

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THEODORE K. NICKEL, Commissioner of
Insurance of the State of Wisconsin,

Plaintiff-Appellee,

No. 11-1158

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

No. 11-1419

WISCONSIN STATE CIRCUIT COURT FOR
DANE COUNTY; THEODORE NICKEL,
Commissioner of Insurance of the State of Wisconsin,
As Rehabilitator of the Segregated Account of
Ambac Assurance Corporation;
AMBAC ASSURANCE CORPORATION,

Defendants-Appellees.

**WISCONSIN COMMISSIONER OF INSURANCE'S OPPOSITION TO
UNITED STATES' MOTION TO CONSOLIDATE APPEALS**

Theodore Nickel, the Commissioner of Insurance of the State of Wisconsin (“the Commissioner”), as court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation (“Ambac”), files this opposition to the United States’ motion to consolidate Appeal Nos. 11-1158 and 11-1419.

BACKGROUND

I. Appeal No. 11-1158

Appeal No. 11-1158 (the “First Appeal”) arises out of the United States’ removal of the largest state insurer rehabilitation proceeding in Wisconsin history from the Dane County, Wisconsin Circuit Court (the “State Rehabilitation Court”) to the United States District Court for the Western District of Wisconsin (the “District Court”) on December 8, 2010. There were and are no formal parties to the rehabilitation proceeding; it is merely a proceeding commenced by the Commissioner to administer the assets of a troubled insurer, and to effect orderly payment of claims against such assets in accordance with the Wisconsin priority statute for delinquent insurers, Wis. Stat. § 645.68. The rehabilitation affects thousands of actual and potential policyholders and other claimants, a number of whom have appeared and challenged one or more aspects of the proceeding in the State Rehabilitation Court.

After the United States’ removal, the Commissioner immediately filed a motion to remand the entire rehabilitation proceeding to the State Rehabilitation Court, and the United States simultaneously moved to dissolve certain protective injunction orders in force in the rehabilitation proceeding, at least as applied to the United States. At the time of the removal and continuing to the present, several state interlocutory appeals challenging injunctive relief entered by the State Rehabilitation Court were pending in the Wisconsin Court of Appeals.

In its Opinion and Order of January 14, 2011, the District Court remanded the rehabilitation proceeding to the State Rehabilitation Court because it lacked subject-matter

jurisdiction over the insurer rehabilitation proceeding.¹ The United States appealed this decision on January 18, 2011.

On January 20, 2011, this Court issued an Order *sua sponte*, requiring the United States to submit a jurisdictional memorandum explaining why the appeal should not be dismissed pursuant to 28 U.S.C. § 1447(d) for lack of appellate jurisdiction. The Order noted:

- (a) “This court has consistently reminded litigants that an order remanding a case to state court based on a lack of subject matter jurisdiction or a defect in the removal procedure is not reviewable on appeal, whether or not the decision is correct[.]”
- (b) “In the present case, the district court explicitly determined that it lacked subject matter jurisdiction” over this insurer rehabilitation proceeding and remanded the proceeding to the Dane County, Wisconsin Circuit Court (“State Rehabilitation Court”); and
- (c) the United States shall file a brief memorandum “stating why the appeal should not be dismissed for lack of jurisdiction” or, in the alternative, a motion for voluntary dismissal under Fed. R. App. P. 42(b).

(1/20/11 Order in Appeal No. 11-1158 (Dkt. 2).) This Court also stayed the briefing schedule pending further order. (*Id.*)

The United States filed its jurisdictional memorandum on February 1, 2011 (Dkt. 6); the Commissioner filed a response on February 7 (Dkt. 9); and the United States filed a reply

¹ In its remand order, the District Court recognized that the caption should reflect that this case is an insurer rehabilitation proceeding (“In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corporation”), and that the Commissioner was the “Petitioner” and the United States was the “Respondent.” (Op. and Order at 1 (Dkt. 36); *see also* Notice of Appeal (Dkt. 38) (using same caption).) On appeal, however, this Court’s orders reflect a different caption, describing the Commissioner as “Plaintiff-Appellee” and the United States as “Defendant-Appellant.” (*See* Appeal No. 11-1158, Dkt. 2, 8.) Because the state insurer rehabilitation proceeding is a non-adversarial proceeding, the Commissioner respectfully submits that the District Court’s caption more accurately reflects the nature of this proceeding.

brief on February 11 (Dkt. 15). A decision on the threshold jurisdictional issue in the First Appeal remains pending.

II. Appeal No. 11-1419

Following formal remand by the District Court, the State Rehabilitation Court reassumed jurisdiction over the rehabilitation proceeding on January 20, 2011.

Unwilling to abide by the District Court's remand order in the First Appeal (or to allow its appeal of that remand order to run its course), the United States filed a separate action against the Commissioner, the State Rehabilitation Court, and Ambac Assurance Corporation ("Ambac") in the District Court. As part of that action, the United States moved for a preliminary injunction to bar the State Rehabilitation Court from exercising jurisdiction over the United States' challenges to the injunction orders, and to enjoin the Commissioner and the State Rehabilitation Court from enforcing the injunction orders against the United States.

The District Court dismissed the complaint in an Opinion and Order filed February 18, 2011. The United States filed a notice of appeal of that order on February 22, 2011, Case No. 11-1419 (the "Second Appeal").

ARGUMENT

THIS COURT SHOULD DECIDE WHETHER IT HAS JURISDICTION OVER THE FIRST APPEAL (NO. 11-1158) BEFORE DECIDING THE UNITED STATES' MOTION TO CONSOLIDATE THE TWO APPEALS

The United States' motion to consolidate the two appeals should be deferred until after this Court decides whether it has jurisdiction over the First Appeal.

In its January 20, 2011 Order in the First Appeal, this Court noted that a threshold jurisdictional issue in that appeal was whether 28 U.S.C. § 1447(d) bars appellate review of the District Court's remand order where the express basis for remand was a lack of subject matter jurisdiction. That threshold jurisdictional issue is now fully briefed, and should be decided

before any decision by this Court regarding consolidation or the setting of a briefing schedule in the First Appeal. If this Court determines that it lacks jurisdiction over the First Appeal, then the United States' motion to consolidate the two appeals would be moot.

In its motion, the United States “recognize[s] the Court is currently considering whether it has jurisdiction over [the First Appeal,]” but suggests that this issue can be resolved through further briefing post-consolidation. (Mot. to Consolidate at 3-4.) However, the point of the January 20, 2011 Order was to resolve the threshold jurisdictional issue at the outset, and to stay the briefing schedule in the First Appeal until after this Court was satisfied that it had jurisdiction to proceed. The United States does not (and cannot) suggest that the jurisdictional issue would benefit from additional briefing; the United States already sought and obtained leave to file a reply brief with respect to that issue. (See 2/11/11 Order in Appeal No. 11-1158 (Dkt. 13).) The Commissioner should not be put to the burden of briefing the merits of the First Appeal until this Court first determines whether it has jurisdiction. Therefore, this Court should decide the threshold jurisdictional issue in the First Appeal on the record before it.

The United States also suggests that the two appeals “present largely identical parties, issues, and records” (Mot. to Consolidate at 2), but there are differences between the two cases. The First Appeal arises out of the United States' removal of the largest state insurer rehabilitation proceeding in Wisconsin history to federal court, and the remand order that the United States seeks review of in the First Appeal implicates the interests of thousands of potential claimants in the rehabilitation proceeding. Contrary to the United States' assertion, there are no formal “defendants” in that non-adversarial regulatory proceeding.

By contrast, the Second Appeal arises out of an original action initiated by the United States in federal court, in which it sued the Commissioner, Ambac and the State Rehabilitation Court as named defendants.

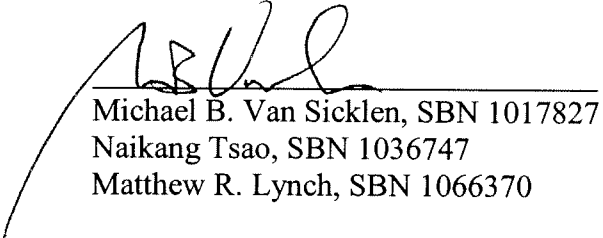
These differences between the two cases provide yet another reason to defer a decision regarding consolidation until after this Court decides whether it has jurisdiction over the First Appeal.

CONCLUSION

For the reasons stated above, the United States' motion to consolidate should be deferred until after this Court decides whether it has jurisdiction over Appeal No. 11-1158.

Dated this 28th day of February, 2011.

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CERTIFICATE OF SERVICE

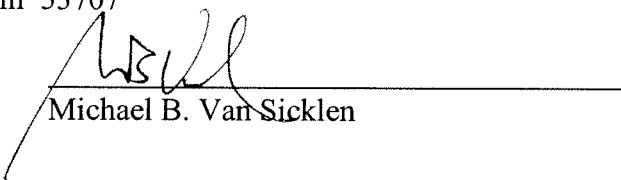
I, Michael B. Van Sicklen, hereby certify that on February 28, 2011, I caused one copy of the Wisconsin Commissioner of Insurance's Opposition to United States' Motion to Consolidate Appeals to be served on the following counsel of record via Express Mail overnight delivery:

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