

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)	

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

**UNITED STATES' MOTION TO
EXTEND THE TIME IN WHICH IT MAY
FILE ITS CONSOLIDATED OPENING BRIEF**

The United States, the appellant herein, by its counsel, moves for a 30-day extension of time within which it may file its opening brief in the above-captioned, consolidated appeals from September 28, 2011, to

and including October 28, 2011. In support of this motion, the United States' counsel, Anthony T. Sheehan, states as follows:

1. The Solicitor General has authorized the briefing of all issues presented in both of the above-captioned appeals. *See* 28 C.F.R. § 0.20.

2. On August 22, 2011, this Court consolidated the above-captioned appeals for purposes of briefing and disposition, ordered the parties to address fully in their briefs the issue of this Court's jurisdiction over appeal No. 11-1158, and set September 28, 2011, as the due date for the United States' consolidated opening brief. On September 8, 2011, the Court granted the United States' motion for an additional 7,000 words, permitting a consolidated opening brief of up to 21,000 words. Thus, it was not until September 8, 2011, that we knew the number of words that we would have to address the issues presented by these appeals. This is the United States' first request for an extension after the issuance of the above-described orders.

3. There is a substantial amount at issue in these cases. Ambac Assurance Corporation has obtained tentative income-tax refunds in excess of \$700 million pursuant to 26 U.S.C. § 6411, and a Wisconsin court has issued injunction orders barring the United States from

levying on Ambac to recover the tentative refunds. In these consolidated cases, the United States seeks relief from the injunctions.

4. The requested extension will permit the careful briefing and thorough review necessitated by the multiple, complex legal issues presented in these appeals. As noted above, this Court has ordered the parties to fully brief, in appeal No. 11-1158, the issue whether 28 U.S.C. § 1447(d) deprives this Court of jurisdiction to review a remand based on the District Court's holding that the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) allowed certain Wisconsin statutes to reverse preempt the federal removal statutes found at 28 U.S.C. §§ 1441 and 1442(a). The merits issues are also complex. They largely center on the McCarran-Ferguson Act, which can allow a state statute to reverse preempt a federal statute if three requirements are satisfied. Analysis of the McCarran-Ferguson requirements calls for an examination of various provisions of 28 U.S.C. and the Internal Revenue Code as well as provisions in Chapter 645 of the Wisconsin Statutes in light of the numerous cases that have been decided under McCarran-Ferguson. In addition, the District Court held in alternative that it would abstain from exercising jurisdiction pursuant to *Burford*

v. Sun Oil Co., 319 U.S. 315 (1943). This separate issue also needs considerable briefing.

5. The resolution of those issues will affect the Internal Revenue Service, and could also affect other federal agencies. As indicated above, the reverse-preemption provisions of the McCarran-Ferguson Act are not restricted to federal tax statutes. Thus, an extensive amount of coordination is 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.

6. I am additionally responsible for the United States' appeal in the Wisconsin courts, arising out of this same Ambac matter. On May 3, 2011, the Wisconsin Court of Appeals, District IV, dismissed the United States from appeal No. 2011AP561 (also involving multiple other appellants) for lack of jurisdiction because the United States' notice of appeal had been signed only by a Department of Justice attorney who was not admitted to the Wisconsin bar. On August 31, 2011, the Wisconsin Supreme Court granted the United States' petition for review of that dismissal (No. 2011AP987). Since then, I have been

occupied with preparing the United States' opening brief and appendix to the Wisconsin Supreme Court, due to be filed on September 30, 2011.

7. The additional time requested will enable the completion of a draft brief for the United States, the review of that draft by the interested components within the Department of Justice and by the Chief Counsel for the IRS, and the filing of the brief with the Court. If the requested extension is granted, we do not anticipate needing any further extensions to complete the United States' consolidated opening brief.

8. On September 19, 2011, I sent an e-mail to all opposing counsel informing them of the United States' intention to seek an extension and containing a draft copy of this motion. As of the filing of this motion, I have received a response from Naikang Tsao of Foley & Lardner, the law firm that represents Insurance Commissioner Nickel and that has taken the lead for the adversaries of the United States in these proceedings. Mr. Tsao stated that his client does not oppose the relief requested herein.

WHEREFORE, it is respectfully requested that the time in which the United States may file its opening brief in the above-captioned, consolidated appeals be extended for 30 days, to and including October 28, 2011.

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney – Tax Division
U.S. Department of Justice
Post Office Box 502
Washington, D.C. 20044
Telephone: (202) 514-4339
Anthony.T.Sheehan@usdoj.gov
Counsel for the United States

Dated: This 20th day of September, 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 20th day of September, 2011, in Washington, D.C.

/s/ Anthony T. Sheehan

ANTHONY T. SHEEHAN

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Peter A. Ivanick, Esquire
Dewey & LeBoeuf, LLP
1301 Avenue of the Americas
New York, NY 10019-6092

Daniel W. Stolper, Esquire
Stafford Rosenbaum, LLP
P.O. Box 1784
Madison, WI 53701-1784

/s/ Anthony T. Sheehan

ANTHONY T. SHEEHAN

Attorney