STATE OF WISCONSIN COURT OF APPEALS DIST. IV

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

Appeal of the United States of America:
Appeal No. 2011AP561

UNITED STATES' REPLY TO THE INSURANCE COMMISSIONER'S OPPOSITION TO THE UNITED STATES' MOTIONS: (1) TO RECONSIDER THE COURT'S CONSOLIDATION ORDER AS IT AFFECTS UNITED STATES' APPEAL; (2) TO HOLD THE UNITED STATES' APPEAL IN ABEYANCE; AND (3) TO WAIVE THE REQUIREMENT THAT A WISCONSIN ATTORNEY CO-SIGN THE UNITED STATES' FILINGS

The United States, an appellant in the above-captioned appeal, through its counsel Richard Humphrey and Anthony T. Sheehan, has filed separate motions asking this Court, *inter alia*, to reconsider its order consolidating the United States' appeal with the other appeals in docket No. 2011AP561, to hold the United States' appeal in abeyance pending the resolution of two related appeals in the United States Court of Appeals for the Seventh Circuit, and to waive the requirement that an attorney

licensed in Wisconsin co-sign all of the United States filings. The Wisconsin insurance commissioner filed a single opposition to the granting of those motions. This is the United States' reply to the arguments in the opposition that require a response. In all other respects, the United States continues to rely on its original motions. The United States is concurrently filing a separate opposition to the insurance commissioner's motion to dismiss the United States' appeal.

1. The insurance commissioner cites *North Central Dairymen's Cooperative v. Temkin*, 86 Wis. 2d 122, 271 N.W.2d 890 (Wis. 1978), in support of its opposition to our motion to hold proceedings in abeyance. That opinion, in turn, relies upon the "prior action pending" rule announced in *Syver v. Hahn*, 6 Wis. 2d 154, 94 N.W.2d 161, 164 (Wis. 1959). The prior-action-pending rule states that "[w]here two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the

administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action." There are several flaws in the insurance commissioner's argument as applied to this appeal.

First, the prior-action-pending rule is a common-law rule created to resolve conflicts among Wisconsin courts that have concurrent jurisdiction over the same dispute. *See Syver*, 94 N.W.2d at 164. Its applicability is limited when applied to the courts of two different sovereigns, as the United States and Wisconsin assuredly are. *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709, ¶¶30–31, 33 (Wis. 2000) (*Teague II*).

Second, the prior-action-pending rule assumes that the courts in question actually have concurrent jurisdiction over a dispute. It is, as yet, undetermined whether the Wisconsin courts even have jurisdiction over the United States in this matter. The overarching issue in all of the United States' appeals is whether

the Wisconsin state courts ever had jurisdiction over a separate and superior sovereign, the United States, in order to enjoin it from pursuing a federal tax liability for which Ambac (an entity that is not in rehabilitation[*]) is severally liable as a matter of federal law. 26 C.F.R. §§ 1.1502-6; 1.1502-78(b)(2). The first four issues raised by the United States in its docketing statement all effectively question the jurisdiction of the Wisconsin courts as a matter of federal law. The insurance commissioner contends that the United States is raising "'issues peculiarly of state character'" (Opp. 3.), but he does not explain how, for example, the sovereign immunity of the United States and the interpretation of federal statutes are issues of Wisconsin law. Unlike the situation in *North Central Dairymen's Cooperative*, those are issues peculiarly of *federal* character (*see* 271 N.W.2d at 892), and they should be addressed, in the first instance, by the federal courts.

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[*] Any allegation that the United States is attempting to "jump the line" would be unfounded, inasmuch as the IRS, by its own regulations, does not interfere with the work of a rehabilitation court by levying on the assets that are in the court's custody. 26 C.F.R. § 301.6331-1(a)(3).

Finally, the prior-action-pending rule is one of comity. It serves to "avoid conflicts and chaos in the work of independent courts" and to "promote the orderly administration of laws." *State ex rel. Milwaukee County Expressway Comm'n v. Spenner*, 51 Wis. 2d 138, 186 N.W.2d 298, 301 (Wis. 1971.) Or, as stated in the case on which the insurance commissioner relies, "'[c]ourts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.'" *North Cent. Dairymen's Coop.*, 271 N.W.2d at 892 (quoting *Crosley Corp. v. Hazeltine Corp*, 122 F.2d 925, 930 (3d Cir. 1941)). The United States agrees, and that is why it has moved to hold its appeal in this Court in abeyance while it seeks the answer to its federal issues in the federal courts. *See Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899, ¶71 (Wis. 2003) (*Teague III*) (concurring majority opinion of Abrahamson, C.J.) (listing comity factors to be applied in conflicts between

Wisconsin state courts and Native American tribal courts within the geographical boundaries of Wisconsin).

The Seventh Circuit appeals could fully resolve this dispute. Even if they do not, this Court would at least be spared from considering this appeal while its jurisdiction is in question. The insurance commissioner, however, seeks duplicative litigation in the court systems of two separate sovereigns, thereby creating a "race to judgment," which the Wisconsin Supreme Court has discouraged. *Teague II*, 612 N.W.2d 709, ¶33.

It appears from the insurance commissioner's opposition (Opp. 3–5), and from his March 25, 2011 motion to supplement the record, that he intends to rely on the opinions of the United States District Court for the Western District of Wisconsin in this appeal. Comity, however, "is based on respect for the proceedings of another system of government and a spirit of cooperation. Comity endorses the principle of mutual respect between legal systems, recognizing the sovereignty and sovereign interests of each governmental system and the unique features of each legal

system." *Teague III*, 665 N.W.2d 899, ¶69. Inasmuch as the United States has appeals pending in the Seventh Circuit from the District Court's decisions, we submit that comity is best served by litigating the federal issues raised by the United States in the federal system, not by litigating those issues in two different court systems simultaneously.

2. As explained in the United States' motion to hold this appeal in abeyance (Abey. Mot. 9–10), the insurance commissioner has represented to the United States District Court for the Western District of Wisconsin that "the merits of the disputed [federal] tax liability" will be resolved in a federal forum, *viz.*, the pending bankruptcy of Ambac Financial Group, Inc., (Ambac's parent company) in the United States Bankruptcy Court for the Southern District of New York. (In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation, No. 10-cv-778 (W.D. Wis.), Doc. 21 at 12.) He has also represented to the Dane County Circuit Court that he "will take necessary steps to ensure the appropriate treatment of [a

federal government] claim[ ] [for tax liabilities] under Wis. Stat. § 645.68 if and when such liabilities become less speculative." (Order of Jan. 24, 2011 at 31.) In his opposition, the insurance commissioner has not disavowed his prior representations. He also has not attempted to explain why this appeal needs to go forward at this time given his prior representations that the federal tax liability remains to be determined in another court (*i.e.*, the federal bankruptcy court) and that he will take necessary steps to ensure the appropriate treatment of the subsequently determined tax liabilities under the priority scheme of Wis. Stat. § 645.68.

3. The insurance commissioner asserts (Opp. 7) that the United States is disrupting the orderly administration of the appeals. The United States, however, is not asking, and has never asked, for this Court to stay any of the appeals of the other appellants in this matter. Those appeals can go to decision in the ordinary course of business. Moreover, as stated in the United States' motions, there is little chance that this Court will issue

conflicting rulings, inasmuch as the Court will be able to consider its prior opinions in later deciding the appeal of the United States, if the result of the Seventh Circuit appeals requires this appeal to proceed. As discussed above, having the federal issues resolved by the federal courts in the first instance will foster the orderly administration of this appeal.

4. We will address the insurance commissioner's arguments regarding the United States' notice of appeal in our opposition to his motion to dismiss our appeal. Regarding waiving the *pro hac vice* signature requirement for *future* filings by the United States, 28 U.S.C. § 517 demonstrates that the waiver should be granted. *See* Mot. for Waiver 3–6; Opp. to Dismissal Mot. 5–8. In addition, the waiver is consistent with Wisconsin authority. The arrangement that the United States is seeking is akin to the one set forth in Wisconsin Supreme Court Rule 10.03(4)(c), under which nonresident military counsel can be allowed to represent military personnel in a particular action or

proceeding without being in association with a member of the Wisconsin bar.

For the foregoing reasons: (1) the appeal of the United States, currently part of appeal No. 2011AP561, should be separated from the other appeals docketed under that number; (2) the United States' appeal should be held in abeyance pending the outcome of the United States' appeals to the Seventh Circuit; and (3) the Court should waive the *pro hac vice* fee and signature requirement.

Respectfully submitted,

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April 4, 2011.

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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 4th day of April, 2011, in Washington, D.C.

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April, 2011, that a true and correct copy of the foregoing document has been served upon counsel for the Wisconsin insurance commissioner via First Class Mail, with postage prepaid, in an envelope properly addressed as follows:

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I further certify that a true and correct copy of the foregoing document (except for replacing handwritten dates and signatures with typed versions of the same) has been served on all counsel of record using the e-mail distribution list established by the Circuit Court for Dane County for that purpose, as listed below:

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