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VIA ECF

Gino J. Agnello, Clerk
U.S. Court of Appeals for the Seventh Circuit
2722 Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Re: *Theodore Nickel v. United States*; Appeal No. 11-1158

Two Recent Published Opinions:

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., No. 09-3975,
2011 WL 2652201 (7th Cir. July 8, 2011) (en banc); and

Townsquare Media, Inc. v. Brill, Nos. 10-3017 and 10-3018, 2011 WL
2906162 (7th Cir. July 21, 2011)

Dear Mr. Agnello:

In the above-referenced appeal by the United States (on behalf of the Internal Revenue Service), we represent the respondent, Theodore Nickel, the Wisconsin Commissioner of Insurance, in his dual role as the Commissioner and as the court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation (the "Commissioner"). For the reasons noted below, the Commissioner respectfully submits that the two new Seventh Circuit cases cited above support the Commissioner's motion to dismiss this appeal.

Although the *Empress Casino* en banc decision involves issues pertaining to a different Tax Injunction Act not applicable to the subject appeal, this Court's discussion in *Empress Casino* directly supports the Commissioner's argument that the District Court's remand order in the subject appeal is not reviewable consistent with the plain language of 28 U.S.C. § 1447(d). In *Empress Casino*, this Court explained that:

Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Functional approaches to legal questions are often, perhaps generally, preferable to mechanical rules; but the preference is reversed when it comes to jurisdiction. And so the more mechanical the application of a

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jurisdictional rule, the better. The chief and often only virtue of a jurisdictional rule is clarity. . . .

The Supreme Court has not endorsed any multifactor test for applying the Tax Injunction Act, and such a test would be inappropriate quite apart from the need for clarity and simplicity in interpreting a forum-selection law. . . . The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary.

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., No. 09-3975, at *3, *4 (7th Cir. July 8, 2011) (en banc) (internal citations and quotations omitted).

This Court's ruling in *Townsquare* underscores the benefits of applying the mandatory dismissal rule of § 1447(d) to Appeal No. 11-1158. In *Townsquare*, this Court noted that where, as in the subject case, the District Court's remand order is expressly based on lack of subject-matter jurisdiction, that order is unreviewable on appeal, "no matter how plain the legal error in ordering the remand" might arguably be. (2011 WL 2906162, at *9 (quotation omitted).) In any case where the absence of subject-matter jurisdiction was at least an arguable basis for the District Court's remand order, "no matter how great a mistake the judge had made in thinking so," the appeal must be dismissed because the remand order is unreviewable. (*Id.* at *8.) This jurisdictional rule is clear and, consistent with *Empress Casino*, it should be applied without delving into the inconsequential distinctions urged by the United States in its August 3, 2011 letter to this Court.

Please give a copy of this letter to each member of the panel assigned to consider this appeal.

Very truly yours,

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

Michael B. Van Sicklen

cc: Anthony T. Sheehan (via email)
Richard D. Humphrey (via email)
Daniel W. Stolper (via email)
Peter A. Ivanick, Emily L. Saffitz, Henry J. Ricardo, Richard W. Reinthaler (via email)
David Rice (via email)



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s/ Michael B. Van Sicklen



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counsel / party:

address:

s/ _____