

**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)	

**APPELLANT’S STATUS REPORT REGARDING
INDICATIVE RULING BY THE DISTRICT COURT**

The United States, the appellant in the above-captioned appeals, is filing this status report in compliance with this Court’s Order of May 15, 2013. Prior to the Court’s order, the United States had filed in

the above-captioned appeals its Unopposed Motion to Dismiss Appeals and to Vacate the Opinions and Orders of the District Court, in which it sought, among other things, vacatur of the District Court's opinions and orders from which it had appealed. Upon receipt of the United States' motion, this Court issued its May 15, 2013 Order stating (emphasis in original):

IT IS ORDERED that the appellant [the United States] should 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 Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1003-04 (7th Cir. 2007). The appellant should file a status report with this court within 14 days after the district court rules on that motion.

The United States complied with this Court's order, and, by unopposed motion, requested that the District Court indicate whether it was inclined to vacate the opinions and orders underlying this consolidated appeal. On July 10, 2013, the District Court filed in each of the proceedings below a memorandum providing an identical indicative ruling. The court stated that it was "inclined to vacate the opinions if the case is returned to this court for that purpose." (Mem. at 5.) The District Court's memoranda containing its indicative rulings are attached for this Court's convenience.

In its memoranda, the District Court noted that the applicable law in this Circuit is set forth in *Marseilles Hydro Power*, 481 F.3d 1002, and that, under that decision, a showing of “exceptional circumstances” is not required for a district court to vacate its own opinions. (Mem. at 4.) The court then agreed that the parties’ arguments set forth adequate reasons for vacating the two opinions for which vacatur was requested. (Mem. at 5.) In this regard, the court noted that the parties argued that the public interest favored the vacatur of its opinions for two reasons.

First, the United States’ decision to relinquish its attempt to obtain a favorable ruling on the jurisdictional issues presented in these appeals allowed a global settlement that (Mem. at 4):

resolve[d] other complex, fact-based issues that affect the success of the entire scheme of rehabilitation and the bankruptcy case involving [Ambac] Financial Group (Ambac’s parent corporation), including the substantive accuracy of the multi-million dollar refund, the collectibility of any attempt to collect the refund, [Ambac] Financial Group’s accounting method and its multibillion dollar net operating losses.

Moreover (Mem. at 4):

had the parties not reached a settlement, it is questionable whether the bankruptcy reorganization and the

rehabilitation could have succeeded or whether any tax liability could have been collected.

Second, vacatur would allow the relitigation, in a federal forum, of the jurisdictional issues presented in these appeals, without the United States “run[ning] the risk that it will be seen as having acquiesced in th[e District C]ourt’s resolution of the jurisdictional issue, which might complicate the defense and settlement of future cases.” (Mem. at 5.)

In light of the District Court’s indicative rulings, the United States respectfully requests that this Court grant its May 9, 2013 motion to dismiss and either vacate the District Court’s opinions and

orders from which it has appealed or, alternatively, remand the cases to the District Court for that purpose.

Respectfully submitted,

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Assistant Attorney General

GILBERT S. ROTHENBERG
Acting Deputy Assistant Attorney General

/s/ Anthony T. Sheehan

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United States Attorney

Dated this 12th day of July, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, I electronically filed the foregoing status report with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I further certify that all counsel in these appeals are registered CM/ECF users who will be served by the CM/ECF system.

/s/ Anthony T. Sheehan

ANTHONY T. SHEEHAN

Attorney

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

IN THE MATTER OF THE
REHABILITATION OF AMBAC
ASSURANCE CORPORATION,

10-cv-778-bbc

THEODORE K. NICKEL, COMMISSIONER
OF INSURANCE OF THE STATE OF
WISCONSIN,

MEMORANDUM

(Dane Cty. Cir. Ct. Civil Case
No.: 10 CV 1576)

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Plaintiff,

v.

11-cv-99-bbc

WISCONSIN STATE CIRCUIT COURT
FOR DANE COUNTY;
THEODORE K. NICKEL, COMMISSIONER
OF INSURANCE OF THE STATE OF WISCONSIN,
as Rehabilitator of the Segregated Account of Ambac
Assurance Corporation; and
AMBAC ASSURANCE CORPORATION,

Defendants.

This case is before the court on the unopposed request from the United States of America for the court to 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 the court's 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. Ambac Assurance Corporation and Theodore K. Nickel, Commissioner of Insurance of the State of Wisconsin, support the request for relief. The Wisconsin State Circuit Court for Dane County takes no position on the request and does not oppose the relief sought by the United States.

The rehabilitation proceedings for Ambac Assurance Corporation were initiated in early 2010 in the Circuit Court for Dane County, the designated state rehabilitation court. The Commissioner of Insurance established a segregated account for part of Ambac's business that includes all policies with material anticipated losses and all other known, potentially material non-policy liabilities of Ambac's general account. The segregated account has no claim-paying assets of its own but is capitalized by a two billion dollar secured note issued by Ambac and an aggregate excess of loss reinsurance agreement provided by Ambac.

In November 2010, Ambac allocated to the segregated account liabilities it had arising from its federal taxes through December 2009, including those related to a \$900 million refund it had received from the Internal Revenue Service. The Commissioner then obtained

an injunction from the Dane County court, barring the United States from taking any action against the segregated account or against Ambac relating to any future tax liability of Ambac. The United States removed the state court action to this court, less any “issues and/or claims in this rehabilitation action that are unrelated to the Internal Revenue Service.” In an order entered on January 14, 2011, I granted the Commissioner’s motion to remand.

The United States appealed the order. Before the appeal was heard, the parties settled the dispute. The settlement was finalized in the Southern District of New York (where a related bankruptcy proceeding was pending) and included a provision to the effect that the Wisconsin Commissioner of Insurance and Ambac Assurance Company would support any motion brought by the United States seeking to vacate the January 14, 2011 order entered in this court and a later order entered on February 18, 2011 in United States of America v. Wisconsin State Circuit Court for Dane County, case no. 11-cv-99-bbc, in which I held that this court had no jurisdiction to consider a motion for a preliminary injunction filed by the United States against the rehabilitation court. Order, dkt. #42.

As part of the settlement agreement, the parties agreed to seek dismissal of the appeals of these orders pending in the Court of Appeals for the Seventh Circuit. The United States moved to dismiss the appeals and vacate the opinions and orders of this court. On May 15, 2013, the court of appeals ordered 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).” Snyder Decl., dkt. #47 (10-cv-778-bbc), dkt. #57 (11-cv-99-bbc), exh. A.

OPINION

Under the applicable law in this circuit, Marseilles Hydro Power LLC v. Marseilles Land & Water Co., 481 F.3d 1002 (7th Cir. 2007), a district court may vacate an opinion under Fed. R. Civ. P. 60(b), which allows the court to relieve a party from an order in a number of different circumstances, including those in which the judgment has been satisfied, released or discharged, Rule 60(b)(5), or for any other reason that justifies relief. Rule 60(b)(6). A showing of “exceptional circumstances” is not required. Marseilles Hydro Power, 481 F.3d at 1003.

The parties argue that the public interest favors vacatur of both opinions. First, the court’s opinions were limited to questions of jurisdiction as it related to the rehabilitation proceeding, the McCarran-Ferguson Act and abstention, whereas the settlement resolves other complex, fact-based issues that affect the success of the entire scheme of rehabilitation and the bankruptcy case involving American Financial Group (Ambac’s parent corporation), including the substantive accuracy of the multi-million dollar refund, the collectibility of any attempt to collect the refund, American Financial Group’s accounting method and its multi-billion dollar net operating losses. Although the bankruptcy and rehabilitation proceedings were separate proceedings in two different courts, both are resolved by the parties’ settlement; had the parties not reached a settlement, it is questionable whether the bankruptcy reorganization and the rehabilitation could have succeeded or whether any tax liability could have been collected. The United States chose to relinquish its attempt to obtain a favorable ruling on the jurisdictional issues in order to resolve the dispute, assure

the collectibility of at least a portion of the tax to which it was entitled and protect the rehabilitation proceedings.

Second, the parties argue, vacating this court's opinions will allow the same or similar issues to be relitigated in a federal forum in a future case and appealed by the United States if the district court order is unfavorable. Without vacatur, the United States runs the risk that it will be seen as having acquiesced in this court's resolution of the jurisdictional issue, which might complicate the defense and settlement of future cases.

The parties' arguments set forth adequate reasons to support the grant of the parties' request for vacatur of the two opinions at issue. Therefore, I am inclined to vacate the opinions if the case is returned to this court for that purpose.

Entered this 10th day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

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FOR THE WESTERN DISTRICT OF WISCONSIN

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Entered this 10th day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge