



U.S. Department of Justice

Tax Division

Please reply to: Appellate Section

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CMN 2011100390

March 25, 2011

**Via FedEx**

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

Re: Theodore Nickel v. United States  
(7th Cir. – No. 11-1158)

United States v. Wisconsin State Court, *et al.*  
(7th Cir. – No. 11-1419)

Dear Mr. Agnello:

Enclosed for filing with your Court are an original and three copies of a motion to extend the time within which the United States may file an opening brief in appeal No. 11-1419 until 30 days after the Court rules on the United States' motion to consolidate the above-entitled appeals, or, in the alternative, for 30 days after the current due date of the United States' opening brief in that appeal, *i.e.*, until May 4, 2011. Please file the motion and inform us of the Court's decision. A copy of this motion has been served on counsel for the other parties, along with a copy of this letter. I can be reached at (202) 514-4339.

Sincerely yours,

ANTHONY T. SHEEHAN  
Attorney  
Appellate Section

Enclosures

cc: See page 2

cc: (via First Class mail)

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

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

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<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff-Appellant</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY;</b>	)	
<b>THEODORE NICKEL, Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation;</b>	)	<b>No. 11-1419</b>
<b>AMBAC ASSURANCE CORPORATION,</b>	)	
	)	
<b>Defendants-Appellees</b>	)	

**UNITED STATES' MOTION TO EXTEND  
THE TIME IN WHICH IT MAY FILE ITS  
OPENING BRIEF IN APPEAL NO. 11-1419**

The United States, the appellant herein, by its counsel, moves for an extension of time within which it may file its opening brief in appeal

No. 11-1419 until 30 days after the Court rules on the United States' motion to consolidate the above-captioned appeals, or, in the alternative, for a 30-day extension, from April 4, 2011, to and including May 4, 2011, within which it may file its opening brief in appeal No. 11-1419. In support of this motion, the United States' counsel, Anthony T. Sheehan, states as follows:

1. In its order dated January 20, 2011, this Court suspended briefing in appeal No. 11-1158 pending its resolution of the issue whether the Court has jurisdiction over that appeal. The United States' opening brief in appeal No. 11-1419 is currently due to be filed and served on April 4, 2011. On February 28, 2011, the United States moved to consolidate the two appeals. Both the jurisdictional question in No. 11-1158 and the motion to consolidate are pending before the Court. This is the United States' first request for an extension in either appeal.

2. The decision whether to authorize the prosecution of an appeal on behalf of the United States may be made only by the Solicitor General of the United States, after review of the recommendations of the Department of Justice, Tax Division, and the Office of Chief

Counsel, Internal Revenue Service. *See* 28 C.F.R. § 0.20. Although the recommendations of the Tax Division and the Office of Chief Counsel have been submitted to the Acting Solicitor General, he has not yet made the decision whether to authorize either of the above-entitled appeals.

3. As indicated by the prior two paragraphs, it is currently unknown whether appeal No. 11-1158 will go forward, whether the appeals will be consolidated, whether the Acting Solicitor General will authorize either or both of the United States' appeals, and what arguments the Acting Solicitor General will authorize the United States to make in its appeals. Proceeding with briefing in appeal No. 11-1419 on that appeal's original briefing schedule — and in the face of such uncertainty — could lead to the submission of multiple, duplicative (and possibly unnecessary) sets of briefs, thereby wasting the resources of the Court and of the parties.

4. I have been delayed in preparing a draft of the brief for the United States in this appeal due to the press of other work, including the presentation of oral argument for the Government in *McGowen v. Commissioner* (10th Cir. – No. 10-9000), on March 9, 2011, in Denver,

Colorado. I have also been responsible for preparing and filing various motions in United States' appeal to the Wisconsin Court of Appeals, District IV (No. 2011AP561), arising out of this same Ambac matter. There presently is substantial overlap in the issues to be presented in this Court and in the Wisconsin court, and the United States' Wisconsin filings included motions to separate the United States' appeal from the appeals of other Ambac litigants and to hold the United States' appeal in abeyance pending this Court's consideration of the federal issues presented in all of the United States' appeals. Finally, the United States' appeals present multiple, complex legal issues involving the interaction of the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) with the federal jurisdictional statutes in Title 28 of the United States Code, the Internal Revenue Code (26 U.S.C.), and the Wisconsin insurance statutes. The resolution of those issues will affect the Internal Revenue Service, and could also affect other federal agencies. Thus, an extensive amount of coordination will be required in the formulation and review of the arguments to be presented, including consulting with the Civil Division of the Department of Justice, which normally represents the United States in

matters involving state insurance insolvency proceedings and the McCarran-Ferguson Act.

5. The additional time requested is essential to enable me to finish my review of the record and research of the law, to complete my draft of the brief for the United States, to permit the draft brief to be reviewed, and to file the brief with the Court. If the requested extension is granted, I do not anticipate needing any further extensions to complete the opening brief in appeal No. 11-1419.

6. Mr. Rice (counsel for the Dane County Circuit Court) does not object to this motion. Mr. Van Sicklen (counsel for the Wisconsin Insurance Commissioner) and Ms. Saffitz (counsel for Ambac) have informed me that they oppose a 30-day extension to May 4, 2011. They would presumably also oppose an extension based upon this Court's ruling on the consolidation motion, an amendment made to this motion after I initially sought the views of opposing counsel. In addition to regular service, a copy of this motion has been sent to opposing counsel today via e-mail.

WHEREFORE, it is respectfully requested that the time in which the United States may file its opening brief in appeal No. 11-1419 be extended until 30 days after the Court rules on the United States' motion to consolidate, or, in the alternative, from April 4, 2011, to and including May 4, 2011.

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Counsel for the United States

Dated: This 25th day of March, 2011.



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

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

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<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff-Appellant</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY;</b>	)	
<b>THEODORE NICKEL, Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation;</b>	)	<b>No. 11-1419</b>
<b>AMBAC ASSURANCE CORPORATION,</b>	)	
	)	
<b>Defendants-Appellees</b>	)	

**DECLARATION**

Anthony T. Sheehan, of the Department of Justice, Washington, D.C., states as follows:

1. I am an attorney employed in the Appellate Section, Tax Division, United States Department of Justice.

2. The facts recited in the foregoing motion are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed this 25th day of March, 2011, in Washington, D.C.

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ANTHONY T. SHEEHAN  
*Attorney*

## CERTIFICATE OF SERVICE

It is hereby certified, on this 25th day of March, 2011, that this motion was sent to the Clerk of the United States Court of Appeals for the Seventh Circuit via FedEx for next business day delivery, and that service of this motion was made on opposing counsel by e-mail and also by sending them one paper copy via First Class mail, in envelopes properly addressed as follows:

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