, and 501C.0204, subdivision 1, govern the proceeding. If the petition designates an in personam proceeding, the district court's in personam jurisdiction is invoked, and sections 501C.0203, subdivision 2, and 501C.0204, subdivision 2, govern the proceeding.

(1) In the absence of a designation of an in rem or an in personam proceeding by the petitioner, the district court's in rem jurisdiction is invoked, and sections 501C.0203, subdivision 1, and 501C.0204, subdivision 1, govern the proceeding.

(2) If the district court's in rem jurisdiction is invoked, the district court shall retain jurisdiction as a proceeding in rem, until jurisdiction is transferred to another court or terminated by court order.

(3) If the district court's in personam jurisdiction is invoked, the trust is not subject to continuing jurisdiction unless otherwise ordered by the court.

(4) Notwithstanding the designation of in personam jurisdiction as set forth in the petition, the district court, on the request of any interested person, may invoke the in rem jurisdiction of the district court and require compliance with the order for hearing and notice

provisions set forth in section 501C.0203, subdivision 1.

(d) A trust is not subject to continuing court supervision as a court-supervised trust except as provided in section 501C.0205 or as otherwise ordered by the court. If the district court assumes court supervision of the trust, all further court proceedings with respect to the trust shall be maintained under the district court's in rem jurisdiction.

Minn. Stat. § 501C.0204 – ORDER AND APPEAL.

Subdivision 1.**In rem judicial proceedings.**

Upon the hearing of a petition under the district court's in rem jurisdiction, the court shall make an order it considers appropriate. The order is binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, even though unascertained or not in being. An appeal from an order which, in effect, determines the petition may be taken by any party after service by any party of written notice of its filing as provided under the Rules of Appellate Procedure or, if no notice is served, within six months after the filing of the order.

Subd. 2.**In personam judicial proceedings.**

Upon the hearing of a petition under the district court's in personam jurisdiction, the court shall make an order it considers appropriate. The order is binding on (1) a party who is served with notice of the judicial proceeding, (2) a party who appears

in the judicial proceeding, and (3) any other party who may be bound by such parties as described in sections 501C.0301 to 501C.0305. An appeal from an order which, in effect, determines the petition may be taken by any party after service by any party of written notice of its filing as provided under the Rules of Appellate Procedure or, if no notice is served, within six months after the filing of the order.

Minn. Stat. § 501C.0206(b) – PERSONAL JURISDICTION OVER TRUSTEE AND BENEFICIARY.

(a) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits to the personal jurisdiction of the courts of this state regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the personal jurisdiction of the courts of this state regarding any matter involving the trust. By not releasing or disclaiming the beneficiary's beneficial interest in the trust, a beneficiary of a trust having its principal place of administration in this state submits to the personal jurisdiction of the courts of this state regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining personal jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

Appendix E

Excerpts from Pooling Agreement for HarborView Mortgage Loan Trust 2005-10, dated as of August 1, 2005

PRELIMINARY STATEMENT

Through this Agreement, the Depositor intends to cause the issuance and sale of the HarborView Mortgage Loan Trust 2005-10 Mortgage Loan Pass-Through Certificates, Series 2005-10 (the "Certificates") representing in the aggregate the entire beneficial ownership of the Trust, the primary assets of which are the Mortgage Loans (as defined below).

SECTION 1.01. Defined Terms.

* * *

"Corporate Trust Office": With respect to the Trustee, the principal corporate trust office at which at any particular time its corporate trust business in connection with this Agreement shall be administered, which office at the date of the execution of this instrument is located at One Federal Street, Boston, Massachusetts 02110, Attention: Corporate Trust, HarborView Mortgage Loan Trust 2005-10, or at such other address as the Trustee may designate from time to time by notice to the Certificateholders, the Depositor, and the Seller. With respect to the Certificate Registrar and presentment of Certificates for registration of transfer, exchange or final payment is located at 100 Wall Street, 15th Floor, New York, New York 10004.

* * *

"Custodian": The Bank of New York, and its successors acting as custodian of the Mortgage Files, as indicated on the Mortgage Loan Schedule.

* * *

"Mortgage File": The mortgage documents listed in Section 2.01 hereof pertaining to a particular Mortgage Loan and any additional documents required to be added to the Mortgage File pursuant to this Agreement.

* * *

SECTION 4.05. Certificate Insurance Policy.

* * *

(d) The Trustee shall (i) receive as attorney-in-fact of the Holders of the Insured Certificates any Insured Amount delivered to it by the Certificate Insurer for payment to such Holders and (ii) distribute such Insured Amount to such Holders as set forth in Section 5.01. Insured Amounts disbursed by the Trustee from proceeds of the Certificate Insurance Policy shall not be considered payment by the Trust Fund with respect to the Insured Certificates, nor shall such disbursement of Insured Amounts discharge the obligations of the Trust Fund with respect to the amounts thereof, and the Certificate Insurer shall become owner of such amounts to the extent covered by such Insured Amounts as the deemed assignee of such Holders. The Trustee hereby agrees on behalf of the Holders of the Insured Certificates (and each such Holder, by its

acceptance of its Insured Certificates, hereby agrees) for the benefit of the Certificate Insurer that, to the extent the Certificate Insurer pays any Insured Amount, either directly or indirectly (as by paying through the Trustee), to the Holder of a Insured Certificate, the Certificate Insurer will be entitled to be subrogated to any rights of such Holder to receive the amounts for which such Insured Amount was paid, to the extent of such payment, and will be entitled to receive the Certificate Insurer Reimbursement Amount as set forth in Section 5.01.

* * *

SECTION 12.01. Amendment.

This Agreement may be amended from time to time by the Seller, the Depositor, and the Trustee without the consent of the Certificateholders and, with respect to any amendment that adversely affects the interests of any of the Holders of the Insured Certificates, with the prior written consent of the Certificate Insurer, (i) to cure any ambiguity, (ii) to correct or supplement any provisions herein which may be defective or inconsistent with any other provisions herein, (iii) to make any other provisions with respect to matters or questions arising under this Agreement, which shall not be inconsistent with the provisions of this Agreement, or (iv) to conform the terms hereof to the description thereof provided in the Prospectus; provided, however, that any such action listed in clause (i) through (iii) above shall be deemed not to adversely affect in any material respect the interests of any Certificateholder, if evidenced by

(i) written notice to the Depositor, the Seller, and the Trustee from the Rating Agency that such action will not result in the reduction or withdrawal of the rating of any outstanding Class of Certificates with respect to which it is a Rating Agency or (ii) an Opinion of Counsel stating that such amendment shall not adversely affect in any material respect the interests of any Certificateholder, is permitted by the Agreement and all the conditions precedent, if any have been complied with, delivered to the Trustee.

In addition, this Agreement may be amended from time to time by Seller, the Depositor, and the Trustee with the consent of the Majority Certificateholders for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement or of modifying in any manner the rights of the Holders of Certificates; and subject, in the case of any amendment or modification to Section 5.01(a) hereof, to the consent of the Bank of New York, as Custodian; provided, however, that no such amendment or waiver shall (x) reduce in any manner the amount of, or delay the timing of, payments on the Certificates that are required to be made on any Certificate without the consent of the Holder of such Certificate, (y) adversely affect in any material respect the interests of the Holders of any Class of Certificates in a manner other than as described in clause (x) above, without the consent of the Holders of Certificates of such Class evidencing at least a 66⅔% Percentage Interest in such Class, or (z) reduce the percentage of Voting Rights required by clause (y) above without the consent

of the Holders of all Certificates of such Class then outstanding. Upon approval of an amendment, a copy of suchamendment shall be sent to the Rating Agency.

Notwithstanding any provision of this Agreement to the contrary, the Trustee shall not consent to any amendment to this Agreement unless it shall have first received an Opinion of Counsel, delivered by and at the expense of the Person seeking such Amendment (unless such Person is the Trustee, in which case the Trustee shall be entitled to be reimbursed for such expenses by the Trust pursuant to Section 8.05 hereof), to the effect that such amendment will not result in an Adverse REMIC Event and that the amendment is being made in accordance with the terms hereof, such amendment is permitted by this Agreement and all conditions precedent, if any, have been complied with.

Promptly after the execution of any such amendment the Trustee shall furnish, at the expense of the Person that requested the amendment if such Person is the Seller (but in no event at the expense of the Trustee), otherwise at the expense of the Trust, a copy of such amendment and the Opinion of Counsel referred to in the immediately preceding paragraph to the Servicer, the Certificate Insurer and the Rating Agency.

It shall not be necessary for the consent of Certificateholders under this Section 12.01 to approve the particular form of any proposed amendment; instead it shall be sufficient if such consent shall approve the substance thereof. The

manner of obtaining such consents and of evidencing the authorization of the execution thereof by Certificateholders shall be subject to such reasonable regulations as the Trustee may prescribe.

The Trustee may, but shall not be obligated to, enter into any amendment pursuant to this 12.01 Section that affects its rights, duties and immunities under this Agreement or otherwise.

SECTION 12.03. Limitation on Rights of Certificateholders.

The death or incapacity of any Certificateholder shall not (i) operate to terminate this Agreement or the Trust, (ii) entitle such Certificateholder's legal representatives or heirs to claim an accounting or to take any action or proceeding in any court for a partition or winding up of the Trust or (iii) otherwise affect the rights, obligations and liabilities of the parties hereto or any of them.

Except as expressly provided for herein, no Certificateholder shall have any right to vote or in any manner otherwise control the operation and management of the Trust, or the obligations of the parties hereto, nor shall anything herein set forth or contained in the terms of the Certificates be construed so as to constitute the Certificateholders from time to time as partners or members of an association; nor shall any Certificateholder be under any liability to any third person by reason of any action taken by the parties to this Agreement pursuant to any provision hereof.

No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of Certificates entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee for 15 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding. It is understood and intended, and expressly covenanted by each Certificateholder with every other Certificateholder, and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder, which priority or preference is not otherwise provided for herein, or to enforce any right under this Agreement, except in the manner herein provided and for the equal, ratable and common benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section 12.03, each and every Certificate-

holder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

By accepting its Insured Certificate, each Holder of an Insured Certificate agrees that, unless a Certificate Insurer Default exists and is continuing, the Certificate Insurer shall have the right to exercise all rights of the Holders of the Insured Certificates under this Agreement (other than the right to receive distributions on the Insured Certificates) without any further consent of the Holders of the Insured Certificates and the Holders of the Insured Certificates shall exercise any such rights only upon the written consent of the Certificate Insurer; provided, however, each Holder of an Insured Certificate and the Certificate Insurer will have the right to receive statements and reports hereunder. Notwithstanding the foregoing, the Certificate Insurer shall have no power without the consent of the Owner of each Certificate affected thereby to: (i) reduce in any manner the amount of, or delay the timing of, distributions of principal or interest required to be made hereunder or reduce the Percentage Interest of the Holders of the Insured Certificates, the Certificate Interest Rate or the Termination Payment with respect to any of the Insured Certificates; (ii) reduce the percentage of Percentage Interests specified in Section 12.01 which are required to amend this Agreement; (iii) create or permit the creation of any lien against any part of the Trust Fund; (iv) modify any provision in any way which would permit an earlier retirement of the Insured Certificates; or (v) amend this sentence.

SECTION 12.05. Notices.

All directions, demands and notices hereunder shall be in writing and shall be deemed to have been duly given if personally delivered at or mailed by first class mail, postage prepaid, or by express delivery service, to (a) in the case of the Seller, to Greenwich Capital Financial Products, Inc., 600 Steamboat Road, Greenwich, Connecticut 06830, Attention: General Counsel (telecopy number (203) 618-2132), or such other address or telecopy number as may hereafter be furnished to the Depositor and the Trustee in writing by the Seller, (b) in the case of the Trustee, to U.S. Bank National Association, One Federal Street, Boston Massachusetts, Attention: HarborView 2005-10 (telecopy number (617) 603-6637), with a copy to the Corporate Trust Office or such other address or telecopy number as may hereafter be furnished to the Depositor and the Seller in writing by the Trustee, (c) in the case of the Depositor, to Greenwich Capital Acceptance, Inc., 600 Steamboat Road, Greenwich, Connecticut 06830, Attention: Legal (telecopy number (203)618-2132), or such other address or telecopy number as may be furnished to the Seller and the Trustee in writing by the Depositor and (d) in the case of the Certificate Insurer, to Ambac Assurance Corporation, One State Street Plaza, New York, New York 10004, Attention: HarborView 2005-8 (telecopy number 212-208-3547), or such other address or telecopy number as may be furnished to the Depositor, the Seller and the Trustee in writing by the Certificate Insurer. Any notice required or permitted to be mailed to a Certificateholder shall be given by first class mail,

postage prepaid, at the address of such Holder as shown in the Certificate Register. Notice of any Event of Default shall be given by telecopy and by certified mail. Any notice so mailed within the time prescribed in this Agreement shall be conclusively presumed to have duly been given when mailed, whether or not the Certificateholder receives such notice. A copy of any notice required to be telecopied hereunder shall also be mailed to the appropriate party in the manner set forth above.