STATE OF WISCONSIN
SUPREME COURT

Case No. 2011AP987

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

United States of America, Appellant

PETITION FOR REVIEW

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PETITION FOR REVIEW

The United States of America, appellant, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § (Rule) 809.62, to review the decision of the Court of Appeals, District IV, in *In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation*, appeal no. 2011AP987, filed on May 3, 2011.

ISSUES PRESENTED FOR REVIEW

The Court of Appeals dismissed the appeal of the United States for lack of jurisdiction because the United States' notice of appeal was signed by a United States Department of Justice attorney who was not a member of the Wisconsin bar and had not sought admission *pro hac vice*. That holding raises two issues warranting review.

1. Does Wisconsin Supreme Court Rule (SCR) 23.02(2) require a Department of Justice attorney, if not licensed to practice law in Wisconsin, to follow the procedures for appearing *pro hac vice* in the Wisconsin courts, or do the exceptions in SCR

23.02(h) or (n) for "[a]ctivities which are preempted by federal law" or employees of "[g]overnmental agencies . . . carrying out responsibilities provided by law" render inapplicable the exception for *pro hac vice* admission?

2. Does 28 U.S.C. § 517, by virtue of the Supremacy Clause of the United States Constitution, preempt any Wisconsin law that would otherwise require a Department of Justice attorney, not licensed to practice in Wisconsin, to follow the procedures for appearing *pro hac vice* in the Wisconsin courts?

These issues were raised in the United States' April 4, 2011 Opposition to the Wisconsin Insurance Commissioner's Motion to Dismiss the United States' Appeal for lack of Jurisdiction and ruled on in the Court of Appeals' May 3, 2011 order. (A. 5–10.)[1] The court held that neither the preemption exception nor the government-employee exception in SCR 23.02(2) exempted the

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[1] "A." references are to the pages of the appendix attached to this Petition. Other filings discussed herein are available at http://ambacpolicyholders.com/court-filings, which organizes the Ambac filings by date and description. We likewise identify filings available on that website by date and description.

Justice Department attorney from the procedures for appearing *pro hac vice*, and that 28 U.S.C. § 517 did not preempt the Wisconsin procedures for appearing *pro hac vice*. (A. 6–9.)

BRIEF STATEMENT OF THE CRITERIA FOR REVIEW

The reasons the Supreme Court should grant review are:

The first issue set forth above raises the question whether the Court of Appeals erred in interpreting the licensing and membership exemptions in SCR 23.02(2). That rule provides that "[a] license to practice law and active membership in the State Bar of Wisconsin are not required . . . ," if a person is engaged in any of twenty-three listed activities in Wisconsin, "regardless of whether these activities constitute the practice of law." The exempted activities include "Governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law" (SCR 23.02(2)(n)) and "Activities which are preempted by federal law" (SCR 23.02(2)(h)). We maintain that the Court of Appeals incorrectly engrafted the *pro hac vice* requirements — a separate exception provided by SCR 23.02(2)(a) — onto those

other exemptions. By deciding this issue, this Court will help develop, clarify or harmonize the law with respect to (1) a novel question, the resolution of which will have statewide impact, and (2) a question of law of the type that is likely to recur unless resolved by this Court.

The second issue only needs to be addressed if the Court decides the first issue adversely to the United States. It presents a real and significant question of federal constitutional law. The holding of the Court of Appeals conflicts with 28 U.S.C. § 517 and other related federal statutes which authorize the Attorney General to send his attorneys into any state or federal court to attend to the interests of the United States. Under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2), the federal statutes preempt any contrary State law.

STATEMENT OF FACTS AND OF THE CASE

Ambac Assurance Corporation (Ambac) is a Wisconsin insurance company and a subsidiary of Ambac Financial Group,

Inc. (AFGI), a holding company headquartered in New York. (A. 15–16.) After Ambac experienced financial difficulties, it, with the approval of the Wisconsin Insurance Commissioner, created a "segregated account" that is being rehabilitated by the Circuit Court for Dane County, Wisconsin (No. 10CV1576). (A. 16–18.) Initially, Ambac's most troubled policies (approximately 1,000 out of a total of 15,000 policies) were allocated to the segregated account, with the healthier policies remaining in Ambac's "general account." (A. 17.)

AFGI received approximately $700 million in tentative federal income-tax refunds[2] from the Internal Revenue Service (IRS). (A. 19.) AFGI transferred the refunds to Ambac, and Ambac was severally liable to repay the tentative refunds if they

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[2] The refunds are "tentative" because the IRS issued them under 26 U.S.C. § 6411. That statute requires the IRS to issue certain refunds quickly and with minimal review, but gives the IRS the right to conduct a later audit and to recapture any erroneously paid funds.

were erroneously obtained.[3] (*Ibid.*) 26 C.F.R. §§ 1.1502-6(a); 1.1502-78(b)(2). In early November 2010, Ambac purported to allocate its potential liability to repay the tentative refund to the segregated account. (A. 19–20.) The corresponding $700 million of refunded money remained in the general account, however. (*See* A. 19.) The allocation was accompanied by an *ex parte* injunction by the Circuit Court prohibiting the IRS from attempting to collect the $700 million from either Ambac's segregated account or its general account, which was not in rehabilitation. (A. 20.) On January 24, 2011, the Circuit Court entered a final, appealable order approving Ambac's plan of rehabilitation. The plan made the injunction against the IRS permanent.

On March 9, 2011, the United States timely filed a protective notice of appeal in the Circuit Court. (A. 35–37.)

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[3] The IRS has recently completed an audit of the tentative refunds, and in early May 2011, filed a proof of claim in the federal bankruptcy case of AFGI for more than $800 million. (Bankr. S.D.N.Y. – No. 1:10-bk-15973-scc.)

Other than a copy of a notice of removal (required by 28 U.S.C. § 1446(d)), the notice of appeal was the first document filed by the United States in the Circuit Court.[4] The United States' notice of appeal was signed by Robert J. Kovacev, an attorney in the Tax Division of the United States Department of Justice, who was authorized to represent the United States but was not admitted to the Wisconsin bar. (A. 5–6, 37.)

On March 25, 2011, the insurance commissioner moved in the Wisconsin Court of Appeals for District IV to dismiss the United States' appeal, arguing that Wis. Stat. § 802.05(1) requires all filings in the Wisconsin state courts to be signed by

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[4] Upon removal to the United States District Court for Western District of Wisconsin (No. 3:10-cv-00778-bbc), the United States maintained that the Dane County Circuit Court lacked jurisdiction to bind the United States to the purported allocation of the refund liability to the segregated account and to enjoin collection broadly. After the District Court remanded for lack of removal jurisdiction, the United States filed a separate suit under the District Court's original jurisdiction seeking injunctive and declaratory relief, which was thereafter dismissed for lack of jurisdiction (No. 3:11-cv-00099-bbc). Appeals from both of those suits are currently pending in the United States Court of Appeals for the Seventh Circuit (Nos. 11-1158; 11-1419).

an attorney admitted in Wisconsin.[5] In its April 4, 2011 opposition, the United States responded that 28 U.S.C. § 517 permitted Mr. Kovacev to represent the United States in the Wisconsin courts without being admitted to the Wisconsin bar.

In a May 3, 2011 order, the Court of Appeals granted the insurance commissioner's motion to dismiss. (A. 5–10.) The court noted that Mr. Kovacev is not a Wisconsin attorney, that he did not seek to appear *pro hac vice*, and that the notice of appeal was not co-signed by a Wisconsin attorney. (A. 5–6.) Although the court recognized "that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar membership in order to practice law in our state courts" (A. 7–8), it nevertheless rejected the United States' argument premised on 28 U.S.C. § 517, finding no conflict between that statute and the Wisconsin *pro hac vice* rules (A. 6–9).

[5] The insurance commissioner also argued for dismissal on the independent ground that the United States did not raise in the Circuit Court any of the issues listed in its docketing statement. The Court of Appeals did not address that argument.

The Court of Appeals' analysis focused on SCR 23.02(2), which allows individuals to engage in a list of lettered activities "regardless of whether these activities constitute the practice of law." SCR 23.02(2)(a) allows the practice of law by non-resident counsel or registered in-house counsel pursuant to the *pro hac vice* rules of SCR 10.03(4). The court engrafted the *pro hac vice* exception onto the other exceptions relied upon by the United States. Thus, the court held that the preemption exception of SCR 23.02(2)(h) was inapplicable because the *pro hac vice* requirements of SCR 10.03(4) did not conflict with, and were not preempted by, 28 U.S.C. § 517 (despite the court's recognition that § 517 empowered the Attorney General to send non-Wisconsin attorneys to represent the United States). (A. 7–8.) The court also acknowledged the government-employee exception of SCR 23.02(2)(n), but it again looked to "the sponsorship and co-signature requirements for *pro hac vice* appearances" and to the fact that they had not been followed with respect to the notice of appeal. (A. 8–9.) Finding the United States' notice of appeal to

be fundamentally flawed, the court dismissed the appeal for lack of jurisdiction. (A. 9–10.) The Court of Appeals severed the United States' appeal from the other challenges before it and assigned that appeal a separate docket number "to make clear that this is a final and appealable order with respect to the United States." (A. 10.)

ARGUMENT

I

The Court should grant review because a decision interpreting the federal and Wisconsin laws relevant to the practice of United States Department of Justice attorneys in the Wisconsin state courts will develop and clarify the law on a novel legal question, the resolution of which will have statewide impact and recurring significance not only to Justice Department attorneys representing the United States in the Wisconsin state courts, but also to Indian tribes

A. Introduction

Wisconsin Statute § 802.05(1) provides, in part, that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual

name, or, if the party is not represented by an attorney, shall be signed by the party." Section 802.05(1) further states that "[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."

Although the signing of court filings falls within the definition of the practice of law (*see* SCR 23.01(3)), SCR 23.02(2) states that "[a] license to practice law and active membership in the State Bar of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin, regardless of whether these activities constitute the practice of law." The listed activities include:

> (a) Practicing law pursuant to SCR 10.03(4) by a nonresident counsel or registered in-house counsel.[[6]]
>
> * * * *
>
> (h) Activities which are preempted by federal law.

[6] SCR 10.03(4)(b) provides a *pro hac vice* procedure for nonresident counsel. SCR 10.03(4)(f) allows for practice by registered in-house counsel.

*　　　　*　　　　*　　　　*

(n) Governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law.

Both the Wisconsin signature requirement and the *pro hac vice* procedures noted by SCR 23.02(2)(a) are tied to concerns about the unauthorized practice of law. The purpose of requiring an authorized attorney to sign court filings include protecting the public, ensuring that any attorney practicing law in Wisconsin is accountable for following the Wisconsin rules of professional responsibility, and ensuring that the signing attorney has reflected upon the filing in question and judged it to be meritorious. *See, e.g.*, *Schaefer v. Riegelman*, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d 715, ¶¶22–23, 29–30, 33 (Wis. 2002); *Brown v. MR Group, LLC*, 2004 WI App 122, 274 Wis. 2d 804, 683 N.W.2d 481, ¶¶11–13 (Wis. App. 2004). The purpose of *pro hac vice* admissions likewise is to control the unauthorized practice of law and to insure that the public is not put upon or damaged by inadequate or unethical counsel. *Filppuila-McArthur ex rel.*

Angus v. Halloin, 2001 WI 8, 241 Wis. 2d 110, 622 N.W.2d 436, ¶¶36, 56, 59 (Wis. 2001). Accordingly, a court can revoke *pro hac vice* privileges for conduct manifesting "incompetency to represent a client in a Wisconsin court or unwillingness to abide by the rules of professional conduct for attorneys or the rules of decorum of the court." SCR 10.03(4)(e); *Filppula-McArthur*, 622 N.W.2d 436, ¶37.

B. Developing and clarifying the law on a novel legal question regarding the interaction of 28 U.S.C. § 517 with SCR 23.02(2)

This case presents a novel legal question because the notice of appeal was signed by an attorney of the United States Department of Justice (Mr. Kovacev, who is not a member of the Wisconsin bar), representing the interests of the United States under the authority granted to the Attorney General by Title 28 of the United States Code. Pursuant to 28 U.S.C. § 515(a), "[t]he Attorney General or any other officer of the Department of Justice . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or

criminal . . . which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought." The Attorney General's authority in the instant context is more specifically confirmed by 28 U.S.C. § 517, which states that the Attorney General may send any officer of the Justice Department "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, *or in a court of a State*, or to attend to any other interest of the United States" (emphasis added).

The pertinent case law regarding the signing of court filings was developed entirely in the context of private parties and practitioners. Thus, *pro se* parties, entitled by law to represent themselves, were allowed to correct unsigned notices of appeal. *State v. Seay*, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437, ¶¶1–6, 10 (Wis. App. 2002). Similarly, a Wisconsin attorney who forgot to sign a complaint was allowed to correct that error. *Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720

N.W.2d 108, ¶¶2, 5, 14–15, 18 (Wis. App. 2006). On the other hand, a Wisconsin attorney was not allowed to submit an untimely amended notice of appeal to correct an original notice of appeal that had been signed in the attorney's name by his non-attorney legal assistant. *Brown*, 683 N.W.2d 481, ¶¶1–2, 3 n.2, 5–7, 10–13. This Court also has upheld the dismissal of a complaint signed by a Minnesota attorney on the instructions and in the name of her supervising partner, a Wisconsin attorney. *Schaefer*, 639 N.W.2d 715, ¶¶1–5, 22–23 (defect was fundamental, but also defect never properly cured). But neither the insurance commissioner in his filings, nor the Court of Appeals in its opinion, has cited (and we have not found) any cases interpreting Wis. Stat. § 802.05(1) and SCR 23.02(2) in the context of 28 U.S.C. § 517.

The Court of Appeals correctly recognized "that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar membership in order to practice law in our state courts." (A. 7–8.) But it held that the

preemption exception of SCR 23.02(2)(h) was inapplicable because the *pro hac vice* requirements of SCR 10.03(4) did not conflict with, and thus were not preempted by, 28 U.S.C. § 517. (*Ibid.*) The Court of Appeals also acknowledged the government-employee exception in SCR 23.02(2)(n), but it again looked to "the sponsorship and co-signature requirements for *pro hac vice* appearances" and the fact that they had not been followed with respect to the notice of appeal in concluding that the government-employee exception was not applicable. (A. 8–9.)

This case, therefore, presents the novel issue whether the Court of Appeals correctly read the preemption and government-employee exceptions of SCR 23.02(2)(h) and (n) as incorporating the separate *pro hac vice* exception of SCR 23.03(2)(a) in a case involving a Justice Department attorney carrying out his duties under 28 U.S.C. § 517. We maintain that the Court of Appeals erred in interpreting Wisconsin law to preclude Justice Department attorneys from carrying out their duties without applying for *pro hac vice* status, and that this Court should grant

the instant petition to address (and to clarify the law with respect to) this important issue. We also maintain that, pursuant to the Supremacy Clause of the United States Constitution, 28 U.S.C. § 517 preempts the Wisconsin bar admissions and *pro hac vice* requirements in any event. *See also Jensen v. Wisconsin Patients Comp. Fund*, 2001 WI 9, 241 Wis. 2d 142, 621 N.W.2d 902, ¶16 (Wis. 2001) (courts seek to avoid constitutional questions if case otherwise resolvable).

C. The Court of Appeals erred when it engrafted the *pro hac vice* exception of SCR 23.02(2)(a) onto the separately listed preemption and government-employee exceptions of SCR 23.02(2)(h) and (n)

As explained above, SCR 23.02(2) states that a Wisconsin law license is not required for a person engaged in any one of a list of separate activities, "regardless of whether these activities constitute the practice of law." The excepted activities include: (1) practicing law after being admitted *pro hac vice* under SCR 10.03(4); (2) activities preempted by federal law; and

(3) employees of government agencies and Indian tribes "carrying out responsibilities provided by law."

The text of SCR 23.02(2) therefore provides no basis for engrafting one of those exceptions — the *pro hac vice* exception of SCR 23.02(2)(a) — onto the entirely separate preemption and government-employee exceptions. The general language of SCR 23.02(2) states that if a person is engaging in an excepted activity, "[a] license to practice law and active membership in the State Bar of Wisconsin are not required . . . regardless of whether [the activity] constitute[s] the practice of law." SCR 23.02(2) then provides *separate* exceptions for nonresident counsel "[p]racticing law pursuant to SCR 10.03(4)" (*i.e.,* the *pro hac vice* procedures), for activities which are preempted by federal law, and for employees of government agencies and Indian tribes "carrying out responsibilities provided by law." The Court of Appeals thus had no textual basis for concluding that one of those exceptions — the *pro hac vice* exception — somehow operated to disable the application of the other, separately enumerated exceptions for

activities preempted by federal law and for employees of government agencies and Indian tribes carrying out their responsibilities.

Once the Court of Appeals recognized the authority granted by 28 U.S.C. § 517 to the Attorney General to send attorneys not licensed in Wisconsin into the Wisconsin state courts to represent the interests of the United States (*see* A. 7–8), it had no authority, under the Rules of this Court, to deny the Attorney General the benefit of either the federal preemption exception or the government-employee exception. Moreover, the drastic consequence of the holding of the court of appeals — the dismissal of an appeal in a case where $700 million is at issue — raises a question of fundamental fairness, inasmuch as a plain reading of the exemptions would not alert a Justice Department attorney of the court's newly created rule requiring a Justice Department

attorney acting pursuant to a federal statute to seek *pro hac vice* admission before he can appear as attorney of record.[7]

For example, SCR 23.02(2)(n) requires only that a government employee be "carrying out responsibilities provided by law" for that exception to be applicable. Correctly treating that exception as a separate exception would allow employees of the government (and of Indian tribes) to carry out their legal responsibilities without having to appear *pro hac vice*. Indeed, it is not at all clear why SCR 23.02(2) would have been drafted with separate, broadly worded exceptions for preempted activities and for government employees if the Court of Appeals were correct that the intent of the rule is to subject attorneys to the *pro hac vice* rules in any event. *Cf. Mueller v. McMillan Warner Ins. Co.*,

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[7] The Court of Appeals erred in stating that § 6-1.120 of United States Attorneys' Manual directs that local counsel be listed as counsel of record in civil tax cases. (A. 8) Instead, that section states that the United States Attorney generally "will be listed as an attorney on the case" (not as counsel of record), and that "[d]epending on local practice, and after consultation, an Assistant United States Attorney may be listed as counsel of record in a particular case."

2006 WI 54, 290 Wis. 2d 571, 714 N.W.2d 183, ¶27 (Wis. 2006) (statute should be construed so that no word or clause rendered surplusage, and every word given effect if possible). By engrafting the *pro hac vice* exception onto the preemption and government-employee exceptions, the Court of Appeals ignored the structure of the Rule and created a trap even for wary government attorneys, like Mr. Kovacev, who examined SCR 23.02(2) and acted consistently with the Rule as written.

This analysis is reinforced by the history of the government-employee exception. SCR 23.02(2)(n) was initially drafted to encompass only government agencies and their employees carrying out responsibilities provided by law. (A. 42–43.)[8] The Wisconsin Tribal Judges Association requested, and obtained, an amendment to this provision to add "Indian tribes" alongside "Government agencies." (*Ibid.*) The amendment was

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[8] The cited written testimony is from this Court's publicly available archives. Related oral testimony is available at: mms://sc-media.wicourts.gov/sc-media/mp3/rh0709am2.mp3 starting at 57:20 and ending at 1:02:37.

done specifically to allow tribes to be represented in the Wisconsin state courts by nonlawyers without the participation of a Wisconsin attorney. (*Ibid.*) This history shows that the government-employee exception encompasses non-lawyers, who cannot seek to appear *pro hac vice*. It thus confirms that the exception is not subject to the *pro hac vice* rules.

D. Justice Department attorney Kovacev fit within the preemption and government-employee exceptions when he signed the United States' notice of appeal

The United States Supreme Court has "long recognized" that the Federal Government is unlike any private litigant "both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates." *United States v. Mendoza*, 464 U.S. 154, 159 (1984). Moreover, "Government litigation frequently involves legal questions of substantial public importance." *Id.* at 160. In light of that reality, Congress has enacted a set of interrelated statutes that empower the Attorney General to attend to the United States' legal interests throughout the nation, while still

recognizing the legitimate interest of federal and state courts in the supervision of litigation before them.

Taken together, 28 U.S.C. §§ 515–519 reserve to the Department of Justice the conduct of virtually all litigation in which the United States, an agency, or an officer thereof is a party, under the direction and supervision of the Attorney General. *See also* 28 U.S.C. §§ 541–550 (establishing a United States Attorney's office for each judicial district). The focus of the instant case, again, is 28 U.S.C. § 517, which states that the Attorney General may send any officer of the Department of Justice "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, *or in a court of a State*, or to attend to any other interest of the United States" (emphasis added).[9] In turn, 28 U.S.C. § 530B(a) respects the legitimate interests of the courts in supervising the practice of the attorneys who appear before

[9] Section 530C(c)(1) of 28 U.S.C. ensures that the officer dispatched by the Attorney General will be an attorney licensed in at least one State, territory, or the District of Columbia.

them by providing that "[a]n attorney for the Government[10] shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Section 530B thus requires Justice Department attorneys to abide by the rules of professional responsibility and generally applicable procedural rules "governing attorneys in each State" where they perform their duties. *See also* 28 C.F.R. § 77.1(b) (§ 530B "requires Department attorneys to comply with state and local federal court rules of professional responsibility"), § 77.2(h) (phrase "state laws and rules . . . governing attorneys" means ethics rules that would subject any attorney to professional discipline); § 77.4(a) (similar).

Under the authority provided by 28 U.S.C. § 517, Mr. Kovacev was authorized and directed by a delegate of the Attorney General to attend to the interests of the United States

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[10] An "attorney for the Government" includes any attorney employed by the Tax Division. 28 U.S.C. § 530B(c); 28 C.F.R. § 77.2(a).

in the *Ambac* litigation, which included filing a notice of appeal in the Dane County Circuit Court. Thus, when Mr. Kovacev filed the notice of appeal at issue, he was both engaging in a preempted activity and acting as an employee of a government agency carrying out responsibilities provided by law, placing him within the exceptions provided by SCR 23.02(2)(h) and (n). Because he fit within both of those exceptions, Mr. Kovacev was entitled to engage in activities constituting the practice of law in Wisconsin on behalf of the United States, and thus was able to serve, according to the terms of Wis. Stat. § 802.05(1) and SCR 23.02(2), as an "attorney of record" for the United States when signing the notice of appeal.

Because the United States' notice of appeal was signed by its attorney of record, it was not defective, and the Court of Appeals erred in holding otherwise.

E. Statewide impact and recurring significance

The Court of Appeals' opinion has implications beyond this case. Justice Department attorneys often appear in state courts

to represent the interests of the United States. As already explained, 28 U.S.C. §§ 515–519 reserve to the Department of Justice the conduct of virtually all litigation — across the country and involving a multitude of issues — in which the United States is interested.

The attorneys dispatched to represent the interests of the United States often serve in the Department's litigating divisions, headquartered in Washington, D.C. Staffing appropriate cases from the Department's headquarters components promotes efficiency and ensures that the United States takes consistent positions on the substantive issues presented. The attorneys in the litigating divisions (such as the Tax Division) have specialized expertise in their areas and are backed by appropriate administrative resources so that they can effectively represent the United States — anywhere in the nation — in litigation concerning their specialized areas. Local United States Attorney's offices are thereby freed to concentrate on managing their own heavy dockets.

For example, the authority to litigate most civil tax cases (outside of Tax Court cases handled by the IRS) is delegated to the Tax Division, not to local United States Attorney's offices. 28 C.F.R. § 0.70. As a result, most of those offices do not dedicate significant resources to tax matters. State-court suits involving Tax Division attorneys include probate actions in which the IRS files a claim against the estate, receiverships, actions involving property against which the IRS has a lien, and interpleader actions. Such proceedings can arise on an expedited basis and require immediate action by the Tax Division trial attorney assigned to the case. Such proceedings can also be legally or factually complex. The instant case, for example, involves over $700 million in tentative income tax refunds and has been described by the insurance commissioner as the largest insurance delinquency proceeding in Wisconsin history. (*See* 12/17/10 brief supporting remand, ECF p. 8.) The Tax Division of the Department of Justice has the specialized attorneys best able to

devote the time and resources necessary to represent the interests of the United States in these proceedings.

Against this backdrop, the *pro hac vice* requirements adopted by the Court of Appeals impose an unnecessary and recurring burden on the United States. Under SCR 10.03(4)(b), headquarters attorneys (that is, Justice Department attorneys based in Washington, D.C.) not only must apply for admission *pro hac vice*, but also must "appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the action or proceeding." Although SCR 10.03(4)(b) itself does not define the extent to which the Wisconsin attorney must appear and participate, the Tenth Judicial Administrative District, for example, has adopted rules for lawyers admitted *pro hac vice*. Under those rules, an attorney admitted *pro hac vice* must be accompanied by a Wisconsin lawyer at all proceedings held on the record (including depositions), and must review and sign all papers to be filed with a circuit court. *See also State v. Mosley*,

201 Wis. 2d 36, 547 N.W.2d 806, 811 (Wis. App. 1996) (participation by local attorney includes "making, at a minimum, one in-court appearance," but court can impose additional requirements).

United States Attorney's offices can be distant from the local court in which a matter is proceeding. For example, the United States Attorney for the Western District of Wisconsin represents the United States in the western two-thirds of Wisconsin from offices in Madison, Wisconsin. If a headquarters attorney is assigned to a matter in the Circuit Court for Eau Claire County (the closest county to Madison in the Tenth Judicial Administrative District, *supra*), the rules of that district would require an Assistant United States Attorney to set aside his own docket and make a round trip of approximately 350 miles every time the headquarters attorney needed to appear at a hearing.

But, even if there were no live-appearance requirements, signing a court paper, even a notice of appeal, is not a ministerial

act. *Brown*, 683 N.W.2d 481, ¶¶1, 11–13. To comply with Wis. Stat. § 802.05(2)'s reasonable-inquiry requirement, an Assistant United States Attorney would have to set aside his own assigned cases to familiarize himself, on an ongoing basis, with the facts and the law of matters already being competently handled by headquarters attorneys, even to file a notice of appeal. To require Assistant United States Attorneys to acquire and maintain that level of familiarity would place considerable obligations on the local attorneys, and would invariably waste already stretched government resources. Indeed, sometimes a local United States Attorney's office cannot litigate a given case, either because the office is particularly small (and the case large), or because the case poses unique issues requiring specialized expertise. For the same reasons that the local office could not handle the case in the first place, it would not be feasible for the attorneys therein to serve as responsible local counsel for the Justice Department lawyers brought in from elsewhere to handle the matter.

Relieving headquarters attorneys of the *pro hac vice* requirements would not detrimentally affect the Wisconsin courts. There is no concern about protecting the public from unscrupulous or incompetent counsel. The United States is a sovereign entity capable of attending to its own interests, and Congress has seen fit to assign to the Department of Justice primary responsibility for representing the United States. 28 U.S.C. § 516. As already explained, Justice Department attorneys headquartered in Washington, D.C., are generally specialists in their practice areas, and they work under the close supervision of more senior attorneys. Moreover, prosecution of all cases beyond the trial level must be approved by the Office of the Solicitor General, located in Washington, D.C. 28 C.F.R. § 0.20(b). Thus, the Wisconsin courts need not be concerned about the Department of Justice pursuing an appeal on behalf of the United States without first giving full and careful consideration to the merits of that appeal. *See Schaefer*, 639

N.W.2d 715, ¶30 (requiring "moment of reflection" by attorneys before signing notice of appeal).

Furthermore, 28 U.S.C. § 530B(a) satisfies any concern about Justice Department attorneys being subject to Wisconsin ethics and procedural rules. Section 530B(a) states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Pursuant to 28 U.S.C. § 530B, headquarters attorneys dispatched to represent the United States are already required to learn the applicable state laws and procedures. For example, 28 U.S.C. § 530B would subject a headquarters attorney to the signature requirements of Wis. Stat. § 802.05(2) (and to the possibility of sanctions under § 802.05(3)) just as if he were a Wisconsin attorney. *See also* 28 C.F.R. §§ 77.1(b), 77.2(h), 77.4(a) (discussed *supra* at pp. 23–24). This is also in harmony with SCR 23.02(2)'s structure making the federal-preemption and

government-employee exceptions independent of the *pro hac vice* exception.

Finally, as discussed above, the exception in SCR 23.02(2)(n) applies not only to government employees, but also to employees of Indian tribes. The Court of Appeals' ruling will require employees of Indian tribes appearing in the Wisconsin courts to obtain *pro hac vice* admission. This, in turn, will require Indian tribes to change their long-standing practice of sending non-lawyers to represent the tribes' interests in state-court, child-custody proceedings involving Indian children. (A. 43.)

The Court of Appeals thus fundamentally erred in its resolution of the novel legal question presented by this case. The United States has interests throughout Wisconsin, and it will continue on a recurring basis to call upon the attorneys of the Department of Justice to represent those interests. The Court should grant this petition for review to provide needed clarification of the procedures that apply to Justice Department attorneys carrying out their responsibilities provided by law.

II

The Court also should grant review because this case presents a real and significant legal issue regarding the interaction of the federal and Wisconsin laws relevant to the practice of United States Department of Justice attorneys in the Wisconsin state courts in light of the Supremacy Clause of the United States Constitution

A. This case presents a question of federal constitutional law

The Supremacy Clause of the United States Constitution (art. VI, cl. 2) states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985). *See also* SCR 23.02(2)(h) (law license not required to engage in "[a]ctivities which are preempted by federal law"). Moreover, the activities of

federal officers and agents carrying out their duties on behalf of the United States are free from direct state regulation, except where Congress has expressly provided otherwise. *See*, *e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180–81 (1988); *Hancock v. Train*, 426 U.S. 167, 178–79 (1976); *James Stewart Co. v. Sadrakula*, 309 U.S. 94, 103–04 (1940). Even where Congress has not completely displaced state regulation by express preemption or by fully occupying a particular field, a state law still must yield "to the extent that it actually conflicts with federal law." *Hillsborough County*, 471 U.S. at 713. Such a conflict arises when compliance with both state and federal law is impossible, or when state law obstructs "'the accomplishment and execution of the full purposes and objectives of Congress.'" *Ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

B. The Court of Appeals erred as a matter of law in holding that Department of Justice attorneys are subject to the *pro hac vice* requirements

1. Whereas 28 U.S.C. § 517 allows the Attorney General to deploy his chosen attorneys to *any* court, Wisconsin's *pro hac vice*

requirements give a state court discretion not only to deny *pro hac vice* admissions, but also to revoke them during a case. SCR 10.03(4); *Filppuila-McArthur*, 622 N.W.2d 436, ¶31. The Court of Appeals seemed to assume that *pro hac vice* admission would be readily granted to, and not lightly withdrawn from, Justice Department attorneys (A. 7–8), but Wisconsin law, as interpreted by the Court of Appeals, is that such admission remains a privilege to be granted and withdrawn by a particular court. *Filpplula-McArthur*, 622 N.W.2d 436, ¶¶33, 47, 56.

This discretion to withhold or to withdraw *pro hac vice* status effectively gives the state courts (and not the Attorney General) the ability to dictate whom the United States can use as counsel.[11] The *pro hac vice* requirements themselves thus stand as an obstacle to the execution of the full purposes and objectives of Congress in enacting 28 U.S.C. § 517, regardless of how

[11] This, of course, assumes that the federal attorney is complying with all applicable state ethics rules. Section 530B of 28 U.S.C. already supplies an avenue for relief for the violation of any such rules.

leniently some Wisconsin courts might apply them to Justice Department attorneys. *See Hillsborough County*, 471 U.S. at 713.

The Supreme Court has long held that, even when Congress has mandated compliance with state-law standards, federal instrumentalities are not subject to associated state-law permitting or licensing requirements absent an affirmative declaration that they are so bound. *Hancock*, 426 U.S. at 178–79; *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1339 (Fed. Cir. 2005) ("It is long established that any state or local law which attempts to impede or control the federal government or its instrumentalities is deemed presumptively invalid under the Supremacy Clause"). For example, the Supreme Court held in *Hancock* that the Clean Air Act required federal installations to comply with local air pollution standards, but that the imposition of substantive emissions standards did not include subjecting the installations to state permitting requirements (and the state control that came with them). 426 U.S. at 180, 184, 198–99. *See also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956)

(reversing conviction of federal contractor for violating state licensing laws; subjecting federal contractor to state license requirements would give state licensing board power to review federal determination of "responsibility," frustrating federal policy to select lowest responsible bidder); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (immunity of federal instruments from state control extends to state examination and fee requirements; such requirements impermissibly go beyond general conduct rules to require qualifications beyond what federal agency has deemed sufficient); *United States v. Virginia*, 139 F.3d 984 (4th Cir. 1998) (granting declaratory judgment against threatened enforcement action; state may not require that contractors performing FBI background investigations comply with state licensing and registration requirements for private investigators).

Moreover, as discussed in Argument I, *supra*, SCR 10.03(4)(b) requires nonresident counsel admitted *pro hac vice* "to appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin

who appears and participates in the action or proceeding." Some Wisconsin courts, on an *ad hoc* basis, might allow Justice Department attorneys to represent the United States without the participation of Wisconsin counsel. But just like the requirement of *pro hac vice* admission, the participation requirement, as a matter of law, conflicts with federal law and, thus, runs afoul of the Supremacy Clause. Section 517 of 28 U.S.C. gives the Attorney General the authority to decide which Justice Department attorney or attorneys will be sent to represent the interests of the United States. The participation requirement, however, purports to give circuit courts authority over the Attorney General so as to compel him to dispatch unwanted and unnecessary (but locally licensed) attorneys in addition to the attorneys already selected for their expertise and experience in the substantive matters presented. Because the participation requirement purports to regulate (without express authorization by Congress) the activities of federal officers carrying out their

duties on behalf of the United States, it is preempted under the Supremacy Clause.

2. We have previously discussed the requirement of 28 U.S.C. § 530B (the McDade Amendment) that Justice Department attorneys must abide by local ethics rules. That provision, which is entitled "Ethical standards for attorneys for the Government," does not subject Justice Department attorneys to state licensure or *pro hac vice* rules. Congress separately addressed bar membership in 28 U.S.C. § 530C(c)(1), where it required only that Justice Department attorneys be "duly licensed and authorized to practice as an attorney under the law of a State, a territory of the United States, or the District of Columbia."

This reading of 28 U.S.C. § 530B is borne out by its legislative history, which indicates that the statute "sets forth ethical standards" for Government attorneys. H.R. Conf. Rep. No. 105-825, at 1102 (1998); *see also* H.R. Rep. No. 105-636, at 154 (1998) (provision "addresses the concerns of the Committee

about the Department of Justice's issuance of a regulation that exempts its attorneys from the same State laws and rules of ethics which all other attorneys must follow"). Consistent with the legislative history, the Justice Department has promulgated regulations requiring its attorneys to obey state ethics rules, but also stating that § 530B "should not be construed in any way . . . to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. § 77.1(b). Moreover, the phrase "state laws and rules" does not include "[a] statute, rule, or regulation requiring licensure or membership in a particular state bar." 28 C.F.R. § 77.2(h)(3). *See also Augustine*, 429 F.3d at 1341 ("while government attorneys must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law").

Taken together, 28 U.S.C. §§ 515, 517, 530B(a), and 530C(c)(1) authorize the Attorney General to send a Justice Department attorney to engage in the same activities that a local

attorney could, in order to protect the interests of the United States in a state court. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2477 (2010) (if text permits, statutes should be construed consistently with each other); *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 143–44 (2001) (similar); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (similar). The state court can expect the Justice Department attorney to behave ethically, to meet deadlines, to file generally applicable forms, and to submit properly formatted filings. On the other hand, the attorney would not be subject: (1) to state licensure requirements (*e.g.*, bar examinations, bar dues, and continuing legal education); (2) to *pro hac vice* requirements; or (3) to local rules that interfere with the Attorney General's prerogatives under 28 U.S.C. § 517 (*e.g.*, rules regarding residency or local offices). *See Hillsborough County*, 471 U.S. at 713.

The Court should grant this petition for review to resolve this real and significant question of federal constitutional law.

III

The Court should grant this petition for review even if the Wisconsin insurance commissioner revives the alternative arguments from his motion to dismiss the United States' appeal

Wisconsin Statute § 809.62(3) allows a response to a petition for review in which the opposing party can raise any reason for denying the petition, but does not permit the petitioner to file a reply to the response. We anticipate that the Wisconsin insurance commissioner will raise in his response the alternative argument that he made in his March 25, 2011 dismissal motion (not reached by the Court of Appeals), *viz.*, that the United States waived the issues listed in its docketing statement by not first raising them in the Dane County Circuit Court. The *pro hac vice* issues, however, are important enough to warrant resolution by this Court. We further maintain that the waiver issue is of sufficient complexity that it should be addressed in the first instance by the Court of Appeals.

Four of the five issues listed in the United States' docketing statement challenged the jurisdiction of the Dane County Circuit

Court to act against the United States either because of the lack of a federal statute waiving the United States' sovereign immunity, or because of the presence of the Federal Tax Anti-Injunction Act (26 U.S.C. § 7421(a)) expressly forbidding injunction suits against the Federal Government.[12] (A. 39.) The subject-matter jurisdiction of the Wisconsin circuit courts can be limited by federal law, and jurisdiction can be challenged at any time. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, ¶¶8–9 & n.2 (Wis. 2004); *Kohler Co. v. Department of Indus., Labor, and Human Relations*, 81 Wis. 2d 11, 259 N.W.2d 695, 701 (Wis. 1977); *In re B.J.N. & H.M.N.*, 162 Wis. 2d 635, 469 N.W.2d 845, 853 (Wis. 1991). The United States Supreme Court has defined subject-matter jurisdiction as the classes of cases falling within a court's adjudicatory authority. *Scarborough v. Principi*, 541 U.S. 401, 413–14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). A court cannot adjudicate (*i.e.*,

[12] The fifth issue protected the ability of the United States to raise additional issues in its brief, if necessary. (A. 39.)

lacks jurisdiction over) any suit against the United States unless there is a statute unequivocally waiving sovereign immunity. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941). The absence of *any* federal statute waiving sovereign immunity (and the presence of 26 U.S.C. § 7421(a)) present issues more fundamental than in the cases cited by the insurance commissioner in his April 7, 2011 reply to the United States' opposition to the motion to dismiss, which cases involved statutes waiving sovereign immunity. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 n.6 (2009); *United States v. United States Fid. & Guar.Co.*, 309 U.S. 506, 512–15 (1940).

To the extent that the issues raised by the United States in its docketing statement were not jurisdictional, we requested in our April 4, 2011 opposition to the motion to dismiss that the Court of Appeals exercise its discretion under Wis. Stat. § 752.35, determine that a miscarriage of justice had occurred, and to consider the United States' arguments on their merits. Inasmuch

as this defense requires an exercise of discretion by the Court of Appeals, it should be addressed by that court after the resolution of the *pro hac vice* issue by this Court.

CONCLUSION

The Court should grant this petition for review.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC FILING

I hereby certify that this petition for review conforms to the rules contained in § 809.19(8)(b) and § 809.62(4)(a) for a petition for review produced with a proportional serif font (Century Schoolbook, 13 points). The length of this brief is 7,941 words (as counted by WordPerfect version X3).

I further certify that the text of the electronic copy of this petition for review is identical to the text of the paper copy of the petition, and that the content of the electronic copy of the appendix is identical to the paper copy of the appendix.

/s/ Anthony T. Sheehan
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Dated May 31, 2011

CERTIFICATION OF DELIVERY

I hereby certify that this petition for review and appendix was hand-delivered to the Office of the Clerk of the Wisconsin Supreme Court, and there submitted for filing with the Court.

/s/ Richard D. Humphrey
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Dated June 1, 2011

CERTIFICATION OF SERVICE

I hereby certify that, on the 1st day of June, 2011, a true and correct copy of the foregoing document (lacking only the signature of Richard D. Humphrey) will be served upon all opposing counsel listed in the opinion of the Court of Appeals, District IV, via First Class Mail, with postage prepaid, in envelopes addressed as stated on the attached list. A courtesy copy will also be sent to all counsel on the e-mail list compiled by the Circuit Court for Dane County, Wisconsin.

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APPENDIX

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May 3, 2011

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You are hereby notified that the Court has entered the following opinion and order:

2011AP987 In the Matter of the Rehabilitation of: Segregated Account of Ambac Assurance Corporation: (L.C. # 2010CV1576)

Before Higginbotham, P.J., Sherman and Reilly, JJ.

We have seven motions currently pending in these consolidated appeals arising out of the Ambac rehabilitation proceeding: (1) a motion by the Insurance Commissioner to dismiss the appeal of the United States for lack of jurisdiction; (2) a motion from Attorney Anthony Sheehan of the Tax Division of the United States Department of Justice to appear *pro hac vice* on behalf of the United States; (3) a motion from Attorney Sheehan to waive the requirements that he pay a $50 *pro hac vice* application fee under SCR 10.03(4)(b)2 (2009)[1] and that his filings be co-signed by a sponsoring attorney licensed to practice in this state pursuant to SCR 10.03(4)(b); (4) a motion by the United States to unconsolidate its appeal from the rest of the pending Ambac appeals; (5) a motion by the United States to stay its appeal pending a decision on its request to remove the rehabilitation proceeding to federal court; (6) a joint motion to amend the captions; and (7) a joint motion to amend the briefing requirements. For the reasons discussed below, we grant the Commissioner's motion to dismiss the appeal of the United States, rendering the motions of the United States moot. We also grant the joint motions to amend the caption and the briefing requirements, but with some modifications from the proposals submitted by the parties.

Jurisdiction Over the Appeal of the United States

The Insurance Commissioner moves to dismiss the appeal of the United States for lack of jurisdiction because its notice of appeal was not signed or co-signed by an attorney licensed to practice law in this state. The parties agree that the notice of appeal was signed by Robert Kovacev, an attorney employed in the Tax Division of the United States Department of Justice who is licensed to practice in Washington D.C. and California, but not Wisconsin. Nothing in

[1] All references in this order to SCR 10.03(4) refer to the version amended by Supreme Court Order 06-06, 2008 WI 109, filed July 30, 2008 and effective January 1, 2009.

the materials before us indicates that Attorney Kovacev ever requested permission from either the circuit court or this court to appear *pro hac vice* in this matter prior to signing and filing the notice of appeal, and there is no co-signature by a sponsoring Wisconsin attorney.

It is well established that a timely and fundamentally compliant notice of appeal is necessary to give this court jurisdiction over an appeal. WIS. STAT. RULE 809.10(1)(e) and (f) (2009-10);[2] ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 211-12, 562 N.W.2d 401 (1997). One of the rules with which a notice of appeal must comply is the subscription requirement of WIS. STAT. § 802.05, stating that a paper "shall be signed by at least one attorney of record in the attorney's individual name," on behalf of a represented party. ***Jadair***, 209 Wis. 2d 187, ¶17, 37-38.

Ordinarily, only an attorney who is licensed to practice law in this state may appear as an attorney of record. ***Schaefer v. Riegelman***, 2002 WI 18, ¶17, 250 Wis. 2d 494, 639 N.W.2d 715; *see also* SCR 23.02(1) (authorizing licensed Wisconsin attorneys with active bar memberships to practice law in this state) and WIS. STAT. § 757.30 (providing penalties for the unauthorized practice of law). The Wisconsin Supreme Court Rules set forth a number of exceptions to the general rule against the unauthorized practice of law, including: (1) for attorneys licensed in other states who have been authorized to appear *pro hac vice* under the sponsorship of a Wisconsin attorney; (2) for persons engaged in "activities which are preempted by federal law;" and (3) for employees of governmental agencies who are "carrying out

[2] All references in this order to the Wisconsin statutes, including provisions created by Supreme Court rule, refer to the 2009-10 version.

responsibilities provided by law." SCR 10.03(4) and SCR 23.02(2)(a), (h), and (n). However, we conclude that none of the potential exceptions apply here.

As noted above, the record before us does not show that Attorney Kovacev had been admitted to appear *pro hac vice* when the notice of appeal was filed, and the notice of appeal does not contain the co-signature of a sponsoring Wisconsin attorney. Therefore, Kovacev plainly did not qualify as an attorney of record with the authority to sign the notice of appeal by virtue of the *pro hac vice* admission exception.

Nor are we persuaded that Attorney Kovacev was authorized to appear in a Wisconsin court without *pro hac vice* admission by virtue of the preemption doctrine. The United States contends that 28 U.S.C. § 517, which provides that Department of Justice attorneys "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court … of a State" preempts any state law or regulation that would otherwise preclude a Department of Justice attorney from appearing in state court. The United States relies primarily upon ***Augustine v. Department of Veteran Affairs***, 429 F.3d 1334, 1341 (Fed. Cir. 2005) for the proposition that "while government attorneys must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law." *See also* 28 U.S.C. § 530B (subjecting federal government attorneys to state laws and rules governing attorneys) and 28 C.F.R. § 77.1(b) and 77.2(h)3 (defining laws and rules governing attorneys to include ethical requirements but exclude licensure or bar membership requirements).

The main problem with the United States' preemption theory is that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar

membership in order to practice law in our state courts. Instead, SCR 10.03(4) and 23.02(2) (2011)[3] explicitly permit nonresident attorneys to appear under the sponsorship of a Wisconsin attorney. The United States cites no authority from any federal or state jurisdiction holding that 28 U.S.C. § 517 preempted any similar sponsorship requirement for a *pro hac vice* appearance in this or any other state. Indeed, the Insurance Commissioner points out that not only has it been the longstanding practice of Department of Justice attorneys to obtain the sponsorship of Wisconsin-licensed attorney when appearing in our state courts, the Department of Justice itself directs that a local U.S. Attorney or Assistant U.S. Attorney should be listed as counsel of record in civil tax cases, even when a Tax Division attorney has primary responsibility for the case. *See* United States Attorneys' Manuel § 6-1.120. Because Wisconsin's procedures for allowing federal government attorneys to appear *pro hac vice* do not appear to be inconsistent with either federal law or practice, we do not see any basis to apply the preemption doctrine here.

Next, we are similarly unconvinced that the exception to the rule against the unauthorized practice of law for employees of governmental agencies who are carrying out their responsibilities has any application here. The responsibilities to which the United States refers again relate to the ability of Department of Justice attorneys to appear in any state court pursuant to 28 U.S.C. § 517. But again, we see nothing in the sponsorship and co-signature requirements for *pro hac vice* appearances that would prevent federal government attorneys from carrying out their responsibilities as provided by law. Rather, federal government attorneys can easily carry out their responsibilities to appear on behalf of the United States while at the same time

[3] All references in this order to SCR 23.02 refer to the rule adopted by Supreme Court Order 07-09, 2010 WI 101, filed July 27, 2010 and effective January 1, 2011.

complying with this state's *pro hac vice* requirements. In short, Wisconsin's procedures for *pro hac vice* admission did not prevent Attorney Kovacev from carrying out his responsibilities; he simply failed to carry out his responsibilities according to the applicable rules.

Finally, the United States contends that if its attorneys are subject to the *pro hac vice* sponsorship and co-signing requirements, it should be allowed to file an amended notice of appeal in compliance with those requirements.[4] However, the failure by a nonresident attorney to obtain a *pro hac vice* admission under the sponsorship of a co-signing Wisconsin attorney cannot be remedied once the time to file a jurisdictional document has already expired. ***Schaefer***, 250 Wis. 2d 494, ¶¶22-23; *see also* ***Brown v. MR Group, LLC***, 2004 WI App 122, ¶¶6 and 13, 274 Wis. 2d 804, 683 N.W.2d 481. This is not a situation where there was simply a missing signature, which WIS. STAT. § 802.05 allows to be promptly corrected. *Cf.* ***State v. Seay***, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437 (pro se litigant was allowed to provide missing signature on notice of appeal); ***Rabideau v. Stiller***, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108 (attorney was allowed to provide missing signature on summons and complaint). This is a situation where the notice of appeal was signed by someone who was not authorized to do so without first taking additional measures to obtain *pro hac vice* status. This is a fundamental defect which cannot be corrected.

Because the notice of appeal filed by the United States was fundamentally flawed, we grant the Insurance Commissioner's motion to dismiss the appeal of the United States for lack of

[4] The United States has attached an amended notice of appeal to its response in opposition to the Insurance Commissioner's Motion to Dismiss. The notice is ineffective, however, because it has not been filed with the clerk of the circuit court as required by WIS. STAT. RULE 809.10(1)(a). A party cannot initiate an appeal by filing a notice of appeal, or an amended notice of appeal, with this court.

jurisdiction. Although it is not strictly necessary, we will also unconsolidate the United States' appeal from the remaining Ambac matters pending before us, and assign it a separate case number to make clear that this is a final and appealable order with respect to the United States. In light of the dismissal, we do not address the other pending motions of the United States.

Caption

The parties jointly move to amend the caption to replace Sean Dilweg with the current commissioner, Ted Nickel. We agree that the substitution is appropriate because the Insurance Commissioner is participating in these appeals in his official capacity.

We note that the proposed caption submitted by the parties also changes the circuit court designation of multiple participants from "proposed intervenor" or "defendant" to "party in interest," and does not include those parties who are not participating in one or more of the appeals. We agree that the terms in our current caption do not accurately reflect the nature of a rehabilitation proceeding, which generally has a petitioner and a subject. Because our computerized database system has a code for "interested party," we will use that term rather than "party in interest." It is also our practice to include parties who participated in the lower court proceedings in our caption, even when they do not participate on an appeal. We will therefore keep all the circuit court parties in our official caption, but will permit the participants on these appeals to list only the participating parties on the captions of their briefs and other papers filed with this court.

Modifications to the Briefing Requirements and Schedule

The parties jointly propose that the appellants for Appeal Nos. 11AP561, 2010AP2835 and 11AP300 be permitted to file a joint brief of up to 22,000 words (i.e., 100 pages), plus optional supplemental briefs of up to 5,000 words (about 23 pages) to allow each individual appellant who joins the joint brief to address any issues which are not covered in the joint brief. Under the proposal, any appellant who opts out of the joint brief could file its own brief subject to the standard rules. The parties would wait until the last appellant's brief is filed, then confer, and provide this court with a proposal for the response and reply briefs. In addition, the appellants in Appeal Nos. 10AP1291 and 10AP2022 (the cases that have already been briefed and screened) would each be permitted to file a supplemental brief of up to 1500 words, and any opposing party could then file a supplemental response of up to 1500 words.

While we greatly appreciate the parties' efforts in putting forth a joint proposal, we are not persuaded that the appeals will require briefs of the length requested. We note that the court already has a basic understanding of the nature of the litigation from the previously filed briefs, and that the relevant facts for the additional appeals should be set forth only once in the joint brief, unless there is a specific factual issue unique to a party or set of parties that may require some supplementation. We therefore modify the parties' proposal as follows.

The appellants for Appeal Nos. 11AP561, 2010AP2835 and 11AP300 may file a joint opening brief of up to 16,500 words (or 75 pages if a monospaced font is used). Parties who join the joint brief may file individual or joint supplements of up to 2,200 words (10 monospaced font pages) that address any issues that are not already included in the joint brief or in the supplemental or individual brief of any other party, unless a different position is taken.

Any party who does not join the joint opening brief shall be limited to filing an individual brief of 5,500 words (or 25 monospaced font pages), unless that party provides this court with good cause to file a larger brief. Any individual briefs do not need to contain a separate statement of facts unless required to address a specific supplemental factual issue. Any party writing separately should also avoid duplicating any materials already contained in the appendix of the joint opening brief.

The respondents shall have up to 16,500 words (or 75 monospaced font pages) to respond to all of the opening briefs of the Appellants.

The appellants may file a joint reply brief of up to 3,300 words (or 15 pages if a monospaced font is used). Any party who does not join the joint reply brief shall be limited to filing an individual brief of up to 1,540 words (or 7 monospaced font pages), and should not repeat any arguments contained in the joint reply brief.

No supplemental briefing in 10AP1291 and 10AP2022 will be allowed without a specific showing from a party as to why it is necessary.

We will extend the briefing schedule to facilitate the coordination of the joint briefs, as described below. We ask that the parties submit briefs that are double spaced and printed on only one side of the page, and remind them that pinpoint and subsequent citations should be made to the official Wisconsin reporter page.

Upon the foregoing reasons,

IT IS ORDERED that the United States' motion to unconsolidate its appeal from the other appeals in 11AP561 is granted. The United States' appeal shall be assigned its own case number, 11AP987.

IT IS FURTHER ORDERED that the Insurance Commissioner's motion to dismiss the United States' appeal for lack of jurisdiction is granted. In light of the dismissal, we do not address the other pending motions from the United States.

IT IS FURTHER ORDERED that the joint motions to amend the caption and the briefing requirements are granted with the modifications described in this order. The appellants' joint opening brief shall be due within 45 days of the date of this order. Any other supplemental or individual briefs filed by an appellant or group of appellants shall be due 15 days after the joint opening brief is filed. The respondents' brief shall be due 35 days after the last appellant's opening brief is filed. The appellants' joint reply brief shall be due 20 days after the respondents' brief is filed, and any appellant not joining the joint reply brief shall have an additional 10 days to file an individual reply brief.

A. John Voelker
Acting Clerk of Court of Appeals

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

THEODORE K. NICKEL, COMMISSIONER
OF INSURANCE OF THE STATE OF
WISCONSIN,[1]

OPINION and ORDER

Petitioner,

10-cv-778-bbc

v.

UNITED STATES OF AMERICA,

Respondent.

- -

This proceeding was removed to this court from the Circuit Court for Dane County, Wisconsin, by the United States. It is before the court on two motions: the Commissioner of Insurance's motion for remand and the United States' motion to dissolve the order entered in the state court enjoining the United States from taking certain actions related to

[1] Theodore K. Nickel replaced Sean Dilweg as Commissioner of Insurance for the State of Wisconsin on January 3, 2011.

the potential tax liability of Ambac Assurance Corporation. A hearing was held on both motions on January 12, 2011.

This order addresses only the first motion, in which I conclude that the case was removed improperly from the state court. In particular, I conclude that the United States' removal of the state court injunction matter is preempted under the McCarran-Ferguson Act, which leaves to the states the business of insurance. Also, I am persuaded that the principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943), require abstention in this case. I will not discuss the United State's motion to dissolve the state court injunction because removal was improper and jurisdiction does not exist to entertain it.

From the record and from the facts adduced at the hearing, I find the following facts solely for the purpose of deciding the pending motions.

FACTS

Ambac is a Wisconsin insurance corporation with headquarters in New York. For most of the past 30 years, it has been one of the two largest insurers of financial guarantees. It is a "monoline" insurer, providing financial guaranty insurance on financial products such as residential mortgage-backed securities, credit default swaps, commercial asset-backed securities and other substantial financial transactions.

Ambac is a wholly-owned subsidiary of Ambac Financial Group Inc., a holding company headquartered in New York City. Throughout the relevant time period, Ambac Financial filed consolidated federal income tax returns for itself and its subsidiaries, including Ambac.

Ambac's financial condition began to deteriorate in late 2007, when many of the transactions it had insured proved to be worth less than they had been held out to be. As the company saw the increase of actual and estimated future losses growing over the following two years and the resulting damage to its credit rating, it stopped writing new policies and began a functional run-off of its policies in force.

Concurrently, the Wisconsin Office of the Commissioner of Insurance began increasing its oversight of Ambac and retained advisers with experience in the specialized complex financial transactions of companies. By early 2010, the office had decided that formal regulatory action was necessary. Accordingly, it implemented the provisions of Wis. Stat. ch. 645, which applies to the rehabilitation and liquidation of insurance companies operating in Wisconsin.

In light of the complexity of the insured transactions and his concern for minimizing the risks to policyholders, the Commissioner of Insurance decided not to undertake a full rehabilitation of the company, which he feared would cause unnecessary and avoidable losses to policyholders and possibly to the economy. If, for example, a transaction that was not at

risk was included in the rehabilitation process, the lenders behind the risk-free notes might have the right to withhold financing for the payment of the notes, thereby giving the counterparties on the notes the right to accelerate and declare default. In those instances, the issuers might not be able to make the accelerated damages payments and would turn to Ambac to cover the payments.

To avoid unnecessary risk, the Commissioner took advantage of Wis. Stat. § 611.24(2), which permits an insurer to establish a segregated account for any part of its business, with the Commissioner's approval. To carry out the segregation, the Commissioner reviewed Ambac's business to evaluate its exposure under its policies. His staff determined that about 1,000 out of Ambac's 15,000 policies had material projected losses, structural problems with the underlying transactions and contractual triggers that could not be avoided except by court action. He assigned these to a "segregated account," while keeping the remainder in Ambac's general account, where they would not be subject to acceleration, early termination or other triggers. All policies with material anticipated losses and all other known, potentially material non-policy liabilities of Ambac's general account are allocated to the segregated account, including the general account's obligations under certain reinsurance contracts and disputed contingent liabilities related to two office leases. The segregated account has no claim-paying assets of its own, but is capitalized by a two-billion dollar secured note issued by Ambac to the account and an aggregate excess of loss

reinsurance agreement provided by Ambac. Plan of Operation, dkt. #13-3, at 3. Under the terms of the secured note, dkt. #31-1, and reinsurance agreement, dkt. #23-3, the segregated account may call upon the general account to pay claims allocated to the segregated account, as long as payment of the segregated account claims would not cause Ambac's assets to fall below $100 million, which is less than 2 % of Ambac's claim-paying assets. In other words, the segregated account has access to 98 % of Ambac's current assets with which to pay claims. In addition, Ambac may not enter into any transaction involving more than $5 million without the segregated account's prior written consent, with the exception of certain investments and policy claims made in the ordinary course of business. On March 24, 2010, the Commissioner asked the Circuit Court for Dane County, Wisconsin, to rehabilitate the segregated account. For the purpose of the rehabilitation, the segregated account is considered a separate insurer from Ambac. On the same day, as part of the rehabilitation, the Commissioner moved ex parte under Wis. Stat. § 645.05 to obtain "first-day injunctive relief" that barred all persons and entities from commencing or prosecuting any actions against the general account "in respect of the segregated account or policies, contracts, or liabilities allocated to the segregated account." First-Day Injunction, Dkt. #14, Exh. D, ¶ 1. Once the injunction was in place, petitioner provided court-approved notice of the rehabilitation and the First-Day Injunction by mail, publication and a posting on a court-approved website, http://ambacpolicyholders.com. Respondent United States had no

advance knowledge of the rehabilitation proceeding or its scope.

The United States' interest in the proceeding grows out of a "tentative" federal tax refund it paid to Ambac Financial from 2008 through 2010, in the amount of approximately $700 million. Ambac Financial allocated the $700 million refund to Ambac. The refund was paid under 26 U.S.C. § 6411, which requires the Internal Revenue Service to provide such refunds within 90 days of an application by a corporate taxpayer asserting that it has overpaid tax because of a net operating loss carryback. The refund is termed tentative, because the IRS retains the right to conduct a more thorough audit of the taxpayer's application later and recapture any funds it has paid erroneously.

On October 28, 2010, the IRS sent Ambac Financial an information document request seeking information related to the basis for the refunds, asking, among other things, whether Ambac Financial had received advance permission from the IRS before changing its accounting method. Within ten days, Ambac Financial filed for Chapter 11 bankruptcy protection in the Southern District of New York and filed an adversary proceeding in the bankruptcy court to determine its tax liability. (Ambac Financial is not in the business of insurance and therefore not entitled to the protections of the rehabilitation proceeding.) The action is pending. On November 7, 2010, Ambac allocated to its 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 with respect to the tax refund.

The Commissioner approved the allocation, filed a "notice" with the Dane County court and served the notice on the United States on or about November 8, 2010, the same day that Ambac Financial filed for bankruptcy. On the same day, the Commissioner obtained an injunction from the Dane County court enjoining the United States from initiating any type of lawsuit in regard to Ambac's potential federal tax liabilities in any court, administrative body or other tribunal against the segregated account or any subsidiary of Ambac whose stock or other form of ownership interest were allocated to the segregated account, to Ambac, to any subsidiary of Ambac or the rehabilitator. The order enjoined the United States from taking any prejudgment or other steps to transfer, foreclose or exercise purported rights in or against any property or assets of the segregated account, Ambac or Ambac subsidiaries in relation to any potential future federal tax liabilities of Ambac. The Commissioner served the United States a copy of the injunction, his motion seeking the injunction and a "Notice of Amendment to Plan of Operation for the Segregated Account."

The United States removed the state court action to this court on December 8, 2010. In its notice of removal, dkt. #1, it specified that it was not removing "issues and/or claims in this rehabilitation action that are unrelated to the Internal Revenue Service, and the Notice, Motion and Order filed on November 8, 2010."

OPINION

The threshold question is whether the United States can remove all or part of the rehabilitation proceeding to this court. If the removal is improper, this court lacks jurisdiction to hear any of the government's challenges to the order entered in the proceeding.

The Commissioner has raised the question by moving for remand. He contends first that the United States is legally incapable of removing the case because it is not a party to the action and the rehabilitation proceeding is not a "civil action" under the applicable removal statute, 28 U.S.C. § 1442. Second, he argues that the McCarran-Ferguson Act "reverse-preempts" federal jurisdictional statutes such as § 1442 that were not enacted specifically to govern or relate to the business of insurance. In other words, the Act is the mirror image of federal laws that preempt state action, effecting preemption with respect to federal laws and actions that bear on state laws governing the business of insurance. Finally, the Commissioner relies on Burford v. Sun Oil Co., 319 U.S. 315 (1943), to support his argument that federal courts should abstain from interfering with specialized, ongoing state regulatory schemes. Because I find the Commissioner's second and third arguments to be persuasive, I need not address the question whether the United States can satisfy the specific requirements of the federal removal statutes.

A. The McCarran-Ferguson Act

It is well established that the business of insurance is left to the states. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, passed in 1945, Congress made it clear that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The Act provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012. In United States Department of the Treasury v. Fabe, 508 U.S. 491 (1993), the Supreme Court ruled that the "business of insurance" extended to proceedings to liquidate or rehabilitate an insurance company.

The Commissioner argues that even if this proceeding had been removed properly, the court would have to remand it because neither the federal removal statutes nor the federal laws authorizing the levying and collection of federal taxes can override state law as it relates to the rehabilitation of an insurance company. The United States disputes this proposition, but not convincingly. It argues that federal tax powers trump state law as it relates to insurance because the power of the Internal Revenue Service to levy and collect taxes derives directly from Art. I, § 8 of the Constitution. In fact, those powers belong to the Congress; the IRS derives its authority from Congress.

Contrary to the United States' argument, the McCarran-Ferguson Act does not exempt federal tax laws from its prohibition. It is true that under the Anti-Injunction Act, 26 U.S.C. § 7421(a), no *state* law or *state* court can restrict the assessment or collection of taxes. Id. ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"). However, it does not follow that *federal* law in the form of the McCarran-Ferguson Act cannot override this statute and any others insofar as they threaten to impede or impair the state's regulation of the business of insurance.

As the Court of Appeals for the Seventh Circuit has recognized, the McCarran-Ferguson Act overturns the ordinary preemptions rules by imposing a rule that state laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless the federal statute specifically provides otherwise. American Deposit Corp. v. Schacht, 84 F.3d 834, 837-38 (7th Cir. 1996) (citing United States Department of Treasury v. Fabe, 508 U.S. 491, 507 (1993)). In American Deposit, the conflict arose out of the desire of national banks to sell Retirement CDs as permitted under the National Bank Act but not allowed by the Illinois director of insurance. Siding with the director, the court of appeals found that the McCarran-Ferguson Act governed the matter.

The United States cites a number of cases in which federal courts have ruled in its favor on questions involving taxation, but these do little to advance its argument. In Security Industrial Insurance Co. v. United States, 702 F.2d 1234 (5th Cir. 1983); Allied

Fidelity Corp. v. Commissioner, 572 F.2d 1190, 1192 (7th Cir. 1978); and Modern Life & Accident Insurance Co. v. Commissioner, 420 F.2d 36 (7th Cir. 1969), the issue was the proper classification for federal tax purposes of an insurance corporation or its subsidiary or the legitimacy of the way in which it had organized itself. None of these cases implicated the policy behind the McCarran-Ferguson Act because the basis on which the federal government taxes an insurance company did not "impair" or otherwise interfere with state regulations categorizing insurance companies for different purposes. The United States is correct that in these cases the Act does not constrain the federal government's right to assess and collect federal taxes from insurance companies, but its point is irrelevant. The Commissioner is not arguing that the United States cannot collect taxes from insurance companies in general or from Ambac in particular or that it can never pursue return of the refund if it determines it was improper; he argues only that under the McCarran-Ferguson Act, the United States must conform its efforts to the restrictions necessary to the effectiveness of the state's rehabilitation proceedings.

Similarly, the McCarran-Ferguson Act can restrict the right of removal to federal court in cases in which a state statute governing insurance sets up a comprehensive framework for state rehabilitation proceedings to be conducted in state court and removal would impair that framework. E.g., Hudson v. Supreme Enterprises, Inc., 2007 WL 2323380, *6-7 (S.D. Ohio Aug. 9, 2007); In re Amwest Surety Insurance Co., 245 F. Supp. 2d 1038, 1044-45 (D.

Neb. 2002); Covington v. Sun Life of Canada (U.S.) Holdings, Inc., 2000 WL 33964592, *9-10 (S.D. Ohio May 17, 2000); United States Financial Corp. v. Warfield, 839 F. Supp. 684, 688-90 (D. Ariz. 1993). In this case, Wis. Stat. ch. 645 vests jurisdiction in the state rehabilitation court over matters related to the rehabilitation of an insurer. Wis. Stat. § 645.04. The state court has authority to enjoin any action that may interfere with the proceedings or "lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding." Wis. Stat. § 645.05. These sections of chapter 645 relate specifically to regulating the business of insurance. Application of the federal removal statutes would impair the operation of chapter 645 by depriving the state rehabilitation court of jurisdiction, disrupting the goal of a comprehensive rehabilitation structure and interfering with the orders issued by the state court for the purpose of protecting assets payable to claimants. In sum, the federal removal statutes would "invalidate[], impair[], or supersede[] the state laws at issue in this case." Hudson, 2007 WL 2323380, at *7; see also Munich American Reinsurance Co. v. Crawford, 141 F.3d 585, 595 (5th Cir. 1998) ("Congress has evinced a strong federal policy in favor of deferring to state regulation of insolvent insurance companies as reflected in the McCarran-Ferguson Act and the express exclusion of insurance companies from the federal Bankruptcy Code. These laws symbolize the public interest in having the States continue to serve their traditional roles as the preeminent regulators of insurance in our federal system

and indicates the special status of insurance in the realm of state sovereignty.") (citations omitted).

The United States contends that even if removal may be restricted in some cases, the principles of preemption should not apply here because it is challenging the injunction only as it affects property that is not controlled by the rehabilitation court or rehabilitation statutes. However, the United States takes a narrow view of the rehabilitation proceeding, focusing on the fact that the only *res* technically subject to the rehabilitation court's jurisdiction is the segregated account, which contains all of Ambac's questionable assets. It overlooks the lengths to which the Commissioner has gone to control the material risks to the claims-paying resources of Ambac and to treat them in the same way it would treat those risks in a full rehabilitation.

Technically, the rehabilitation proceeding extends only to the segregated account to which certain of the Ambac's liabilities are allocated. In reality, it extends to the general account and to Ambac's affiliates and subsidiaries to the extent that these entities are lenders or insurers of the segregated account. Although the segregated account is deemed to be a separate insurer for purpose of rehabilitation, it is not actually a separate corporation from Ambac. Indeed, the whole point of the rehabilitation is to rehabilitate Ambac Assurance Corporation. The Commissioner and the presiding judge have made the decision that treating the assets and liabilities as they have is best calculated to lead to a successful

rehabilitation. The judge held a five-day hearing on the scope and nature of the proceeding and determined that the relationship between the general account and segregated account is fair and equitable. Thus, the plan to rehabilitate the segregated account depends in large part on the assets of the general account being protected by the first-day and supplemental injunctions. Allowing the United States to proceed against Ambac or any of the affiliates and subsidiaries would amount to pulling out the linchpin that secures the entire enterprise. Cf. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477-78 (1936) (in dispute over right to funds belonging to Russian insurance companies that were being held in state court in connection with liquidation and distribution, United States was not entitled to maintain suit in federal court for accounting of funds; such suit was not merely to establish debt or right to share in property but rather, sought control of property and could not be litigated without disturbing control of *res* by state court); Metropolitan Life Insurance Co. v. Board of Directors of Wisconsin Insurance Security Fund, 572 F. Supp. 460, 471 (W.D. Wis. 1983) (noting the "disastrous conflicts that would arise if this court were to issue rulings that reduced the funding in the account [used to provide coverage for policyholder claimants] and thereby defeated that part of the state's liquidation efforts. . . .").

Finally, the United States contends that even if the McCarran-Ferguson Act reverse-preempts removal statutes in some situations, the Act has no effect when the party

attempting removal is a government agency asserting a federal claim. The United States cites Granite Reinsurance Co. v. Frohman, 2009 WL 2601105 (D. Neb. 2009), in which a creditor filed an action against the Federal Crop Insurance Corporation (FCIC) and the liquidated insurance company seeking to collect unpaid premiums on reinsurance policies. The FCIC removed the matter to federal court pursuant to § 1442(a) and the liquidator filed a motion to remand that the federal court denied. However, the court did not hold that federal agencies possess an unrestricted right to remove, as the United States suggests; rather, the court noted specifically that the FCIC was a "federal agency charged with implementing a federal insurance program." Id. at *5. Thus, actions by the FCIC fell into the exception to McCarran-Ferguson for federal statutes relating specifically to insurance. The IRS is not an agency directed specifically to implement an insurance program and thus, Granite Reinsurance does not help it.

In sum, I conclude the McCarran-Ferguson Act restricts the United States' right to remove this case to federal court, even though the taxing authority of the Internal Revenue service may be implicated by the state rehabilitation court's supplemental injunction. Even if the United States' right to remove was not preempted, I would remand this case to the state court on the basis of the principles of comity and federalism set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943).

B. Abstention

In Burford, the United States Supreme Court held that federal courts should abstain from interfering with specialized, ongoing state regulatory schemes. Abstention under Burford is appropriate in two situations: "First, federal courts should abstain from deciding difficult questions of state law bearing on policy problems of substantial import. . . ." International College of Surgeons v. City of Chicago, 153 F.3d 356, 362 (7th Cir. 1998) (internal quotations omitted). Second, courts "should also abstain from the exercise of federal review that would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Id. The Court of Appeals for the Seventh Circuit has applied the second type of Burford abstention in cases involving state insurance rehabilitation proceedings, noting that states have assumed primary responsibility for regulating the insurance industry. E.g., Hartford Casualty Insurance Co. v. Borg-Warner Corp., 913 F.2d 419, 425-27 (7th Cir. 1990) (finding Burford abstention appropriate where Illinois had implemented state-court rehabilitation proceeding that would resolve plaintiff's claims); see also Mountain Funding, Inc. v. Frontier Insurance Co., 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004) (abstention appropriate where insurance liquidation proceeding was adjudicating all claims against defendant in detailed and uniform manner); Metropolitan Life Insurance Co., 572 F. Supp. 460 (in case involving challenge to Wisconsin statutes governing operation of Wisconsin Insurance Security Fund, abstention was required under Burford and

Colorado River Water Conservation District v. Untied States, 424 U.S. 800, 814 (1976), to avoid conflicts with state's ongoing rehabilitation-liquidation proceeding of insurer). However, abstention is proper under Burford only if the state "offer[s] some forum in which claims may be litigated," and that forum "stand[s] in a special relationship of technical oversight or concentrated review to the evaluation of those claims." Property & Casualty Insurance Ltd. v. Central National Insurance Co. of Omaha, 936 F.2d 319, 323 (7th Cir. 1991).

The United States asserts several reasons why abstention would be inappropriate in this case, including the absence of any unsettled questions of state law, the uniqueness of the circumstances and the unlikelihood of any disruption to Wisconsin's insurance regulatory scheme and the presence of important federal tax issues. In addition, it contends that dissolution of the supplemental injunction would have little affect on the rehabilitation proceedings because the assets covered by the injunction are not covered by the rehabilitation case. None of these arguments are persuasive.

Wisconsin has a great interest in maintaining a uniform insurance rehabilitation process that provides strong protection to policyholders. Property & Casualty Insurance Ltd., 936 F.2d at 323. To accomplish this, the state has assumed primary responsibility for regulating the insurance industry. In re All-Star Insurance, 484 F. Supp. 623, 626 (W.D. Wis. 1980) ("The regulation and liquidation of state domestic insurance companies is a

matter of substantial public concern, . . . and Ch. 645, Wis. Stats., is a comprehensive state effort to deal with that area of state concern. . . . Thus . . . the strong state interest in orderly liquidation dictates the exercise by the court of its discretionary abstention.") (citations omitted). The Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court, which has the authority both to enjoin actions that threaten the success of the rehabilitation and to address challenges to the structure of the rehabilitation. The statutes allow the rehabilitator to segregate accounts in order to achieve greater protection for policyholders. Ultimately, claims against the segregated account will be collected in the rehabilitation court and paid according to Wisconsin's priority statutes.

Federal court review of the United States' claims would be disruptive of the state's rehabilitation goals and procedures. The rehabilitation proceeding has been in state court for roughly ten months and includes nearly 1,000 financial guaranty insurance policies insuring approximately $60 billion of financial obligations. Removal of this case to federal court has taken the proceedings out of state court and stalled confirmation of the rehabilitation plan. In addition, it has deprived the state court of the ability to address a direct challenge to the lawfulness of the rehabilitation structure and account allocation and has created the potential for conflicting rulings.

Also, the removal has the potential of interfering with the state's priority statutes and

the Commissioner's final rehabilitation plan. Although the United States removed the case for the purpose of seeking dissolution of the supplemental injunction, it has requested that this court retain jurisdiction over any future issues that might arise related to the Internal Revenue Service's attempts to collect taxes owed by Ambac. The United States admits that such issues may include whether the IRS may assert priority over other claimants to assets that would otherwise be used to pay claims on the segregated account. Thus, this case has the potential for disrupting any rehabilitation plan developed by the Commissioner and approved by the state court. Courts have recognized that under such circumstances, policyholders are best served by avoiding competing actions in federal court. Blackhawk Heating & Plumbing Co. v. Geeslin, 530 F.2d 154, 159-60 (7th Cir. 1976) ("The liquidation . . . is best left to a proceeding which will settle all of its affairs and dispose of all of its property. Federal courts should refrain from deciding issues confronting another court in pending proceedings."); Metropolitan Life, 572 F. Supp. at 471. Under such circumstances, abstention is appropriate.

The United States has not argued that its claims cannot be heard in the rehabilitation proceeding. The state rehabilitation court has allowed entities with an interest in the rehabilitation an ongoing right to be heard and apply for relief. In fact, the state court has heard challenges to the lawfulness of the account allocation and structure and the first-day injunction. As other claimants have done, the United States may present its challenges to

the state court, argue its position on the merits and if the result is unsatisfactory, appeal to the Wisconsin Court of Appeals. Cf. Bank of New York & Trust, 296 U.S. at 481 ("We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held."); United States v. $79,123.49 in United States Cash and Currency, 830 F.2d at 99 ("[T]he United States "is in no position to claim that its interests . . . could not be preserved by a Wisconsin court.").

In many respects, the state rehabilitation proceedings and the supplemental injunction are similar to federal bankruptcy proceedings and the automatic stay that goes into effect in bankruptcy. Insurance companies are barred from using bankruptcy to reorganize; their only remedy is a state court rehabilitation proceeding. As in bankruptcy, the efficacy of a rehabilitation proceeding is dependent upon the court's ability to stay actions by creditors that will interfere with the court's ability to manage the proceeding. When a claimant is affected by the stay, the claimant challenges the effect in the bankruptcy court and if the result is unfavorable, it appeals. The claimant does not file a separate proceeding in a separate court to determine whether the stay should apply, as the United States has done in this case.

Finally, the state rehabilitation court is uniquely qualified to hear these claims. It has the most familiarity with the rehabilitation proceeding and the applicable state statutes.

Thus, the principles of Burford require abstention in this case to permit resolution of the United States' claims through the available mechanisms in the state rehabilitation proceedings.

For the foregoing reasons, I will grant petitioner's motion to remand this case to the Circuit Court for Dane County. Because I conclude that removal was improper, I will not address the United States' motion for dissolution of the supplemental injunction.

ORDER

IT IS ORDERED that petitioner Theodore K. Nickel's motion to remand, dkt. #12, is GRANTED and this case is REMANDED to the Circuit Court of Dane County for lack of subject matter jurisdiction. The clerk of court is directed to transmit the file to the Circuit Court of Dane County.

Entered this 14th day of January, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Case No. 10 CV 1576

NOTICE OF APPEAL OF THE UNITED STATES OF AMERICA

PLEASE TAKE NOTICE that the United States of America appeals to the Court of Appeals, District IV, from the final Judgment entered on January 24, 2011 in the Circuit Court for Dane County, the Honorable William D. Johnston of the Lafayette County Circuit Court presiding by designation, entitled "Decision and Final Order Confirming the Rehabilitator's Plan of Rehabilitation, with Findings of Fact and Conclusions of Law," in favor of the Office of the Commissioner of Insurance of the State of Wisconsin, Theodore Nickel, Commissioner ("OCI"), and Ambac Assurance Corporation ("Ambac"), where the Court confirmed OCI's Plan of Rehabilitation of the Segregated Account of Ambac. The decision and final order provides (at p. 60) that the Court's March 24, 2010 order for temporary injunctive relief "shall remain in full force and effect throughout the period of administration of the Plan" and thus appears to make final that injunction. The decision and final order also provides (at p. 60) that "the prior orders of this Court shall remain in full force and effect throughout the period of administration of the Plan" and thus appears to make final the ex parte Order for Temporary Supplemental Injunctive Relief entered against "the United States Internal Revenue Service, and all other federal . . . governmental entities" on November 8, 2010 in favor of OCI and Ambac, in which the Court enjoined the United States Internal Revenue Service from "commencing or prosecuting any

actions, claims, lawsuits or other formal legal proceedings" or "taking any prejudgment or other steps to transfer, foreclose, sell, assign, garnish, levy, encumber, attach, dispose of, or exercise purported rights in or against any property or assets of the Segregated Account, Ambac, the Allocated Subsidiaries, or the Ambac Subsidiaries" with respect to the potential federal liabilities of Ambac. The United States' appeal encompasses this order making final the injunctions.

There are two appellate proceedings pending in the United States Court of Appeals for the Seventh Circuit arising from federal court actions relating to the same January 24 Judgment and November 8 Injunction. *See Nickel v. United States*, Case No. 11-1158 (7th Cir.); *United States v. Wisconsin State Circuit Court*, Case No. 11-1419 (7th Cir.) The United States asserts that the federal courts, not Wisconsin state courts, properly have jurisdiction over this dispute, that the Circuit Court had no jurisdiction to enter the Judgment or Injunction against the United States, and that the Circuit Court's Judgment and Order violate the sovereign immunity of the United States. The United States files this Notice of Appeal to preserve its right to appeal within the Wisconsin state court system and does not admit that the Wisconsin state courts have properly asserted jurisdiction over the United States. The United States therefore maintains that the Court of Appeals, District IV, should hold this appeal in abeyance pending the outcome of the federal appeals.

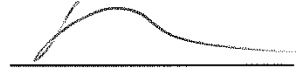
This is not an appeal within Wis. Stat. § 752.31(2).

This is not an appeal entitled to preference by statute.

Respectfully submitted,

March 8, 2011

UNITED STATES DEPARTMENT OF JUSTICE



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STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV COUNTY OF ORIGIN DANE

Case Caption (Case Name)
In the Matter of the Rehabilitation of
Segregated Account of Ambac Assurance Corporation

DOCKETING STATEMENT

Circuit Court Case No. 2010-CV-1576

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Appellant)	Attorney's Name and Address	(Space for file stamp.)
United States of America	Robet J. Kovacev Hilarie Snyder United States Department of Justice Tax Division Benjamin Franklin Station Post Office Box 7238 Washington, D.C. 20044	
	Attorney's Telephone Number (202) 307-6541 (202) 307-2708	
Respondent(s) (Cross-Respondent)	Attorney's Name and Address	
Office of the Office of the Commissioner of Insurance of the State of Wisconsin, Theodore Nickel, Commissioner, and Ambac Assurance Corporation	Counsel for OCI: Michael B. Van Sicklen Foley & Lardner LLP 150 East Gilman Street Post Office Box 1497 Madison, Wisconsin 53701 Counsel for Ambac: Daniel Stolper Stafford Rosenbaum LLP 222 West Washington Avenue, Suite # 900 P.O. Box 1784 Madison, Wisconsin 53701-1784 Peter A. Ivanick Dewey & LeBoeuf LLP 1301 Avenue of the Americas New York, NY 10019	
	Attorney's Telephone Number (608) 257-5035 (608) 256-0226	

CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
  1. no more than 3 issues are raised;
  2. the parties' briefs will not exceed 15 pages in length; and
  3. the briefs can be filed in a shorter time than normally allowed.

  These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

☒ Yes ☐ No If yes, date of entry January 24, 2011.

Is appeal timely? *(See §808.04, Wisconsin Statutes)*

☒ Yes ☐ No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

☒ Yes ☐ No *(If "no", explain jurisdiction basis for appeal on separate sheet.)*

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

This appeal arises from an insurance rehabilitation proceeding of the "Segregated Account" of Ambac Accurance Corporation. The Commissioner of Insurance is the rehabilitator of the Segregated Account. Ambac itself is not in rehabilitation. In that proceeding, the circuit court issued temporary injunctions against the United States and its agency the Internal Revenue Service purporting (1) to assert exclusive jurisdiction over certain potential federal tax liabilities of Ambac (not yet asserted by IRS), and (2) to enjoin the IRS and any other federal entities from "commencing or prosecuting any actions, claims, lawsuits or other formal legal proceedings" or "taking any prejudgment or other steps to transfer, foreclose, sell, assign, garnish, levy, encumber, attach, dispose of, or exercise purported rights in or against any property or assets of the Segregated Account, Ambac, the Allocated Subsidiaries, or the Ambac Subsidiaries" with respect to the potential federal tax liabilities of Ambac. On 1/24/2011, the circuit court issued a final Decision and Order approving a rehabilitation plan for the Segregated Account that made the injunctions permanent. The injunctions exceeded the jurisdiction and power of the circuit court as they violate the sovereign immunity of the United States, as well as the federal Tax Anti-Injunction Act, 26 U.S.C. 7421(a), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.".

ISSUES – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*
(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

Whether the injunctions violate the sovereign immunity of the United States.

Whether the injunctions are barred by the federal Tax Anti-Injunction Act, 26 U.S.C. § 7421(a).

Whether the circuit court exceeded its jurisdiction when it asserted exclusive state court jurisdiction over a potential federal tax liability of Ambac not yet asserted by the IRS and where Ambac itself is not in rehabilitation or receivership. See 26 U.S.C. § 6871.

Whether the circuit court erred in concluding that "the rest of the disputed tax allocations, which total approximately $700 million, are subject to the jurisdiction of this Court and the priority structure adopted by the Plan due to the timely, pre-bankruptcy allocation of those disputed liabilities by the Rehabilitator and OCI to the Segregated Account."

Whether the circuit court otherwise erred in confirming the rehabiliation plan as it relates to the United States and its agencies.

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

The proper standard of review for all issues is de novo. See Miller Brewing Co. v. Dep't of Industry, Labor & Hum. Relations, Equal Rights Div., 210 Wis.2d 26, 563 N.W.2d 460 (Wis, 1997) (de novo review of determination of preemptive effect of federal law over state law); Canadian Nat. R.R. v. Noel, 304 Wis.2d 218, 736 N.W.2d 900 (Wis. App. 2007)("Whether a claim is barred by sovereign immunity is a question of law.")

Do you wish to have this appeal placed on the expedited appeals calendar? *(See Criteria For Expedited Appeals.)*

☐ Yes ☒ No If "no", explain : There are two appellate proceedings pending in the United States Court of Appeals for the Seventh Circuit, arising from an order rejecting the United States' attempt to remove this action to federal court and from the dismissal of a separate federal court action relating to the same January 24 Judgment and the injunctions made final therein. See Nickel v. United States, Case No. 11-1158 (7th Cir.); United States v. Wisconsin State Circuit Court, Case No. 11-1419 (7th Cir.). The United States asserts that the federal courts, not Wisconsin state courts, properly have jurisdiction over this dispute. The United States files this Notice of Appeal to preserve its right to appeal within the Wisconsin state court system if the federal appeals court affirms the orders of the federal trial court, and does not admit that the Wisconsin state courts have properly asserted jurisdiction over the United States. The United States therefore maintains that the Wisconsin Court of Appeals, District IV, should hold this appeal in

abeyance pending the outcome of the federal appeals

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?
☒ Yes ☐ No

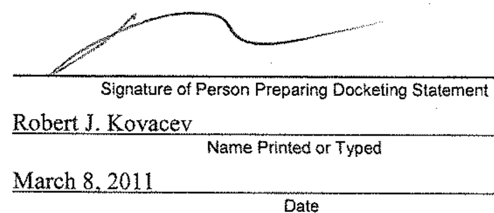
Will you request oral argument?
☒ Yes ☐ No

List all parties in trial court action who will not participate in this appeal:

Party	Attorney's Name and Telephone Number	Reason for not Participating
The rehabilitation proceeding involves several interested parties, several of whom have already filed appeals in this Court, and none of which are federal tax authorities or are affected by the circuit court's injunction against collecting potential federal tax liabilities. None of those parties are affected by this appeal by the United States.		

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?
☒ Yes ☐ No Name of Case Nickel v. United States; United States v. Wisc. State Circuit Court

Appeal Number 11-1158; 11-1411 (7th Circuit)



Signature of Person Preparing Docketing Statement

Robert J. Kovacev
Name Printed or Typed

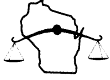
March 8, 2011
Date

Appellant Note:

You MUST attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also furnish all opposing counsel with a copy of this completed Docketing Statement and attached trial court documents.



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February 25, 2010

RECEIVED
FEB 26 2010
CLERK OF SUPREME COURT
OF WISCONSIN

Carrie Janto
Deputy Clerk of Wisconsin Supreme Court
P.O. Box 1688
Madison, WI 53701

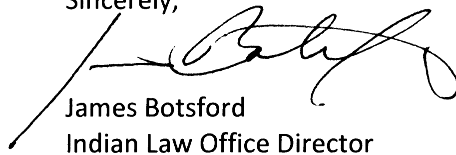
Re: Rule Petition regarding Unauthorized Practice of Law

Dear Ms. Janto,

Per your instructions please find 10 copies (including the original) of written testimony on the proposed Supreme Court Rule regarding the Unauthorized Practice of Law. A Hearing is set for this matter on March 8, 2010.

I have been authorized by the Wisconsin Tribal Judges Association (WTJA) to submit this testimony, signed by their President, on their behalf. If you have any questions, please contact me. It is my understanding that no one from WTJA will be requesting to present oral testimony at the Hearing on March 8th.

Sincerely,



James Botsford
Indian Law Office Director

JB/mn
Encs.

STATE OF WISCONSIN	IN THE SUPREME COURT
In re proposed SCR 23 Regulation of Unauthorized Practice of Law	**TESTIMONY REGARDING PROPOSED RULE**

Madam Chief Justice and Honorable Justices of the Wisconsin Supreme Court:

Although the Unauthorized Practice of Law (UPL) Rule does not appear to involve Indian law, it potentially touches tribes in two areas: 1) the common practice of tribes to be represented by non-attorneys in state court child custody proceedings involving Indian children and 2) the practice of non-attorney lay advocates in tribal courts. The Wisconsin Tribal Judges Association (WTJA) would not presume to advise the Wisconsin Supreme Court on the merits of the proposed Rule before you regarding the regulation of the UPL in the state courts. We trust you will make an informed and appropriate decision. We do, however, take this opportunity to address two elements of the Petition before you that have the potential for unintended adverse consequences on the rights of tribes and the practices in our tribal judicial systems.

The proponents of this UPL Rule Petition have been responsive to these two concerns in their drafting, and in response to discussions with the Indian Law Section of the State Bar have amended their proposed Rule in a manner that would seem to favourably resolve our concerns of unintended consequences. We wish to simply and briefly state what these two concerns are, so that you might know why the amended language before you is both important and satisfactory to us.

1. *Proposed SCR 23.02(2)(h) – "Activities which are pre-empted by federal law": "COMMENT: This rule does not apply to tribal courts operated under the jurisdiction of federally recognized Indian tribes."*

RECEIVED
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CLERK OF SUPREME COURT
OF WISCONSIN

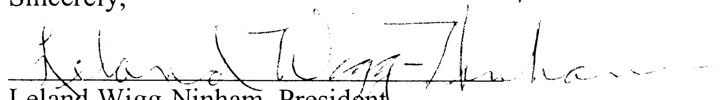
This important Comment would avoid a potential unintended consequence of clouding the issue of who may practice in tribal courts. Each of WTJA's member tribal judiciaries has its own admittance to practice criteria based on its own laws and court rules. Some tribal courts in Wisconsin require successful passage of a tribal bar exam. Typically our tribal courts allow for admittance of trained Lay Advocates and Guardians-ad-Litem who are not state-licensed attorneys but do meet other criteria. These non-attorney representatives play a vital role in access to justice in our courts. The Comment quoted above will make clear that this Rule would not apply to our tribal judicial forums.

2. *Proposed SCR 23.02(2)(n):*
"(n) Government agencies, Indian tribes, and their employees carrying out responsibilities produced by law."

The inclusion of "Indian tribes" in this subpart avoids a potential unintended consequence of interfering with tribal participation in state court cases, particularly those involving the federal Indian Child Welfare Act (ICWA) or the recently enacted Wisconsin Indian Child Welfare Act (WICWA). Under both ICWA and WICWA tribes have the right to intervene in certain state court proceedings involving the custody or placement of their tribal children. It is not uncommon in such cases for tribes (particularly poorer tribes) to send their tribal ICWA Director or Social Services Director to represent the tribe's interests in these cases. Indeed, the job descriptions of these tribal employees may include such representation. This deference to each tribe's right to select their own representative has been a common practice in the state courts of Wisconsin for many years. The above quoted subpart of the proposed Rule would eliminate any ambiguity as to this tribal right and practice.

On behalf of WTJA I extend our greetings, thank you for this opportunity to express our interests, and wish you well in your deliberations of this important proposed rule before you.

Sincerely,



Leland Wigg-Ninham, President
Wisconsin Tribal Judges Association
Submitted this 22th day of February, 2010