IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THEODORE NICKEL,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	No. 11-1158
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant	)	

REPLY TO RESPONSE TO JURISDICTIONAL MEMORANDUM

This reply addresses those contentions in the Wisconsin insurance commissioner's response that warrant further comment.[1] In all other respects, we rely upon our original Jurisdictional Memorandum.

1. In his statement of the factual background, Mr. Theodore Nickel, the insurance commissioner, neglected to mention that on February 7, 2011, he filed in the Wisconsin state court a request that it "expeditiously" schedule a hearing on the United States' motion, filed in the District Court during the removal proceedings, to dissolve the supplemental injunction. (*See* Resp. 6; *see also* Ex. A. (request for

[1] "Doc." references are to the documents in the District Court's record. "Resp." references are to the insurance commissioner's response. "Juris. Memo." references are to the United States' original jurisdictional memorandum.

hearing (exhibits omitted)).) The Wisconsin court has set that hearing for February 23, 2011. In his Wisconsin filing, Nickel neglected to mention this appeal. Coming, as it does, so soon after this Court ordered Nickel to respond to the United States' jurisdictional memorandum (which also stated that the United States contemplated filing an independent federal action seeking to enjoin the Wisconsin court), Nickel's request for expedited action appears to be nothing more than an attempt to forestall federal review by obtaining a ruling (in what he presumably considers a friendly forum) that could arguably be treated as preclusive by the federal courts (although we would likely dispute any such conclusion).[2] Additionally, the United States has filed today an injunction complaint under 26 U.S.C. § 7402(a) in District Court asking that court to resolve this matter. *United States v. Wisconsin State Circuit Court, et al.*, W.D. Wis. – No. 3:11-cv-00099.

2. Nickel summarizes the conventional law that has developed around 28 U.S.C. § 1447(d) without addressing the substance of the United States' position. (Resp. 6–14.) The United States starts with the proposition that courts have allowed appeals of remand orders that

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[2] The "jump the line" allegations (Resp. 4, 15) are unfounded. The IRS, by its own regulations, does not interfere with the work of the rehabilitation court by levying on the assets in the custody of the court. Treas. Reg. (26 C.F.R.) § 301.6331-1(a)(3).

were beyond the District Court's authority, 28 U.S.C. § 1447(d) notwithstanding. *E.g.*, *Osborn v. Haley*, 549 U.S. 225, 241–44 (2007); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 339–42, 351–52 (1976); *In re Continental Cas. Co.*, 29 F.3d 292, 294–95 (7th Cir. 1994). The Government next maintains that the 1996 amendments to 28 U.S.C. § 1442 did more than just extend to agencies the right of removal formerly granted to federal employees. (Resp. 11.) Instead, the amended 28 U.S.C. § 1442 is the statutory manifestation of "Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S. Rep. No. 104-366, at 30–31 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 4202, 4210; H.R. Rep. No. 104-798 at 19–20 (1996). It follows from that statement of intent that the amended 28 U.S.C. § 1442(a) grants jurisdiction to the district courts when a civil action, commenced against the United States in state court, is removed by the United States to the district court. Therefore, when the United States removes such an action to the district court, the district court cannot thereafter "lack jurisdiction" within the meaning of 28 U.S.C. § 1447(c). And if, as a matter of law, the district court had jurisdiction within the meaning of 28 U.S.C. § 1447(c), then it

would be unable to remand under 28 U.S.C. § 1447(c) for lack of jurisdiction, making 28 U.S.C. § 1447(d) inapplicable.

Nickel further argues that the cases relied upon by the United States are distinguishable. (Resp. 13–14.) But even if that is so, it does not get Nickel where he wants to go. As we indicated in our jurisdictional memorandum, "[t]his case appears to be unique — we have been unable to find any case in which the sovereign rights of the United States were so squarely affected." (Juris. Memo. 20.) Instead, we maintain that the principles established in the cases on which we rely are fully applicable to the instant case. In *Osborn*, 549 U.S. at 241–44, the Supreme Court held that 28 U.S.C. § 2679(d) trumped 28 U.S.C. § 1447(d). The certification by the Attorney General that a defendant employee was acting within the scope of his federal employment was conclusive for purposes of removal and "categorically precludes a remand." *Id.* at 243. It logically follows that if the certification of the Attorney General imbues a federal employee with enough of the sovereignty of the United States that he is "categorically" entitled to the protection of the federal courts, then United States itself, especially when it is exercising a sovereign function, is likewise "categorically" entitled to a federal forum. The opinion of the Fourth

Circuit in *Shives v. CSX Transp. Inc.*, 151 F.3d 164, 166–68 (4th Cir. 1998), was prompted in part by the need to decide which federal liability law governed the claim of a dockyard worker — a question that the Fourth Circuit described as "exclusively a federal question which Congress never intended for state courts to resolve." And in *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838–48 (3d Cir. 1991), the Third Circuit addressed whether a statute granting jurisdiction to the district court was itself constitutional.

Like those cases, the instant case does not involve the garden-variety jurisdictional inquiry normally faced under 28 U.S.C. § 1447(c). Like those cases, the instant case involves a conflict of federal laws, *viz.*, the significant, and inherently federal, question whether the McCarran-Ferguson Act renders inapplicable the removal provisions of the Judicial Code as they relate to the United States and its agencies. And unlike those cases, the District Court in the instant case made its ruling in the context of a fundamental federal function — the collection of federal tax.[3] We respectfully submit that the principles established by those cases encompass this one as well.

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[3] The cases relied upon by the District Court (Doc. 36 at 11–12) are distinguishable because they all involved private parties, not the United States.

3. Nickel also criticizes the United States for planning to file a suit seeking relief under the District Court's original jurisdiction. (Resp. 14–15.) He ignores, however, this Court's precedent that, if a remand order is not reviewable on appeal, it does not bar a subsequent suit in the district court based upon its original jurisdiction. *Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 708–09 (7th Cir. 1999). *See also Blue Cross & Blue Shield of Ill. v. Cruz*, 396 F.3d 793, 796–97 (7th Cir. 2005), *vacated on other grounds*, 548 U.S. 901 (2006). The United States cannot be faulted for availing itself of all of the opportunities open to it to secure a federal forum to resolve the inherently federal issues presented by this case. Finally, to the extent that the last sentence in Nickel's response could be viewed as an invitation for this Court to issue an advisory opinion on the United States' suit (Resp. 15), the Court should decline that invitation. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (federal courts lack jurisdiction under Article III to issue advisory opinions).

CONCLUSION

The United States respectfully requests that this Court accept jurisdiction over this appeal.

Respectfully submitted,

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Dated: This 9th day of February, 2011.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

REHABILITATOR'S REQUEST FOR HEARING ON UNITED STATES INTERNAL REVENUE SERVICE'S MOTION TO DISSOLVE SUPPLEMENTAL INJUNCTION

The Commissioner of Insurance for the State of Wisconsin, as the Court-appointed Rehabilitator (the "Rehabilitator") of the Segregated Account of Ambac Assurance Corporation (the "Segregated Account"), hereby requests that this Court schedule a hearing for argument on the pending motion of the United States Internal Revenue Service ("IRS") to dissolve this Court's November 8, 2010 Order for Temporary Supplemental Injunctive Relief (the "Supplemental Injunction"). The motion has been fully briefed,[1] and the Rehabilitator is ready to argue the issue at a hearing set at a date and time convenient to the Court.

The procedural history of this motion is as follows:

1. On November 8, 2010, this Court entered the Supplemental Injunction, which in relevant part clarified that the provisions of the March 24, 2010 Order for Temporary Injunctive Relief (the "First-Day Injunction") applied to certain liabilities that were allocated to the Segregated Account on November 7, 2010, including a disputed contingent tax liability to the IRS. Paragraph 5 of the Supplemental Injunction allowed any interested party directly affected

[1] Copies of the briefs filed in the Federal Court in regard to the injunction, as well as the Opinion and Order of the Federal Court, are attached to this Request. Copies of the filings related to the Rehabilitator's Motion to Remand are not attached, but are available on the Court-approved web site for this proceeding, http://ambacpolicyholders.com/court-filings.

by the Supplemental Injunction to file a motion seeking to dissolve it within 45 days of its issuance.

2. On December 8, 2010, the IRS removed this rehabilitation proceeding to the United States District Court for the Western District of Wisconsin (the "Federal Court"). On December 15, 2010, the IRS filed a motion to dissolve the Supplemental Injunction with the Federal Court, accompanied by a supporting brief filed on December 17, 2010. On December 30, 2010, the Rehabilitator and Ambac Assurance Corporation ("Ambac") filed briefs opposing the motion to dissolve. The IRS filed its reply on January 7, 2011.

3. Concurrently with the briefing on the IRS's motion to dissolve the Supplemental Injunction, the Rehabilitator filed a motion to remand the entire rehabilitation proceeding—including the IRS's specific disputes—to this Court.

4. On January 14, 2011, the Federal Court issued a written Opinion and Order granting the Rehabilitator's motion to remand. Because the Federal Court found that the relevant Wisconsin insurance statutes and this Court's orders pursuant to them reverse-preempted the federal removal statutes invoked by the IRS by operation of the McCarran-Ferguson Act, 15 U.S.C. § 1012, the Federal Court held that it lacked subject matter jurisdiction over the rehabilitation proceeding, including jurisdiction to decide the IRS's motion to dissolve the Supplemental Injunction.

5. Because the Rehabilitator's motion to remand was granted, this Court now has jurisdiction to decide the IRS's pending motion to dissolve the Supplemental Injunction, which is fully briefed.

WHEREFORE, the Rehabilitator respectfully requests that this Court schedule a hearing on the IRS's motion to dissolve the Supplemental Injunction at a convenient time and date for

the Court. Because resolution of this motion would clarify the effect of the Supplemental Injunction on the IRS, the Rehabilitator requests that the hearing be held as expeditiously as the Court's calendar reasonably permits.

By copy of this Request, the Rehabilitator is serving notice upon counsel for the IRS, at the address listed below:

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Dated this 7th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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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