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092281-0101

February 7, 2011

VIA FEDERAL EXPRESS

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

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

Dear Mr. Agnello:

Enclosed for filing are an original and three copies of the Wisconsin Commissioner of Insurance's Response to United States' Jurisdictional Memorandum in the above-referenced matter.

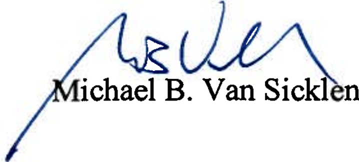
Also enclosed is our Circuit Rule 26.1 Disclosure Statement.

By copy of this letter, copies of these documents have been served on counsel of record.

Thank you for your attention to this matter.

Very truly yours,

FOLEY & LARDNER LLP



Michael B. Van Sicklen

Enclosures

cc: Robert W. Metzler and Anthony T. Sheehan,
U.S. Department of Justice (with enclosures, via email and Express Mail)
Daniel W. Stolper (with enclosures, via email and Express Mail)
Peter A. Ivanick, Emily L. Saffitz, Henry J. Ricardo, Richard W. Reinthaler
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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-1158

Short Caption: Theodore Nickel v. United States

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Theodore K. Nickel, Wisconsin Commissioner of Insurance, as Court-Appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: [signature] Date: 02/07/2011

Attorney's Printed Name: Michael B. Van Sicklen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No [ ]

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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.

WISCONSIN COMMISSIONER OF INSURANCE'S RESPONSE TO UNITED STATES' JURISDICTIONAL MEMORANDUM

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INTRODUCTION

On January 20, 2011, this Court issued an Order, which noted that:

(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");[1] 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).

(App. Dkt. 2.)

On February 1, 2011, the United States filed a Jurisdictional Memorandum ("Juris. Memo."), arguing that this Court should exercise jurisdiction over its appeal. (App. Dkt. 6.) On February 4, 2011, this Court issued an Order requiring the Wisconsin Commissioner of

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[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* App. Dkt. 2, 8.) Because the state insurer rehabilitation proceeding is a non-adversarial proceeding, which was not initiated against the United States (any more than it was initiated against any of the thousands of potential claimants with an interest in the proceeding), the Commissioner respectfully submits that the district court's caption more accurately reflects the nature of this proceeding.

Insurance,[2] as court-appointed Rehabilitator of the Segregated Account ("the Segregated Account") of Ambac Assurance Corporation ("Ambac"), to file this response to the United States' Jurisdictional Memorandum. (App. Dkt. 8.)

Because the district court held that it lacked subject matter jurisdiction over this insurer rehabilitation proceeding, and because 28 U.S.C. § 1447(d) and settled Supreme Court and Seventh Circuit precedent bar appellate review of remand orders based on a lack of subject matter jurisdiction, the United States' appeal should be dismissed. As discussed below, the United States' arguments for circumventing the Section 1447(d) statutory bar are unpersuasive.

FACTUAL BACKGROUND[3]

A. The Rehabilitation Proceeding

In March 2010, the Commissioner initiated the rehabilitation of Ambac's Segregated Account,[4] which is the largest insurer rehabilitation proceeding in Wisconsin history. The Commissioner sought and obtained a First-Day Injunction under state law, akin to the

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[2] On January 3, 2011, Theodore K. Nickel was appointed Wisconsin Commissioner of Insurance, replacing former Commissioner Sean A. Dilweg, who initiated this rehabilitation proceeding.

[3] The background facts are discussed in greater detail in the district court's remand order.

[4] As explained in the official comments to Wis. Stat. § 611.24(3):

> The basic idea behind segregated accounts is that different operations can be kept independent without formally creating a separate corporation. A segregated account is in some respects like a "corporation within a corporation." . . . Sub. (3)(a) requires that a segregated account be equipped with an adequate share of the corporation's capital and surplus. . . . If it carries no risks not assumed by the corporation's general account, the commissioner may set the required figure at zero under s. 611.19(1). . . .

Wis. Stat. Ann. § 611.24 cmt.

automatic stay in federal bankruptcy proceedings. The First-Day Injunction prevented policy counterparties and others from exercising contractual triggers, which would terminate the contracts and accelerate and increase the amount of claims, and from taking actions detrimental to the claims paying resources designated to fund the Rehabilitation Plan. The First-Day Injunction also barred the commencement or prosecution of other legal actions outside the State Rehabilitation Court on account of Segregated Account liabilities or contractual obligations.

The State Rehabilitation Court has heard and decided numerous issues in the rehabilitation proceeding, including challenges to the scope of the First-Day Injunction. It held a six day evidentiary hearing with oral arguments regarding the Commissioner's Rehabilitation Plan in November 2010.[5]

Nine months into this comprehensive insurer rehabilitation proceeding, the United States removed the entire proceeding to federal court on December 8, 2010. The basis for the removal was the United States' disagreement with a November 8, 2010 Supplemental Injunction entered by the State Rehabilitation Court that prevented it from seizing a federal tax refund (in the amount of approximately $708 million) that Ambac received prior to the rehabilitation, which comprises part of the resources in Ambac's General Account designated by the Commissioner to fund the Plan.[6]

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[5] Currently, there are a number of pending appeals in the Wisconsin Court of Appeals, challenging various interlocutory decisions of the State Rehabilitation Court. (*See* Comm'r Br. in Supp. of Mot. to Remand at 15 (Dkt. 15); Declaration of Michael B. Van Sicklen ("Van Sicklen Decl."), Exs. H, J & M (Dkt. 14).)

[6] As the State Rehabilitation Court has explained, the Segregated Account and the General Account draw from the same pool of assets:

> The plan of operation, the secured note and reinsurance agreement that has been provided by the [Commissioner gives] the Segregated Account access to all of the assets of Ambac on par

(footnote continued on following page)

The Supplemental Injunction was necessary because, if the United States eventually proves that it has a claim, that claim will be subordinate to policyholder loss claims under Wisconsin insurance law (*i.e.*, Wis. Stat. § 645.68(3) & (3c)). Pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, state insurance law reverse-preempts federal statutes to the extent those federal statutes do not specifically relate to the business of insurance and would impair or supersede state law relating to the business of insurance. *See U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491 (1993). In the absence of injunctive relief, the Commissioner was concerned that the United States would try to "jump the line" ahead of policyholders by seizing or placing a lien on assets in the amount of the tax refund. The United States' subsequent court filings have confirmed that the IRS wishes to take steps to get paid from the assets available to fund the rehabilitation ahead of policyholders, a position that is in direct conflict with *Fabe*.

> with the general account policyholders unless the payment of Claims would cause Ambac's assets to fall below $100,000,000.00, which is less than two percent of Ambac's claim paying assets. The net effect of this is that the Segregated Account is capitalized at 98 percent of Ambac's current assets despite having liabilities of less than 1000 of Ambac's 15,000 insurance policies. The [Commissioner] has exercised reasonable discretion in requiring the Segregated Account policyholders have access to virtually all of the resources available to pay their claims prior to the allocation of their policies to the Segregated Account. Under Wis. Stats. Sec. 611.24, the Segregated Account is to have an adequate share of the corporation's capital and surplus. No legal basis in this matter has been shown on which to require additional capitalization of the Segregated Account.

(Van Sicklen Decl., Ex. L at 9-10.)

B. The District Court's Remand Order

In federal court, the Commissioner filed a motion to remand the rehabilitation proceeding to state court, and the United States filed a motion to dissolve the Supplemental Injunction. The district court held a hearing on both motions on January 12, 2011.

On January 14, 2011, the district court issued its Opinion and Order, holding that the Commissioner's "motion to remand, dkt. #12, is GRANTED and this case is REMANDED to the Circuit Court of Dane County *for lack of subject matter jurisdiction*." (Op. and Order at 21 (Dkt. 36) (emphasis added).)

In reaching that conclusion, the district court first noted that the remand order:

> addresses only the first motion [*i.e.*, the Commissioner's motion to remand], in which I conclude that the case was removed improperly from the state court. . . . I will not discuss the United State[s'] motion to dissolve the state court injunction because removal was improper and *jurisdiction does not exist* to entertain it.

(*Id.* at 2 (emphasis added); *see id.* at 21 ("Because I conclude that removal was improper, I will not address the United States' motion for dissolution of the supplemental injunction.").)

The district court thereafter again framed the issue to be decided in terms of its subject matter jurisdiction to proceed:

> The threshold question is whether the United States can remove all or part of the rehabilitation proceeding to this court. If the removal is improper, this court *lacks jurisdiction* to hear any of the government's challenges to the order entered in the proceeding.

(*Id.* at 8.)

In deciding that the removal was improper, and that it lacked subject matter jurisdiction, the district court ruled that the McCarran-Ferguson Act reverse-preempted the

general federal statutes on which the United States based its removal. (*Id.* at 9-15.) This holding was supported by precedent from numerous federal courts. (*See id.* at 11-12 (collecting cases).)[7]

On January 18, 2011, the United States filed a notice of appeal of the district court's remand order. (Dkt. 38.)

C. Post-Remand Activities In The State Rehabilitation Court

On January 19, 2011, the Clerk of Court for the United States District Court for the Western District of Wisconsin wrote the Dane County Clerk of Circuit Court, noting that the district court was returning the original record "including certified copies of the [district court] docket sheet and the order remanding this case to your court."[8]

On January 24, the State Rehabilitation Court issued an Order granting the Commissioner's motion to approve his Rehabilitation Plan. The Commissioner is now implementing the Plan.

ARGUMENT

I. BECAUSE THE DISTRICT COURT EXPLICITLY DETERMINED IN ITS REMAND ORDER THAT IT LACKED SUBJECT MATTER JURISDICTION, THAT ORDER IS NOT SUBJECT TO APPELLATE REVIEW

28 U.S.C. § 1447(d) bars appellate review here. "For over a century now, statutes have . . . limited the power of federal appellate courts to review orders remanding cases removed

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[7] In the alternative, the district court ruled that, even if "the United States' right to remove was not preempted" and subject matter jurisdiction existed in federal court, the court "would remand this case to state court on the basis of the principles of comity and federalism set forth in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)." (Op. and Order at 15; *see id.* at 16-21 (applying *Burford* abstention).)

[8] (*See* Dkt. 41.) Section 1447(c) provides, in relevant part, that: "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case." 28 U.S.C. § 1447(c). *See also Good v. Kvaerner U.S. Inc.*, No. IP 1:03-CV-0476 SEB, 2003 WL 23104240, at *2 (S.D. Ind. Dec. 12, 2003) (discussing transition in jurisdiction on remand under Section 1447(c)).

by defendants from state to federal court." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (citing *United States v. Rice*, 327 U.S. 742, 748-52 (1946) and *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346-48 (1976)).

Under 28 U.S.C. § 1447(d), an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[9] The Supreme Court has interpreted this phrase to bar appellate review of "remands based on the grounds specified in § 1447(c), that is, a defect in removal procedure or lack of subject matter jurisdiction." *Kircher*, 547 U.S. at 640 (citations omitted).

The Supreme Court has "relentlessly repeated that 'any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'" *Id.* at 640 (alteration in original, citing *Thermtron*, 423 U.S. at 351); *see also Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977) ("Where the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand."); *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (noting "unmistakabl[e] command[]" of Section 1447(d) in cases where remand is based on grounds specified in Section 1447(c)); *Thermtron*, 423 U.S. at 343 ("If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals . . . .").

Based on this precedent, "[t]his Court has consistently reminded litigants that an order remanding a case to state court based on a lack of subject matter jurisdiction . . . is not reviewable on appeal, whether or not the decision is correct." (Jan. 20, 2011 Order (App. Dkt. 2)

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[9] Section 1447(d) contains a narrow exception for certain civil rights actions, which is inapplicable here.

(citing *Rubel v. Pfizer Inc.*, 361 F.3d 1016 (7th Cir. 2004), *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir. 2000), and *In re Continental Cas. Co.*, 29 F.3d 292, 293 (7th Cir. 1994)).) *See also Holmstrom v. Peterson*, 492 F.3d 833, 839 (7th Cir. 2007) ("Where jurisdiction is lacking, this court is not at liberty to recharacterize the basis of the district court's judgment in the interest of correcting a perceived error in statutory interpretation.") (citations omitted); *Ill. Muni. Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 851 (7th Cir. 2004) ("Even clear errors in a district court's jurisdictional analysis may not be corrected by the courts of appeals if the district court *thought* that it lacked subject matter jurisdiction. Section 1447(d) makes clear that errors in favor of remand which yield inconsistent holdings on subject matter jurisdiction must be tolerated.") (citation omitted); *Adkins v. Ill. Central R.R.*, 326 F.3d 828, 832 (7th Cir. 2003) ("Section 1447(d) establishes that endpoint for almost all cases that are removed to federal court: it comes when the district court judge makes the call, and it therefore falls outside the normal pattern of cases in which an appeal is either immediately or ultimately available."); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) ("[E]ven an obviously erroneous invocation of § 1447(c) is untouchable. . . . If the [trial] judge believed that subject-matter jurisdiction was missing at the outset, . . . § 1447(d) puts the remand beyond our ken.") (citation omitted).

Here, as this Court already has noted, the district court in its remand order "*explicitly determined* that it lacked subject matter jurisdiction and sent the case back to state court." (Jan. 20, 2011 Order (App. Dkt. 2) (emphasis added); *see* Op. and Order at 21 (Dkt. 36); *see also id.* at 2, 8.) As a result, Section 1447(d) immunizes the remand order from appellate review, and the United States' appeal should be dismissed.

II. THE UNITED STATES' ARGUMENTS SEEKING TO CIRCUMVENT THE SECTION 1447(d) BAR TO APPELLATE REVIEW ARE UNPERSUASIVE

The United States inaccurately describes the district court's remand order. In its Notice of Appeal, the United States contends that it is appealing:

> the District Court's Opinion and Order entered January 14, 2011, Docket #36, granting the Wisconsin Insurance Commissioner's Motion to Remand and *declining to dissolve* the injunction entered by the Circuit Court for Dane County, Wisconsin, on November 8, 2010 . . . .

(Notice of Appeal at 1 (Dkt. 38) (emphasis added); *see also* Juris. Memo. at 17-21 (App. Dkt. 6) (raising challenges to the merits of the Supplemental Injunction).) In fact, the district court did not "declin[e] to dissolve" the Supplemental Injunction; it expressly ruled that it lacked subject matter jurisdiction to address that issue. (*See* Op. and Order at 2, 21 (Dkt. 36).)

In its Jurisdictional Memorandum, the United States acknowledges that the district court held that, pursuant to the McCarran-Ferguson Act, the federal removal statutes at issue were reverse-preempted by state insurance law, thereby depriving the district court of subject matter jurisdiction to hear the case. (Juris. Memo. at 7-8; *see* Op. and Order at 9-15.) Because there is no ambiguity in the district court's reason for remand—*i.e.*, "[t]here is only one *plausible* explanation of what legal ground the District Court actually relied upon for its remand in the present case"[10]—the Section 1447(d) bar applies. *See Rubel*, 361 F.3d at 1020 ("Appellate courts review judgments, not opinions. If the judgment is one remanding for lack of jurisdiction, the reasoning in the opinion is not independently reviewable."); *Phoenix Container*, 235 F.3d at 355 ("*Gravitt* demonstrates that a court of appeals must look at the *reason* for remand rather than the *reasoning* supporting that decision. Otherwise § 1447(d) would amount to little more than a

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[10] *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 233 (2007) (emphasis in original).

caution against reversing decisions that are not erroneous. Unless it blocks inquiry into the question *whether* the decision was erroneous, § 1447(d) serves no function.") (emphasis in original, citation omitted).

Despite the clarity of the district court's remand order, and the clarity in the Supreme Court and Seventh Circuit precedent interpreting Section 1447(d) to bar appellate review of remand orders based on a lack of subject matter jurisdiction, the United States suggests that this Court "*could*" disregard "*the difficulties presented by the current state of the law*" by fashioning a new judicial exception to the Section 1447(d) statutory bar based on certain arguments that "*can be made*." (Juris. Memo. at 9, 10, 12 (emphasis added).) The United States' own choice of words shows that even it has no conviction that the positions it advances have any merit.

A. This Court Should Not Re-Write Section 1447(d)

The United States argues that this Court "could" fashion a new judicial exception to Section 1447(d) based on its "sovereign prerogatives" and the "sovereign rights of the United States under the Constitution" to assess and collect taxes. (Juris. Memo. at 8, 10, 17, 20-21.) However, this argument is directed at the wrong branch of government. As the district court explained in its remand order:

> [The United States] argues that federal tax powers trump state law as it relates to insurance because the power of the Internal Revenue Service to levy and collect taxes derives directly from Art. I, § 8 of the Constitution. In fact, those powers belong to the Congress; the IRS derives its authority from Congress.
>
> Contrary to the United States' argument, the McCarran-Ferguson Act does not exempt federal tax laws from its prohibition. It is true that under the Anti-Injunction Act, 26 U.S.C. § 7421(a), no *state* law or *state* court can restrict the assessment or collection of taxes. . . . However, it does not follow that *federal* law in the form of the McCarran-Ferguson Act cannot override this

> statute and any others insofar as they threaten to impede or impair the state's regulation of the business of insurance.

(Op. & Order at 9-10 (internal citation omitted, emphasis in original).) In other words, the appropriate audience to hear the United States' concerns about the protection of its "sovereign rights" is Congress, the branch of government directly responsible for authorizing the use of such powers, for limiting their scope in the insurance context, and for creating the "difficulties [for the United States' position] presented by the current state of the law." (Juris. Memo. at 9.)

By instead addressing its dissatisfaction with the current state of the law to this Court, the United States essentially asks for the creation of protections for "sovereign rights" or powers that Congress has not authorized, or has limited through the McCarran-Ferguson Act and Section 1447(d). The United States' argument for jurisdiction here amounts to a request that this Court re-write unambiguous statutes to serve the IRS's litigation interests in this dispute. *See Kircher*, 547 U.S. at 640 ("relentlessly repeat[ing]" that Section 1447(d) bars appellate review of any remand orders based on a lack of subject matter jurisdiction).

B. The Amendments To Section 1442(a) Are Not Relevant

The United States attempts to attribute significance to the 1996 amendments to Section 1442(a), but this also is unpersuasive. (Juris. Memo. at 11-12.) That amendment did nothing more than "explicitly permit[] the removal to be effected by the agency itself[,]" rather than limiting the right of removal to agency officers sued for acts in their official capacity. 28 U.S.C.A. § 1442 cmt. on 1996 amend. of § 1442.

C. The United States Cannot Second-Guess The Merits Of The District Court's Decision

The United States asserts that "an argument can be made that" when the United States removes an action to the district court under 28 U.S.C. § 1442(a), "the district court cannot thereafter 'lack jurisdiction' within the meaning of 28 U.S.C. § 1447(c)." (Juris. Memo. at 12-

13.) However, that essentially is an argument that the district court erred in remanding the case based on a lack of jurisdiction, a merits determination that the Supreme Court and this Court have repeatedly held "is not reviewable on appeal, whether or not the decision is correct." (Jan. 20, 2011 Order (App. Dkt. 2); *see* cases discussed *supra*.) Moreover, in support of its holding, the district court cited numerous federal court decisions that held that application of the McCarran-Ferguson Act reverse-preempted federal removal statutes, in view of uniform and comprehensive state insurance regulatory proceedings. (*See* Op. and Order at 11-12.)

D. The United States' Treatment Of The Caselaw Is Unpersuasive

The United States contends that the three cases cited in this Court's January 20, 2011 Order are distinguishable because they involved private parties and different removal statutes. (Juris. Memo. at 20 n.12 (citing *Rubel*, *Phoenix Container* and *Continental Casualty*).) However, as the Supreme Court has explained, Section 1447(d) applies "not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (alteration and emphasis in original, quoting *Rice*, 327 U.S. at 752).

Moreover, contrary to the United States' suggestion, the fact that there are different statutes that permit removal on different grounds (*e.g.*, diversity of citizenship, federal question, federal officer or agency, etc.) does not affect the controlling analysis under Section 1447(c)-(d). In fact, in the court below, the United States asserted two statutory bases for removal: 28 U.S.C. §§ 1441 and 1442(a)(1). (Notice of Removal at 2 (Dkt. 1).) The first cited statute, Section 1441, applies to private parties and the United States alike. Therefore, the United States' attempt to distinguish this Court's precedents based on the type of party seeking removal or the specific removal statutes at issue in those cases fails.

Furthermore, the cases the United States relies upon are distinguishable. For example, the United States contends that *Shives v. CSX Transp., Inc. (In re CSX Transp., Inc.)*, 151 F.3d 164 (4th Cir. 1998), is a case where the court of appeals concluded that, "[d]espite the apparent bar of 28 U.S.C. § 1447(d), . . . it had jurisdiction over the remand order." (Juris. Memo. at 14.) However, *Shives* was not even decided under Section 1447. As the Fourth Circuit has subsequently explained,

> in *Shives* we exercised appellate jurisdiction over an appeal of a remand order that we somewhat hesitantly construed to be predicated upon § 1445(a)'s prohibition against removal of state-filed FELA claims, *not* upon § 1447(c)'s mandate to remand in the absence of subject matter jurisdiction. *See* [*Shives*, 151 F.3d] at 167-68. Because the Supreme Court has clarified that § 1447(d)'s restriction on review applies only to remand orders made pursuant to § 1447(c), *see Thermtron*, 423 U.S. at 346, 96 S.Ct. 584, we concluded that § 1447(d) did not prohibit appellate jurisdiction, *see Shives*, 151 F.3d at 167. In other words, appellate jurisdiction existed in *Shives* because the district court's order did not rest upon lack of subject matter jurisdiction, the ground set forth in § 1447(c).

In re Blackwater Sec. Consulting, LLC, 460 F.3d 576, 587 (4th Cir. 2006) (emphasis in original); *see also In re WTC Disaster Site*, 414 F.3d 352, 369 (2d Cir. 2005) ("[I]n *In re CSX* [*Shives*] . . . the remand was on a basis other than lack of jurisdiction[.]").

Likewise, the United States' reliance on *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), is misplaced. (Juris. Memo. at 15-17.) As the Second Circuit has explained,

> The *TMI* court stated that it had granted permission to appeal pursuant to § 1292(b) "[b]ecause [it was] convinced that the bar of section 1447(d) was not intended to preclude appellate consideration of a section 1292(b) certified question concerning the constitutionality of an Act of Congress." 940 F.2d at 836. The Third Circuit has subsequently emphasized that it views its *TMI* decision on the availability of § 1292(b) review as limited to remands premised on a federal statute's unconstitutionality and as leaving undisturbed the principle that "a routine jurisdictional

> inquiry into the satisfaction of the removal requirements" is unreviewable. *Feidt*, 153 F.3d at 129 n.5.
>
> In the present case, there was no constitutional issue, and we see no support in *TMI*, or any other case, for the City's contention that a jurisdiction-based remand is reviewable on the basis that it involved novel or important jurisdictional questions. Given the Supreme Court's interpretation of § 1447(d) as barring review even where the remand "order might be deemed *erroneous* by an appellate court," *Thermtron*, 423 U.S. at 351, 96 S.Ct. 584 (emphasis added), review is barred *a fortiori* where the order raises questions that are merely "significant" or "unsettled."

WTC Disaster Site, 414 F.3d at 370.[11] As in *WTC Disaster Site*, there is no support in *TMI* or any other case for the United States' contention here that the district court's remand order is reviewable on the basis that it involves "important," "fundamental," "compelling" or "unique" issues. (Juris. Memo. at 17, 19, 20.)

E. Aside From Being Irrelevant To This Appeal, Any New Federal Action Initiated By The United States To Circumvent The District Court's Remand Order Would Be Reverse-Preempted By The McCarran-Ferguson Act

Finally, the United States notes that it is considering bringing a suit under the district court's original jurisdiction, if this appeal is dismissed. (*Id.* at 9, 17.) Aside from having no relevance to the issue presented—*i.e.*, the effect of Section 1447(d) on this appeal—this point highlights the reasons the McCarran-Ferguson Act was enacted. Specifically, in McCarran-Ferguson, Congress displaced all general federal laws to the extent they interfered with state law relating to the business of insurance, which in the specific context of insurer rehabilitation

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[11] *See also Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 197 (D.C. Cir. 2002) (*TMI* "recognizes that § 1447(d) precludes appellate review of an order remanding a case to a state court when, as here, the order is 'based upon a finding that removal was not authorized by Congress.'") (citing *TMI*, 940 F.2d at 845); *Rio de Janiero v. Philip Morris Inc.*, 239 F.3d 714, 716 n. 6 (5th Cir. 2001) (TMI "made clear that any exceptions could reach only 'claims not remanded on jurisdictional grounds.'") (citing *TMI*, 940 F.2d at 841); *Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914, 915-16 (9th Cir. 1992) (declining to expand scope of *TMI* beyond review of decision challenging constitutionality of federal statute).

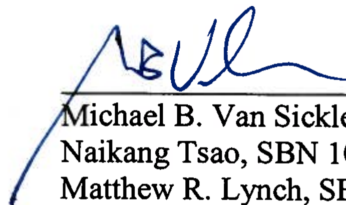
proceedings, ensures that claimants such as the United States (through the IRS) do not "jump the line" ahead of policyholders by bringing separate suits or taking steps to secure their interests in violation of state insurance law. (*See* Op. and Order at 9-15.) Thus, even if the United States were to try to circumvent the district court's remand order by filing a new suit, that suit would be subject to dismissal under the McCarran-Ferguson Act and *Fabe*.

CONCLUSION

For the reasons stated above, the United States' appeal should be dismissed.

Dated this 7th day of February, 2011.

FOLEY & LARDNER LLP



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CERTIFICATE OF SERVICE

I, Michael B. Van Sicklen, hereby certify that on February 7, 2011, I caused one copy of the Wisconsin Commissioner of Insurance's Response to United States' Jurisdictional Memorandum to be served on the following counsel of record via Express Mail overnight delivery:

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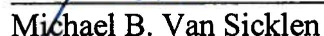

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