**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

| | |
|---|---|
| IN THE MATTER OF THE REHABILITATION OF SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION | Case No. 10-cv-778-bbc<br><br>(Dane Cty Cir. Crt. Civil Case No.: 10 CV 1576) |
| THEODORE K. NICKEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN<br><br>Petitioner<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | |
| UNITED STATES OF AMERICA,<br><br>Plaintiff<br><br>v.<br><br>WISCONSIN STATE CIRCUIT COURT FOR DANE COUNTY;<br>THEODORE K, NICKEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation; and<br>AMBAC ASSURANCE CORPORATION,<br><br>Defendants. | Case No. 11-cv-99-bbc |

**UNITED STATES' UNOPPOSED REQUEST FOR INDICATION THAT THE COURT IS INCLINED TO GRANT MOTION TO VACATE ORDERS**

The United States respectfully requests that the Court indicate that it is inclined to grant a motion to vacate its opinion and order of January 14, 2011, in *In the Matter of the Rehabilitation of Segregated Account of Ambac Assurance Corp*., Case No. 10-cv-778-bbc, Dkt. # 36, reported at 782 F. Supp. 2d 743, and its opinion and order of February 18, 2011, in *United States v. Wisconsin State Circuit Court for Dane County*, Case No. 11-cv-99-bbc, Dkt. # 42, *reported at* 767 F. Supp. 2d 980 (collectively, the "Orders").[1] The United States makes this request pursuant to Rule 60(b) of the Federal Rules of Procedure, Seventh Circuit Rule 57, and the order of the United States Court of Appeals for the Seventh Circuit (attached as Exhibit A).

The undersigned is authorized to represent that Ambac and the Wisconsin Insurance Commissioner support the requested relief consistent with the parties' settlement agreement. Additionally, Assistant Attorney General David C. Rice of the Wisconsin Department of Justice informed counsel for the United States that his client, the Wisconsin State Circuit Court for Dane County, takes no position on this Request and will not oppose the relief sought by the United States.

[1] This Request will be filed concurrently in both actions.

## STATEMENT OF FACTS

The facts regarding the events leading up to the parties' litigation are outlined in more detail in this Court's Orders. The United States briefly restates only those facts necessary to provide context and background for the present Request.

Ambac Financial Group, Inc. (AFGI) is the parent company of Ambac Assurance Corporation (AAC), a Wisconsin insurance company. AAC's financial condition began to deteriorate in late 2007. The Commissioner of Insurance for the State of Wisconsin (Commissioner), along with AAC, created a Segregated Account pursuant to Wis. Stat. § 611.24. The Segregated Account included the more troubled of the AAC insurance policies. It did not include all of AAC's assets. On March 24, 2010, the Commissioner filed a petition in Dane County Circuit Court to rehabilitate the Segregated Account.

From 2008 through 2010, AFGI received approximately $700 million in "tentative" tax refunds, which it allocated to AAC. On October 28, 2010, the IRS sent AFGI a request seeking information related to the basis for the refunds and asking whether AFGI had received advance permission from the IRS before changing its accounting method. On November 7, 2010, AAC allocated to the Segregated Account any liabilities it has or may ever have arising from its federal taxes through December 2009 and specifically any liabilities it may have in conjunction with the $700 million refund. The next day, on November 8, 2010, AFGI filed a Chapter 11 bankruptcy petition in the Southern District of New York

and an adversary proceeding against the United States to determine, among other things, whether it was entitled to the tentative refund and to several billion dollars of net operating losses. Also on November 8, 2010, the Commissioner approved AAC's allocation of the potential tax liabilities and obtained an ex parte injunction from the Dane County court severely restricting the United States' ability to assess or collect the $700 million refund. The Commissioner served the United States with a copy of the Dane County injunction, and the United States removed the case to this Court.

The United States then filed a motion in the removed action to dissolve the injunction, and the Commissioner filed a motion to remand to the state court. This Court granted the Commissioner's motion to remand and, as a result, did not consider the United States' motion regarding the merits of the dispute - i.e., the propriety of the State Court injunction. Specifically, this Court held that the "United States' removal of the state court injunction matter . . . [was] preempted under the McCarran-Ferguson Act. . ." and that it was appropriate to abstain from deciding the merits of the case based on the Supreme Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The United States filed a notice of appeal.

Approximately a month after this Court's decision remanding the removed action, the United States filed an original action seeking injunctive relief against the Wisconsin State Court, the Commissioner, and AAC. Along with the complaint, the United States filed a motion for a preliminary injunction seeking to collaterally attack the ex parte injunction order of the state court. This Court

dismissed the case and again determined that it did not have jurisdiction to consider the merits of the dispute (i.e., the propriety of the injunction and whether AAC's tax obligations could be allocated to a Segregated Account) because the McCarran-Ferguson Act allowed for the reverse-preemption of the federal jurisdiction statutes and because it was appropriate to abstain pursuant to *Burford*. The United States filed a notice of appeal, and the Seventh Circuit consolidated the government's two actions.

In the meantime, the AFGI bankruptcy case, the adversary proceeding, and the State Court rehabilitation actions continued to move forward. And, upon motion of AFGI, the Bankruptcy Court ordered the United States and AFGI to engage in alternative dispute resolution in an attempt to resolve the adversary proceeding, which involved substantive tax issues regarding the propriety of the tentative refund, AFGI's accounting method, and the amount of net operating losses to which AFGI was entitled. *See* Order, Bankr. No. 10-15973 & Adv. Pro. No. 10-4210 (Bankr. S.D.N.Y. Mar. 2, 2011), attached as Exhibit B. The Commissioner, AAC, and the AFGI creditors' committee took part in these settlement negotiations.

On January 31, 2012, after the parties briefed the consolidated appeal but before any oral argument, the Seventh Circuit, at the parties' request, suspended proceedings to allow consideration of a settlement offer (the "Offer") that was formally submitted to counsel for the United States, on February 24, 2012 (as supplemented by a letter dated April 3, 2013), by AFGI, AAC, Ambac's

Segregated Account, the Rehabilitator of the Segregated Account, the Commissioner, and the official creditors committee for AFGI. *See* Ex. C, Offer Letters and Acceptance. On April 30, 2013, the settlement was finalized, and the United States received payment of $101.9 million, as provided for in the Offer.[2] The settlement resolved the substantive tax issues raised by AFGI and ACC, including setting the amount of future, net operating losses available to carry forward at $3.4 billion, and provided for the payment of taxes to the United States. *See* Ex. C, Offer and Acceptance Letters. The Offer also contained the following two paragraphs:

> 6. Following the satisfaction of all conditions set forth in paragraphs 1 and 2, OCI [Wisconsin Office of the Commissioner of Insurance], the Segregated Account, the Rehabilitator, and AAC will, upon the request of the United States, state in writing to the court that they support any motion brought by the United States seeking to vacate (i) the Opinion and Order entered on January 14, 2011 by the United States District Court for the Western District of Wisconsin in the proceeding captioned *Theodore Nickel v. United States of America*, Case No. 10-cv-778 and (ii) the Opinion and Order entered on February 18, 2011 by the United States District Court for the Western District of Wisconsin in the proceeding captioned *United States of America v. Wisconsin State Circuit Court for Dane County*, Case No. 11-cv-099.

[2] The settlement, finalized on April 30, 2013, in the Southern District of New York, resolved all outstanding issues regarding the United States' involvement in the AFGI bankruptcy and the Ambac rehabilitation. As part of the settlement, AFGI and Ambac paid the United States a total of $101.9 million, and AFGI reduced, from over $4.4 billion to $3.4 billion, the net operating loss carryforwards related to the contracts at issue and available to AFGI and its consolidated group for decreasing the tax on their future income. *See* Ex. C, Offer and Acceptance Letters; *see also* Bloomberg BNA Daily Tax Report, 84 DTR K-6 (May 1, 2013).

> 7. Following the satisfaction of all conditions set forth in paragraphs 1 and 2, upon stipulation, the United States, the Rehabilitator, OCI, AAC and the Segregated Account, shall dismiss with prejudice the two cases that are currently pending before the U.S. Court of Appeals for the Seventh Circuit and captioned as *Theodore Nickel v. United States of America*, Case No. 11-1158 and *United States of America v. Wisconsin State Circuit Court for Dane County, et. al.*, Case No. 11-1419.

Pursuant to the above-quoted paragraphs 6 and 7 of the Offer, the United States filed a motion in the Seventh Circuit to dismiss the appeals and vacate the opinions and orders of this Court. *See* Ex. D, USA's Motion to Dismiss and to Vacate. On May 15, 2013, the Seventh Circuit issued an order directing the United States to "comply with Circuit Rule 57 by requesting that the district court indicate whether it is inclined to vacate the orders underlying this appeal under Fed. R. Civ. P. 60(b)." *See* Ex. A, 7th Circuit Order.

## ARGUMENT

Typically, when a case becomes moot pending an appellate decision, the "established practice of . . . [an appellate court]. . . is to reverse or vacate the judgment below. . ." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994), however, the Supreme Court considered the possibility of vacatur at the appellate level when mootness resulted from a settlement, rather than from happenstance or from an action by the appellee. The Court concluded that vacatur should not ordinarily be granted at the appellate level because of a settlement. *Id.*

at 24-28. The Court, however, allowed an exception for extraordinary circumstances:

> We hold that mootness by reason of settlement does not justify vacatur of a judgment under review. **This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course.**

*Id*. at 29 (bold emphasis added). Additionally, the Supreme Court permitted "a court of appeals presented with a request for vacatur of a district-court judgment" to "remand the case with instructions that the district court consider the request. . . pursuant to Federal Rule of Civil Procedure 60(b)." *Id*. Here, the Seventh Circuit has ordered the United States to inquire as to whether this Court is inclined to vacate its Orders.

Under Rule 60(b) of the Federal Rules of Civil Procedure, this Court may relieve a party from an order when "applying it prospectively is no longer equitable" or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5) & (6). In considering a Rule 60(b) motion, this Court need not use the exceptional circumstances test described by the Supreme Court in the *Bancorp* case and, instead, should balance the equities of public and private factors to determine whether vacatur is appropriate. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co*., 481 F.3d 1002, 1003 (7th Cir. 2007) ("on remand the district court would not be cabined by the 'exceptional circumstances' test"); *see also Obrycka v. City of Chicago*, – F. Supp.2d –, 2012 WL 6642354* 2 (N.D. Ill. 2012); *Mayes*

*v. City of Hammond, Ind*., 631 F. Supp. 2d 1082, 1087-88 (N.D. Ind. 2008); *Orlowski v. Ericksen*, 2010 WL 2401938 * 2 (N.D. Ill. 2010); *but cf Valero Terrestrial Corp. v. Paige*, 211 F.3d 113, 116-21 (4th Cir. 2000).

Often, however, the considerations appellate courts use to determine whether the "exceptional circumstances" test has been met or whether vacatur is otherwise appropriate are similar to those lower courts consider in determining whether to vacate their own decisions. *Obrycka*, 2012 WL 6642354; Mayes, 631 F. Supp.2d at 1087-89; *Orlowksi*, 2010 WL 2401938 *2 (all citing *Bancorp* in support of their Rule 60(b) decisions); *see also Valero Terrestrial*, 211 F.3d at 117. As such, the United States has cited some appellate decisions considering vacatur below. Nonetheless, District Courts have more discretion than appellate courts, and can exercise that discretion to vacate their own judgments in light of, or as conditions precedent, to settlement. *Mayes*, 631 F. Supp.2d at 1086 n.2.

The United States requests that this Court indicate that it is likely to vacate its decisions because the public and private interests - which overlap as the United States is a party - favor the relief.

**The Private And Public Factors Favor Vacatur.**

The United States recognizes that the public has an interest in judicial precedents and that those precedents are presumptively correct.[3] *Bancorp*, 513

[3] By petition filed with this Court on May 9, 2013, OneWest Bank, F.S.B. ("OneWest"), a non-governmental entity, removed to this federal Court under diversity jurisdiction the rehabilitation action or portions of that action. *See In the*
(footnote continued on next page)

U.S. at 26. Additionally, the United States is mindful that judicial resources were expended with the oral argument and the writing of the two Orders. Nonetheless, here it was in the public's and parties' interest to resolve the merits of these tax disputes, and the only way to do so was to moot the current appeals. Under these circumstances, the public's interests, as well as the interests of the parties, favors vacatur.

This Court's Orders and the related proceedings in the other courts involved different issues, both overall and with respect to the United States. The AFGI bankruptcy case and the AAC segregated-account rehabilitation involved multiple parties, and their resolutions required the approval of a complex reorganization plan in the case of AFGI and a complex rehabilitation plan in the case of the AAC segregated account. Further, those other cases involved the merits issues - i.e., the substantive correctness of the $700 million refund, the collectability of any assessment to recover that refund, the accounting method used by AFGI, and AFGI's multi-billion dollar net operating losses. In contrast, this Courts' Orders involved the interplay between various federal jurisdictional statutes and the McCarran-Ferguson Act, as well as *Burford* abstention.

---

*Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corp.*, Case No. 13-cv-325 (W.D. Wis.) (dkt. #1). The Commissioner then moved this Court on May 21, 2013 to remand all aspects of the OneWest removal. (*See id.* at dkt. #4.) The Commissioner's brief in support of his remand motion addresses the relationship between the United States' request that this Court's prior orders as to the United States be vacated and the arguments addressed in the Commissioner's motion for remand as to OneWest. (*See id.* at dkt. #5, at pg. 1, ftn. 1.)

If the tax and collection issues in the bankruptcy and rehabilitation cases had not been resolved on their merits, there was a significant possibility that the reorganization plan for AFGI and the rehabilitation plan of the Ambac Segregated Account would fail, which would be detrimental to a large number of creditors and other interested parties. As the Insurance Commissioner pointed out, the $700 million represented "a material part of the claims-paying resources available to satisfy claims of the Segregated Account."[5] Additionally, if these issues had not been resolved, there was also a possibility that the tax (in whatever sum was ultimately determined by the bankruptcy court to be owed) would be rendered uncollectible.

The United States was thus faced with a difficult decision. Pursue its jurisdictional appeals in this case - issues that are important and that may arise again - or resolve a billion-dollar tax dispute that, if not resolved, (1) could disrupt what the Wisconsin Insurance Commissioner described as "the largest insurer delinquency proceeding in Wisconsin history"[6] and (2) might result in rendering uncollectible whatever amount of tax was ultimately determined to be owed. The

---

[5] *In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation* Case No. 10-778 (W.D. Wis.), Dkt. # 21, Commissioner's Brief in Opposition at 2; *see also In re Rehabilitation*, 782 F. Supp. 2d at 749-50 (W.D. Wis. 2011) ("[a]llowing the United States to proceed against Ambac or any of the affiliates and subsidiaries" to recover the tentative refund "would amount to pulling out the linchpin that secures the entire enterprise").

[6] *In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation* Case No. 10-778 (W.D. Wis.), Dkt. # 15, Commissioner's Brief in Support of Motion to Remand at 1.

United States' motivation in resolving all of these cases was to reach a settlement of the substantive tax-accounting issues from the bankruptcy and the collectability of any tax liability from the rehabilitation case. Reaching a settlement on the merits-based issues, however, necessarily would moot the jurisdictional appeals in the Seventh Circuit. To be sure, although the settlement agreement required the dismissal of the appeals, had dismissal not been included as a term, the result would have been the same. Once the merits got resolved, including provision for payment of the agreed-to tax, the settlement would have mooted the appeals.

The public's and the parties' interests favored resolving the merits of the tax issues and now favor vacating the Court's earlier orders to permit the novel issues pertaining to the United States and federal subject matter jurisdiction to be relitigated in a federal forum in a future case, including to an appellate conclusion, unrestrained by a lower court decision that was mooted before it could be reviewed.[7] To do otherwise would, in the future, create the inaccurate impression that the United States acquiesced in this Court's resolution of the jurisdictional issues and potentially hinder the settlement of complex, multi-issue, and cross-jurisdictional cases. Appellate courts considering these multi-issue, cross-jurisdictional cases often hold that vacatur is appropriate. *Alvarez v. Smith*, 558

[7] Congress amended the law in 2011 to make unequivocal the United States' right to appeal a removed case that has been remanded back to state court. 28 U.S.C. §§ 1442, 1447(d).

U.S. 87 (2009); *In re Marcola*, 2012 WL 995289 (E.D. Mich. 2012) (bankruptcy court appeal).

Subsequent to *Bancorp*, the Supreme Court in *Alvarez v. Smith* held that the vacatur prohibition articulated in *Bancorp* did not apply to a federal case that challenged a procedure used by Illinois in seizing property and became moot on appeal when Illinois voluntarily dismissed related state-court actions for reasons unrelated to the federal action. 558 U.S. at 94-96. The Court "conclude[d] that the terminations here fall on the 'happenstance' side of the line." *Id*. at 95. In this regard, the Court noted that the related actions: (i) were in a different court system (the Illinois courts) without a procedural link to the federal case; (ii) involved different issues (substantive Illinois law, not "the procedural question at issue here" that "no one ... raised"); (iii) were resolved on their substantive merits (Illinois had weighed the evidence and decided against keeping the property); and (iv) were not coordinated with each other or with the federal suit ("the presence of this federal case played no significant role in the termination of the separate state-court proceedings"). *Id*. at 95-97. The Court explained that "if the presence of this federal case played no role in causing the termination of those state cases, there is not present here the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id*. at 97.

A district court in *In re Marcola*, 2012 WL 995289 (E.D. Mich. 2012), granted the United States' motion to dismiss an appeal that was mooted by a

settlement, and also to vacate the bankruptcy court order that had occasioned the appeal. During the pendency of a government appeal from a bankruptcy-court order regarding the scope of the automatic stay, an agreement was reached in the underlying bankruptcy-court proceeding resolving a broader dispute over the payment of the federal taxes of the debtors and their non-debtor corporation, and requiring that the bankruptcy be dismissed. *Id*. at *1-*2. The district court recognized that: (i) the government had settled discrete issues in the ongoing bankruptcy case; (ii) the bankruptcy and the appeal from the automatic-stay order were separate proceedings under the bankruptcy rules; and (iii) the automatic-stay order could have adverse implications for the government in future bankruptcy cases. *Id*. at *3. It therefore decided that the United States was entitled to a vacatur to clear the path for future relitigation of the automatic-stay issue and to avoid the "absurd result" of maintaining a disputed ruling while preventing an appeal because the bankruptcy case was dismissed. *Id*. The district court also recognized "the need not to deter settlements by entities that, of necessity, are parties to large numbers of lawsuits." *Id*.

The decisions in *Alvarez* and *Marcola* both show that in multi-issue and multi-jurisdictional cases where the government is a party, vacatur is appropriate for procedural decisions that involve matters unrelated to the true merits of the parties' dispute. As in those cases, the government is a party here and the Orders relate to procedural issues, as opposed to the merits of the parties' disputes.

Finally, the First Circuit in *Motta* granted vacatur after the parties settled at that court's urging. *Motta v. District Director of I.N.S.*, 61 F.3d 117, 118-19 (1st Cir. 1995). (First Circuit raised during oral argument the possibility of settlement and counsel indicated that INS might be willing to settle only if the lower-court's decision were vacated). As in *Motta*, the settlement that the parties reached here arose after a lengthy court-ordered mediation, which AFGI requested.

**CONCLUSION**

For the reasons set forth, the United States respectfully requests that this Court indicate that it is inclined to grant a motion to vacate the Orders.

Respectfully submitted,

June 10, 2013

KATHRYN KENEALLY
Assistant Attorney General

ROBERT J. KOVACEV
Senior Litigation Counsel, Tax Division

/s/ Hilarie E. Snyder
HILARIE E. SNYDER
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Washington, D.C. 20044
Telephone: (202) 307-2708 (Snyder)
Telephone: (202) 307-6541 (Kovacev)
Fax: (202) 514-6770
hilarie.e.snyder@usdoj.gov
robert.j.kovacev@usdoj.gov

JOHN W. VAUDREUIL
United States Attorney for the Western District of Wisconsin

LESLIE K. HERJE
Assistant United States Attorney
Chief, Civil Division

/s/ Richard Humphrey
_____
RICHARD HUMPHREY
Assistant United States Attorney
660 West Washington Avenue
Suite 303
Madison, WI 53703
Phone: 608-264-5158
Richard.Humphrey@usdoj.gov

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on this 10th day of June, 2013 the foregoing was filed in the Court's electronic filing system which sends notice to all parties of record, including:

Michael B. Van Sicklen
Matthew R. Lynch
Naikang Tsao
Foley & Lardner LLP
150 East Gilman Street
Post Office Box 1497
Madison, Wisconsin 53701
Attorney for Sean Dilweg,
Commissioner of Insurance of the State of Wisconsin

Daniel Warren Stolper
Stafford Rosenbaum LLP
222 West Washington Avenue, Suite # 900
P.O. Box 1784
Madison, Wisconsin 53701-1784
Attorney for Ambac Assurance Corporation

David C. Rice
Wisconsin Department Of Justice
P.O. Box 7857
Madison, Wisconsin 53707
Attorney for the Wisconsin State Circuit Court for Dane County

/s/ Hilarie Snyder
HILARIE SNYDER
Trial Attorney, Tax Division