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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

**THEODORE NICKEL,** )  
 )  
 **Plaintiff-Appellee** )  
 )  
 v. )  
 ) **No. 11-1158**  
 ) **U.S.C.A. – 7th Circuit**  
 **UNITED STATES OF AMERICA** ) **FILED**  
 ) **JAN 25 2011 SMP**  
 **Defendant-Appellant** ) **GINO J. AGNELLO**  
 ) **CLERK**

**DOCKETING STATEMENT FOR THE APPELLANT**

**Statement of Jurisdiction**

This is an appeal from the United States District Court for the Western District of Wisconsin (Judge Barbara B. Crabb). A brief summary of the facts, as stated in the District Court’s opinion and order, will clarify the jurisdictional issues presented by this case.<sup>1</sup>

Ambac Assurance Corporation (Ambac) is a Wisconsin subsidiary of Ambac Financial Group, Inc. (Financial), a holding company headquartered in New York. (Doc. 36 at 2–3.) After Ambac experienced financial difficulties, it, with the approval of the Wisconsin Insurance Commissioner, assigned its troubled policies to a “segregated

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<sup>1</sup> References in this Docketing Statement are to the documents filed in the District Court, as numbered by its Clerk.

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account.” (*Id.* at 3–4.) The remainder of Ambac’s policies (as well as most of the assets) remained in its “general account.” (*Id.* at 4–5.) On March 24, 2010, the insurance commissioner asked the Circuit Court for Dane County, Wisconsin to rehabilitate the segregated account. (*Id.* at 5.)

The United States’ interest in the proceedings arises out of a tentative federal tax refund paid to the parent company, Financial, in the approximate amount of \$700 million and arising out of net operating loss carrybacks claimed by Financial. (Doc. 36 at 6.) The refund is tentative because Section 6411 of the Internal Revenue Code (26 U.S.C.) requires the Internal Revenue Service (IRS) to issue such refunds within 90 days, but gives the IRS the right to conduct a later audit and to recapture any erroneously paid funds. (*Id.* at 6.) Financial allocated the tentative federal tax refund to Ambac. (*Ibid.*)

On October 28, 2010, the IRS sent Financial an information document request. (Doc. 36 at 6.) On November 7, 2010, Ambac allocated to its segregated account any liability that it might have to repay the \$700 million tentative federal tax refund. (*Ibid.*) On November 8, 2010, the insurance commissioner approved that

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allocation, filed a notice with the Dane County court, obtained an injunction from the Dane County court prohibiting the United States from attempting to recover the tentative refund, and served the notice and the injunction on the United States.<sup>2</sup> (*Id.* at 7.) The United States maintains that under the Anti-Injunction Act (26 U.S.C. § 7421(a)) the Dane County court lacked jurisdiction to enjoin the United States. The Anti-Injunction Act states that “[e]xcept as provided in [certain statutes irrelevant here] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”

On December 8, 2010, within 30 days after service, the United States timely removed the case to the District Court. (Doc. 1.) 28 U.S.C. § 1446(b). Section 1442(a)(1) of 28 U.S.C. states that the United States, or any agency thereof, can remove a civil action filed against it in a state court to the local federal district court. Moreover, 28 U.S.C.

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<sup>2</sup> On November 8, 2010, Financial filed for Chapter 11 bankruptcy in the United States District Court for the Southern District of New York. (Doc. 36 at 6.)

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§ 1441(a) and (b) allow a defendant to remove any civil action over which the local district court would have had original jurisdiction. The District Court in the instant case would have had original jurisdiction pursuant to 28 U.S.C. § 1331 (federal questions) and § 1340 (internal revenue matters).

The United States moved to dissolve the state-court injunction (Doc. 10), and the insurance commissioner moved for a remand to the Wisconsin state court (Doc. 12). The District Court framed the issue as whether the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) preempted the federal removal statute, 28 U.S.C. § 1442. (Doc. 36 at 2, 8.) In an opinion and order entered on January 14, 2011, the District Court answered that question in the affirmative, held that it lacked jurisdiction because the United States' removal was preempted, declined to discuss the United States' motion to dissolve the injunction, and remanded the case to the Wisconsin state court. (*Id.* at 2, 8, 15, 21.) We will discuss our disagreements with the District Court's analysis in our opening brief.

On January 18, 2011, the United States timely filed a notice of appeal within 60 days after the entry of the District Court's order.

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(Doc. 38.) 28 U.S.C. § 2107(b). Section 1292(a)(1) gives this Court jurisdiction over the District Court's interlocutory order refusing to dissolve or modify the state court's injunction. Section 1447(d) of 28 U.S.C., however, states that an order remanding a case to a state court is not reviewable on appeal or otherwise. On January 20, 2011, this Court ordered the United States to file a Jurisdictional Memorandum on or before February 2, 2011, discussing the impact of 28 U.S.C. § 1447(d) on this appeal. We are considering the matter raised by the Court and will address it in the Jurisdictional Memorandum.

### **Statement of Prior or Related Appeals**

There have not been any prior appeals, nor are there any related appeals. There has not been any prior litigation in the District Court.

### **Statement Regarding Parties Appearing in an Official Capacity**

Theodore K. Nickel, the petitioner-appellee, is appearing in his official capacity as the Commissioner of Insurance of the State of Wisconsin.

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**Statement Regarding Criminal Matters**

Not applicable; this is a civil case.



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Dated this 24th day of January, 2011

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## CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2011, I served the foregoing document on the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by sending him a copy thereof in a properly addressed envelope via FedEx for overnight delivery. I further certify that I have served the foregoing document on counsel for all other parties by sending to each of them a copy thereof via FedEx or Express Mail for overnight delivery in envelopes addressed as follows:

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**REPRESENTATION STATEMENT**

Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure counsel for the plaintiff-appellant hereby informs the Court that the undersigned attorney represents the United States of America in the above-captioned appeal.

  
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Dated this 24th day of January, 2011