

STATE OF WISCONSIN  
SUPREME COURT

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In the Matter of the Rehabilitation of:  
Segregated Account of Ambac Assurance  
Corporation:

Theodore K. Nickel and Office of the  
Commissioner of Insurance,

Petitioners-Respondents,

v. Appeal No. 2011AP987

Ambac Assurance Corporation,  
Interested Party-Respondent,

United States of America,  
Interested Party-Appellant,

Access To Loans for Student Loan  
Corporation, Assured Guaranty  
Corporation, Aurelius Capital  
Management LP, Bank of America, N.A.,  
Bank of New York Mellon, Countrywide  
Home Loans Servicing L.P., Customer  
Asset Protection Company (“CAPCO”),  
Depfa Bank, plc, Deutsche Bank National  
Trust Company, Deutsche Bank Trust  
Company Americas, Eaton Vance, Federal  
Home Loan Mortgage Corporation  
(“Freddie Mac”), Federal National  
Mortgage Association (“Fannie Mae”), Fir  
Tree Inc., Goldman Sachs & Co., Inc.,  
HSBC Bank SA, National Association,  
King Street Capital Master Fund, Ltd.,  
King Street Capital, L.P.,  
Knowledgeworks Foundation, Lloyds TSB  
Bank plc, Monarch Alternative Capital  
LP, Nuveen Asset Management, One State  
Street LLC, PNC Bank, Restoration  
Capital Management LLC, Stone Lion  
Capital Partners LP, Stonehill Capital

Management LLC, Treasurer of the State of Ohio, U. S. Bank National Association, Wells Fargo Bank, N.A., Wells Fargo Bank, National Association as Trustee for the LVM Bondholders, Wilmington Trust Company and Wilmington Trust FSB, Interested Parties.

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Appeal from the Circuit Court of Dane County  
The Honorable William D. Johnston, Presiding  
Circuit Court Case No. 10CV1576

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**RESPONSE TO UNITED STATES'  
PETITION FOR REVIEW**

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## INTRODUCTION

The Petition for Review filed by the United States, on behalf of the Internal Revenue Service (hereinafter “IRS”), seeks review of an unpublished *per curiam* decision in which the Court of Appeals dismissed the IRS’s appeal because the government attorney who signed the notice of appeal is not licensed to practice law in Wisconsin. Following settled Wisconsin precedent, the Court of Appeals held that the improperly signed notice of appeal was a fundamental defect that divested the court of jurisdiction over the appeal.

The IRS’s Petition for Review should be denied for the following reasons.

*First*, this Court’s law-development function would not be well-served by reviewing the unpublished *per curiam* decision of the Court of Appeals. By rule, the decision may not be cited in the future and has no precedential impact on any case other than this one.

*Second*, the IRS is seeking relief from the mistake of having a government attorney not licensed to practice law in Wisconsin sign its notice of appeal, a mistake that is contrary to the government’s longstanding practice in Wisconsin state

courts. Granting review here would not advance this Court's interest in developing the law on important legal issues likely to recur in the future because the government has never committed the mistake at issue here in any reported case in the history of Wisconsin, and it is unlikely to repeat the mistake in the future.

*Third*, even if it were this Court's institutional role to perform the error-correction function requested by the IRS (which it is not), granting review is unnecessary because the Court of Appeals' decision was correctly decided based on WIS. STAT. § 802.05 and the applicable Supreme Court Rules.

*Finally*, even if this Court were otherwise interested in reaching the practice mistake issue, waiver is an alternate and case-dispositive ground for affirmance. Specifically, the IRS has waived any right under settled Wisconsin law to seek appellate review of the Dane County Circuit Court's ("Rehabilitation Court's") Plan Confirmation Order because, for tactical reasons, the IRS never objected to the entry of that order in the Rehabilitation Court.

## STATEMENT OF THE CASE

The IRS's Petition for Review arises from an insurer rehabilitation proceeding being conducted by the Wisconsin Commissioner of Insurance (the "Commissioner") in the Rehabilitation Court in accordance with WIS. STAT. ch. 645. On November 10, 2010, the Commissioner served the IRS with written notice of the Plan confirmation hearings.<sup>1</sup>

Despite this written notice, the IRS elected for strategic reasons not to raise any objections in the Rehabilitation Court to the Plan at any time (not before, at, or after the Plan confirmation hearings). As the IRS acknowledges in its Petition:

Other than a copy of a notice of removal (required by 28 U.S.C. § 1446(d)),<sup>[2]</sup> the notice of appeal was the first document filed by the United States in the Circuit Court.

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<sup>1</sup> See <http://ambacpolicyholders.com/seconddeclaration> (at ¶¶ 2-5, and Exs. 1-3). The Commissioner also served the IRS with copies of various documents pertaining to the rehabilitation proceeding, which directed the IRS to the above court-approved Web site for the rehabilitation proceeding to obtain additional information, including all substantive court filings.

<sup>2</sup> For a discussion of the IRS's federal court strategy, starting with its removal of the rehabilitation proceeding to federal court, see Argument § V, *infra*.

(Pet. at 7.)

Even though the IRS elected not to appear in the state court proceedings or to object in any fashion to the Commissioner's request that the Rehabilitation Court enter an order confirming the proposed Plan, the IRS nevertheless attempted to pursue the present appeal of the resulting order. In doing so, the IRS compounded its problems on appeal by having a government attorney who was not licensed to practice law in Wisconsin sign its notice of appeal.

On March 25, 2011, the Commissioner filed a motion to dismiss the IRS's state court appeal on two grounds. *First*, the Commissioner noted that the IRS's Notice of Appeal was fundamentally defective because it was not signed by an attorney licensed to practice in Wisconsin. WIS. STAT. § 802.05(1). Specifically, the IRS's failure to have the Notice of Appeal signed by a Wisconsin-licensed attorney was contrary to the United States' own past practice in Wisconsin appellate courts, under which federal government attorneys are authorized to attend to federal interests in state court, but Wisconsin-licensed attorneys (such as attorneys from the

local United States' Attorney's office) sign papers such as a Notice of Appeal.

*Second*, the Commissioner noted that the IRS had waived all of its challenges to the Plan Confirmation Order by failing to present any of those challenges to the Rehabilitation Court and to permit that court to decide those issues in the first instance. In other words, by making the calculated decision to pursue an exclusively federal court strategy (and to avoid presenting any arguments to the Rehabilitation Court), the IRS failed to preserve any arguments for state court appellate review.

On May 3, 2011, in an unpublished *per curiam* decision, the Court of Appeals dismissed the IRS's appeal for lack of jurisdiction based on the first ground (*i.e.*, the fundamental defect in the Notice of Appeal) raised in the Commissioner's motion to dismiss. (*See* A. 1-13.) The Court of Appeals did not reach the question of waiver.

The IRS then filed the subject Petition for Review.

## ARGUMENT

### THE IRS'S PETITION SHOULD BE DENIED

“Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented.” WIS. STAT.

§ 809.62(1r). Review is reserved for legal questions that serve the Court’s law-developing function, *id.*, not mere error correction. *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515, 516 (1987). Even when review would serve a law-developing purpose, the grant of a petition for review “should occur only when the issues are significant to the justice system as a whole or to a significant class of litigants. A case with issues of importance only to the parties to the dispute should not reach the supreme court.” Michael S. Heffernan, APPELLATE PRACTICE & PROCEDURE IN WISCONSIN § 22.2 (2011).

For the multiple reasons discussed below, the IRS’s Petition should be denied.

**I. The Court of Appeals Decision Is An Unpublished *Per Curiam* Memorandum Order With No Precedential Effect**

The IRS argues that the Court of Appeals' decision has "statewide impact," "recurring significance," and broad-reaching effects on Justice Department attorneys who "often appear in state courts[.]" (Pet. at 10, 25-26.)

To the contrary, the decision of the Court of Appeals in this matter is both unpublished and *per curiam*. Unlike authored unpublished opinions, which may be cited for persuasive value only, Rule 809.23(3) bars the citation of unpublished *per curiam* opinions of the Court of Appeals for any purpose other than claim preclusion, issue preclusion or the law of the case. WIS. STAT. § 809.23(3)(a)-(b). Thus, rather than having "statewide impact" or "recurring significance," the decision of the Court of Appeals in this case will never be cited and has no impact on any Wisconsin case other than this one.

**II. The Petition Seeks To Absolve The IRS Of A Practice Mistake By Its Attorney, And Does Not Address A Broad Legal Issue Which Either Has Affected The Federal Government In The Past Or Is Likely To Ever Affect It Again**

The IRS’s claim that the decision has “statewide impact” and “recurring significance” also is contradicted by the United States’ longstanding practice in having Wisconsin-licensed attorneys appear as counsel of record in state appellate court proceedings. As the Court of Appeals stated:

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 [a] 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. United States Attorneys’ Manu[a]l § 6-1.120.

(A. 8.)<sup>3</sup>

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<sup>3</sup> Based on the 17 years of appellate dockets that are available through the state’s electronic court records, the United States has participated in numerous appeals before Wisconsin state courts as an appellant or respondent and has always had a state-licensed attorney as counsel of record. *See* Appeal Nos. 2006AP1442 (private Wisconsin-licensed Attorney Jost); 2002AP3200 (Attorney Knepel, of the United States Attorney’s Office (“USAO”) for the E.D. Wis.); 2002AP2932 (Attorney Biskupic, USAO for the E.D. Wis.); 1998AP2419 (Attorney Richmond, USAO for the E.D. Wis.); (continued on following page)

Thus, contrary to the IRS's suggestion, the Court of Appeals' decision does not upset any longstanding practice of the federal government in this state. The United States' standard practice in *every other case* (except this one) has been to involve a Wisconsin-licensed attorney, typically from the U.S. Attorney's office, as counsel of record.

The mistake by the IRS's attorney in this case was an aberration from the federal government's standard practice, so the dismissal decision has no systemic impact. (*See* A. 9 (the issue here arises because non-licensed government attorney who signed Notice of Appeal "simply failed to carry out his responsibilities according to the applicable rules".))

This Court's law-development function would not be well-served by taking review to address an argument by the IRS about a mistake it apparently has never made before in a Wisconsin court and is unlikely to repeat again.

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1994AP652 (Attorney Knepel); 1994AP159 (Attorney Lautenschlager, USAO for the W.D. Wis.); 1992AP1429 (Attorney Humphrey, USAO for the W.D. Wis.). The dockets for these cases, including the two in which the United States was an appellant (1994AP159 and 1994AP652), do not indicate that the United States has ever moved to waive generally applicable signature requirements on the basis of federal or other law.

**III. Even If It Were The Role Of This Court To Correct Alleged Errors By The Court Of Appeals, There Is No Error To Correct**

Contrary to the IRS's arguments, the Court of Appeals' dismissal of the IRS's appeal was correctly decided.

*First*, on its face, WIS. STAT. § 802.05(1) does not exempt government attorneys from compliance with the statutory signature requirement, which is the state law analog to Rule 11 of the Federal Rules of Civil Procedure.

*Second*, the IRS discusses Section 802.05(1) generally (*see* Pet. at 7, 10-11, 12), but fails to note that one of the purposes of the statutory signature requirement is “to guarantee that an attorney who is familiar with the procedural and substantive laws of this state has read the claims and has made an assessment of the claims’ validity.” *Schaefer v. Riegelman*, 2002 WI 18, ¶ 33, 250 Wis. 2d 494, 639 N.W.2d 715. Neither the Supreme Court Rules nor the federal statutes or regulations cited by the IRS address (or conflict with) this purpose underlying Section 802.05(1).

*Third*, the decision does not declare new legal doctrine or contradict any prior decision of this Court or the Court of Appeals. In its Petition, the IRS does not even mention

*Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 211-12, 562 N.W.2d 401, 410-11 (1997), relied on by the Court of Appeals (*see* A. 6), and includes only an incomplete discussion of *Schaefer* and *Brown v. MR Group, LLC*, 2004 WI App 122, ¶¶ 1, 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481. (*See* Pet. at 12, 15, 31-32.)

*Finally*, attorneys employed by the federal government enjoy no immunity from state *pro hac vice* rules, as a matter of either state or federal law. Supreme Court Rule (“SCR”) 10.03(4)(b), which articulates the requirement that nonresident counsel be admitted *pro hac vice* in order to appear in Wisconsin courts, contains no general exception for government attorneys. Instead, SCR 10.03(4)(c) exempts “nonresident military counsel,” a subset of all government attorneys, demonstrating that other government attorneys must comply with the usual *pro hac vice* regime.

In the alternative, the IRS argues that if SCR 10.03(4) contains no exception for government attorneys, it is preempted by federal law. But federal law provides that government attorneys must comply with the same rules as other attorneys:

An 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.

28 U.S.C. § 530B(a).

**IV. The IRS Waived The Right To Pursue This Appeal Because It Never Appeared Before The Rehabilitation Court And Never Objected To The Plan Confirmation Order It Seeks To Appeal**

Pursuant to WIS. STAT. § 809.62(3)(d), there also is an “alternative ground supporting the court of appeals result”: the IRS failed to preserve any issues for review in the Rehabilitation Court and thereby waived any right to appeal. Even if this Court took review, it likely would later conclude that doing so had been improvident because the Court of Appeals’ decision is equally valid and affirmable on the waiver issue.

The IRS argues that the waiver issue is “sufficiently complex[.]” that this Court should not consider it in deciding the Petition. (Pet. at 43.) However, there is no such complexity. All this Court needs to know about the waiver issue is what the IRS admits in its Petition:

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.

(Pet. at 7.) In other words, as part of its federal court strategy, the IRS intentionally avoided presenting any of its challenges to the state Rehabilitation Court, despite repeated directions by the district court (Crabb, J.) to do so. *See In the Matter of Rehab. of Segregated Account of Ambac Assurance Corp.*, No. 10-CV-778-BBC, --- F. Supp. 2d ---, 2011 WL 956855 at \*9 (W.D. Wis. Jan. 14, 2011); *United States v. Wis. State Circuit Ct.*, No. 11-CV-99-BBC, ---F. Supp. 2d ---, 2011 WL 572406 at \*4-\*5 (W.D. Wis. Feb. 18, 2011). As a result, the IRS failed to preserve any issues for state court review.

As this Court has noted:

It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.

*State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727.<sup>4</sup>

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<sup>4</sup> This waiver rule applies to government entities as well as private litigants. *See, e.g., Oneida County v. Wis. Emp't Relations Comm'n*, 2000 WI App 191, ¶¶ 22-24, 238 Wis. 2d (continued on following page)

Finally, there is no merit to the IRS's contention that the issues it never presented to the Rehabilitation Court for consideration involve subject matter jurisdiction, which cannot be waived on appeal. (Pet. at 43-45.) Contrary to the IRS's assertion, arguments related to the United States' sovereign immunity do not implicate a court's subject matter jurisdiction. As the Seventh Circuit has explained,

Sovereign immunity is not a jurisdictional doctrine. . . . The Department of Justice needs to abandon its rear-guard attempt to treat all conditions on waivers of sovereign immunity as "jurisdictional." It should recognize the modern understanding of the difference between "jurisdiction" and other norms.

*Wis. Valley Improvement Co. v. United States*, 569 F.3d 331, 333-34 (7th Cir. 2009); *see also Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008).<sup>5</sup>

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763, 618 N.W.2d 891 (holding arguments raised by county government waived); *In re Commitment of Bollig*, 222 Wis. 2d 558, 564, 587 N.W.2d 908, 910 (Ct. App. 1998) ("This waiver rule applies to the State with equal force, when the State is the appellant."). The same waiver rule applies in federal court, including as to the United States. *See, e.g., Hutchings v. United States*, 618 F.3d 693, 696 (7th Cir. 2010); *Gutierrez v. Schomig*, 233 F.3d 490, 491 n.1 (7th Cir. 2000).

<sup>5</sup> In addition, it is well-established in Wisconsin that "a circuit court is never without subject matter jurisdiction." *Village of* (continued on following page)

**V. The IRS Is Not Unfairly Prejudiced By The Dismissal Of Its State Court Appeal, Which Was Filed Solely As A Backstop In The Event Its Federal Court Strategy Failed**

The IRS asserts that “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.” (Pet. at 19.) However, this assertion ignores the IRS’s federal court strategy and the relief it continues to pursue in different federal courts.

*First*, the IRS admits that it has “filed a proof of claim in the federal bankruptcy case of AFGI [Ambac’s parent] for more than \$800 million” related to the same disputed tax liability. (Pet. at 6 n.3.)

*Second*, the IRS has two pending federal appeals in the Seventh Circuit, in which the IRS seeks to lift the Rehabilitation Court’s injunction so it can use its federal levy or lien powers to seize the disputed tax refund directly.

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*Trempeleau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis. 2d 76, 681 N.W.2d 190. *See also Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 147-48, 605 N.W.2d 210, 214-15 (Ct. App. 1999) (applying same principle in insurer rehabilitation context).

Specifically, on December 8, 2010, the IRS removed the entire rehabilitation proceeding to federal court. On January 14, 2011, the district court (Crabb, J.) granted the Commissioner's motion to remand the rehabilitation proceeding to the state Rehabilitation Court, noting:

*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.*

*In re Segregated Acct.*, 2011 WL 956855 at \*9 (emphasis added).

The IRS ignored this advice. Instead of presenting its challenges to the Rehabilitation Court upon remand, the IRS appealed the Remand Order to the Seventh Circuit, where that appeal remains pending. *See Nickel v. United States*, No. 11-1158 (7th Cir.).

The IRS also filed a separate action in district court on February 9, 2011, naming the Rehabilitation Court itself, along with the Commissioner and Ambac, as defendants. The district court (Crabb, J.) dismissed the IRS's action *sua sponte*, noting that the IRS had "disregarded" the court's prior discussion in the Remand Order that the IRS should pursue its

challenges in the state Rehabilitation Court. *Wis. State Circuit Ct.*, 2011 WL 572406 at \*4.

The district court also noted the detrimental effect of the IRS's repeated attempts to federalize the state insurer rehabilitation proceeding:

By filing a collateral attack against orders issued in the state rehabilitation proceeding, the United States has *once again* disrupted the proceeding and *deprived the state court of the opportunity to address issues* that are similar to those raised by other creditors and have the potential to impair the rehabilitation plan.

*Id.* at \*5 (emphasis added).

The IRS ignored the district court's advice once again, choosing instead to appeal the dismissal order to the Seventh Circuit, where that second appeal remains pending. *See United States v. Wisconsin State Circuit Ct.*, Case No. 11-1419 (7th Cir.).

The IRS's suggestion that it is unfairly prejudiced by the dismissal of its state court appeal, which the IRS filed solely *as a backstop* in the event its federal court strategy was unsuccessful, should be rejected. (*See* Notice of Appeal, A. 36 (asserting that "the federal courts, not Wisconsin courts, properly have jurisdiction over this dispute" and "the

United States file[d] this Notice of Appeal to preserve its right to appeal within the Wisconsin state court system”)

### CONCLUSION

For the reasons discussed above, the IRS’s Petition seeking review of the Court of Appeals’ unpublished *per curiam* decision should be denied.

Dated this 15th day of June, 2011.

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/s/ Naikang Tsao

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**CERTIFICATION OF FORM, LENGTH AND  
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I hereby certify that this response brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman, 13 point). The length of this brief is 3,298 words (as counted by MS Word).

I further certify that the text of the electronic copy of this response brief is identical to the text of the paper copy of the response brief.

Dated: June 15, 2011

/s/ Naikang Tsao

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Naikang Tsao