COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION Appeal No. 2011AP561

Dane County Circuit Court Case No. 2010-CV-1576
The Honorable William D. Johnston,
Lafayette County Circuit Court, Presiding by Judicial Assignment

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WISCONSIN COMMISSIONER OF INSURANCE'S MOTION TO DISMISS UNITED STATES' APPEAL

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Respondents Theodore Nickel, the Wisconsin Commissioner of Insurance, and the Office of Commissioner of Insurance (collectively, the "Commissioner"), hereby move to dismiss this appeal filed by the United States, on behalf of the Internal Revenue Service ("IRS").

INTRODUCTION

The IRS's appeal should be dismissed for two independent reasons.

First, this Court lacks appellate jurisdiction over the IRS's appeal. Under Wisconsin law, the IRS's March 8, 2011 Notice of Appeal is fundamentally defective because it was not signed by an attorney of record licensed to practice law in Wisconsin. WIS. STAT. § 802.05(1). This Court advised counsel of this requirement on March 15, 2011: An "attorney licensed in Wisconsin with whom the nonresident attorney is associated must . . . sign *all papers*, motions, and briefs filed with this court in the above-referenced case." (3/15/11 Court of Appeals Letter to Counsel in Appeal No. 2011AP561 ("3/15/11 Letter") (emphasis added).) Thus, the Notice of Appeal contains a fundamental defect, which divests this Court of jurisdiction over the IRS's appeal.

The IRS notes that a federal statute (28 U.S.C. § 517) authorizes the Attorney General to send federal government attorneys to

"attend to the interests of the United States" in state court,[1] but that federal statute is not in conflict with the subscription requirement in WIS. STAT. § 802.05. Consistent with the United States' own past practice in Wisconsin appellate courts, 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) must sign papers such as Notices of Appeal.

Second, even if appellate jurisdiction existed, the dismissal of the IRS's appeal would be required for another reason, as well. The IRS has waived all of its challenges to the Rehabilitation Plan Confirmation Order (the "Confirmation Order") in this appeal by failing to present those challenges to the Dane County Circuit Court handling this rehabilitation proceeding (the "Rehabilitation Court") and to permit that court to decide those issues in the first instance. Under settled Wisconsin law, the IRS cannot blindside the Rehabilitation Court now by seeking reversal based on theories that it purposefully chose not to pursue in that court for its own strategic reasons.

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[1] *See* 3/22/11 IRS Mot. for Waiver of Signature and Fee Requirements of Supreme Court Rule 10.03(4) at 4 ("IRS Mot. for Waiver of Signature and Fee Requirements").)

FACTUAL BACKGROUND

This appeal arises out of the largest insurer rehabilitation proceeding in Wisconsin history. The ongoing proceeding is pending in the Rehabilitation Court and relates to the rehabilitation of the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac"), which was one of the two largest providers of financial guaranty insurance in the world prior to its recent decline.

Pursuant to WIS. STAT. ch. 645, the Commissioner commenced the rehabilitation proceeding in March 2010, and also obtained first-day and supplemental injunctive relief to preserve claims-paying resources of the delinquent insurer and to prevent potential claimants from taking actions that would interfere with the orderly administration of the rehabilitation process.

The Rehabilitation Court scheduled hearings (on November 15-19 and November 30, 2010) on the Commissioner's proposed Plan of Rehabilitation. On November 10, 2010, the Commissioner sent the IRS written notice regarding the dates of the Plan confirmation hearings set by the Rehabilitation Court.[2] The Commissioner also served the IRS with

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[2] Proof of this notice is published on the court-approved Web site for the proceeding, at http://ambacpolicyholders.com/seconddeclaration (*see* Second Declaration of Michael B. Van Sicklen ¶¶ 2-5, and Exhs. 1, 2 and 3).

copies of various documents pertaining to the rehabilitation proceeding and, therein, directed them to the court-approved Web site for the rehabilitation proceeding, http://ambacpolicyholders.com, to obtain additional information, including substantive court filings in the rehabilitation proceeding.

Despite this written notice, the IRS did not raise any objections to the Rehabilitation Court at any time, at or after the Plan confirmation hearings held in November 2010. Indeed, before taking this appeal, the IRS had not asked any Wisconsin state court for any relief whatsoever, on any ground.

I. The IRS's Removal Of The Rehabilitation Proceeding To Federal Court, And The District Court's Remand To The Rehabilitation Court

On December 8, 2010, the IRS removed the entire rehabilitation proceeding to the United States District Court for the Western District of Wisconsin. *See In the Matter of Rehab. of Segregated Account of Ambac Assurance Corp. ("In re Segregated Acct.")*, No. 10-cv-778-bbc, 2011 WL 956855, at *3 (W.D. Wis. Jan. 14, 2011).

After the IRS's removal, the Commissioner immediately filed a motion to remand the rehabilitation proceeding to the Rehabilitation Court, and the IRS simultaneously moved to dissolve certain protective injunction orders in force in the rehabilitation proceeding, at least as applied to the IRS.

On January 14, 2011, the district court entered an Opinion and Order ("Remand Order"), granting the Commissioner's motion to remand the rehabilitation proceeding to the Rehabilitation Court. Because the district court concluded that it lacked subject matter jurisdiction over the IRS's removal action, it did not decide the IRS's motion to dissolve the Rehabilitation Court's supplemental injunction. *In re Segregated Acct.*, 2011 WL 956855, at *9 ("Because I conclude that removal was improper, I will not address the United States' motion for dissolution of the supplemental injunction.").

In the Remand Order, the district court noted that the IRS should present its challenges to the Rehabilitation Court on remand:

> 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 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.*

Id. at *9 (emphasis added, citations omitted).

However, the IRS did not heed the district court's advice and present its challenges to the Rehabilitation Court after the rehabilitation proceeding was remanded. Instead, on January 18, 2011, the IRS appealed the Remand Order to the United States Court of Appeals for the Seventh Circuit, and that appeal is pending. *See Nickel v. United States*, No. 11-1158 (7th Cir.).

II. The Rehabilitation Court's Issuance Of Its Confirmation Order

Upon remand of the rehabilitation proceeding, the Rehabilitation Court entered a final order on January 24, 2011, confirming the Commissioner's Plan of Rehabilitation. As the record reflects, the IRS failed to present *any* challenges related to the Confirmation Order to the Rehabilitation Court prior to (or after) that court's issuance of the Confirmation Order.

The Commissioner is now in the process of implementing the confirmed Plan of Rehabilitation.

III. The IRS's Collateral Federal Challenge To The District Court's Remand Order

Unwilling to abide by the district court's Remand Order and pursue its challenges before the Rehabilitation Court, on February 9, 2011, the IRS filed an original action in federal district court, naming the Rehabilitation Court, the Commissioner and Ambac as defendants. *United States v. Wis. State Circuit Ct. for Dane County*, No. 11-cv-99-bbc, 2011 WL 572406, at *2 (W.D. Wis. Feb. 18, 2011).

As part of that action, the IRS moved for a preliminary injunction to enjoin the Rehabilitation Court from holding a hearing on the IRS's motion to dissolve the supplemental injunction, and to enjoin the Rehabilitation Court from enforcing the Confirmation Order against the IRS. *Id.* at *2.

On February 18, 2011, the district court dismissed the IRS's complaint and entered a final judgment. *Id.* at *2-*5. In doing so, the district court noted that the IRS had "disregarded" the court's discussion in its Remand Order (excerpted above), *id.* at *4, which noted that the IRS should pursue its challenges in the Rehabilitation Court.

> 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 United States appealed the district court's dismissal order to the Seventh Circuit on February 22, 2011, and that appeal, Case No. 11-1419 (7th Cir.), is pending.

IV. The IRS's State Court Appeal

By statute, the deadline for seeking appellate review of the Confirmation Order, following the Commissioner's timely notice of the same to all parties-in-interest (including the IRS), was March 10, 2011. *See* WIS. STAT. § 808.04.

On March 8, 2011, the IRS filed a Notice of Appeal in the Rehabilitation Court, seeking appellate review of the Confirmation Order. The IRS's Notice of Appeal was signed by a non-resident United States Department of Justice (Tax Division) attorney, Robert A. Kovacev, who is not licensed to practice law in Wisconsin. (*Id.* at 3.)

On March 15, 2011, this Court wrote all counsel of record in Appeal No. 2011AP561, informing counsel that a notice of appeal had been filed that was signed by a non-resident attorney; that Wisconsin Supreme Court Rule 10.03(4) required the non-resident attorney to be associated with an attorney licensed to practice in Wisconsin; and that the attorney licensed in Wisconsin with whom the non-resident attorney is associated

"*must . . . sign all papers*, motions and briefs filed with this court in the above-referenced case." (3/15/11 Letter (emphasis added).)

On March 22, 2011, twelve days after the deadline for appealing the Confirmation Order, the IRS filed the following: (1) an entry of appearance for Assistant United States Attorney Richard Humphrey, an attorney licensed to practice in Wisconsin; (2) a motion to admit a different non-resident attorney, Anthony T. Sheehan, *pro hac vice*; (3) a motion to waive the signature (and administrative fee for *pro hac vice* admission) requirements under Wisconsin law; (4) a motion to hold the IRS's appeal in abeyance based on the IRS's First and Second Federal Appeals; and (5) a motion for reconsideration of this Court's March 16, 2011 Order, which among other things, assigned a single appeal case number to all recently filed appeals, including the IRS's appeal.

The Commissioner has filed an opposition to the IRS motions listed in (3)-(5) above concurrently with the filing of this Motion.

ARGUMENT

I. BECAUSE THE IRS'S NOTICE OF APPEAL IS FUNDAMENTALLY DEFECTIVE UNDER WISCONSIN LAW, THIS COURT LACKS APPELLATE JURISDICTION OVER THAT APPEAL

It is well settled that a notice of appeal must be signed by an attorney of record authorized to practice law in Wisconsin. *Brown v. MR Group, LLC*, 2004 WI App 122 ¶¶ 1, 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481. *See also Schaefer v. Reigelman*, 2002 WI 18 ¶¶ 17-19, 250 Wis. 2d 494, 639 N.W.2d 715 (holding that an attorney "not licensed to practice law in Wisconsin at the time the pleadings were filed" is "ineligible to appear as an attorney of record" or sign pleadings); *Jadair Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 211-12, 562 N.W.2d 401, 411 (1997) (holding that notice of appeal not signed by an attorney licensed to practice law in Wisconsin fails to confer appellate jurisdiction). *See generally* WIS. STAT. § 802.05(1).

Because the IRS's Notice of Appeal was not signed by an attorney licensed to practice law in Wisconsin, dismissal of the appeal is required.

A. Legal Standard

Section 802.05 provides, in relevant part, that:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual's name . . . .

WIS. STAT. § 802.05(1). The subscription requirement in Section 802.05 applies to a notice of appeal. *Brown*, 2004 WI App 122, ¶¶ 7, 13.

To establish whether a notice of appeal is fatally defective, courts in Wisconsin apply a two-part test.

> First, we must ascertain whether there is, in fact, a defect in the pleading. Second, we must determine if the defect is technical or fundamental in nature. If the defect is technical, the court has jurisdiction only if the non-pleading party has not been prejudiced by the defect. *If the defect is fundamental*, however, *the court does not have jurisdiction over the action, regardless of whether or not prejudice exists*.

Schaefer, 2002 WI 18, ¶ 14 (emphasis added, citations omitted).

In *Schaefer*, the Supreme Court held that the signature on a pleading by an attorney not licensed to practice law in Wisconsin—and therefore ineligible to appear as an attorney of record, as required by Section 802.05—is a fundamental defect, which prevented the court from acquiring jurisdiction. *Id.* ¶¶ 17-19, 34-38. In reaching this conclusion, the Court noted:

> [T]he purpose of requiring a handwritten signature, made by the attorney of record, is not

> only to clarify who is accountable for an invalid claim, but also 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. Authorizing rubber-stamped signatures or *allowing someone who is not licensed to practice law in Wisconsin to sign a pleading runs counter to this guarantee.* To hold that a failure to meet the subscription requirement is merely technical jeopardizes judicial economy, erodes attorney accountability, and lessens the essential protection that the subscription requirement affords to defendants.
>
> . . . In *Jadair*, the court of appeals held that a fundamental defect existed when a nonlawyer had signed a notice of appeal on behalf of a corporation. [209 Wis. 2d] at 212, 562 N.W.2d 401. The court stated that to allow this type of defect would be contrary to the legislative mandates of the procedural requirements and would evince this court's acceptance of the unauthorized practice of law. *Id.* We think that similar reasoning is applicable in this case.

Schaefer, 2002 WI 18, ¶¶ 33-34 (overruling *Novak v. Phillips*, 2001 WI App 156, 246 Wis. 2d 673, 631 N.W.2d 635, to the extent that the court of appeals in *Novak* held that a subscription defect was technical rather than fundamental) (emphasis added).[3]

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[3] Section 802.05 was amended and reorganized in 2005, *see* Sup. Ct. Order No. 03-06, 2005 WI 38, and Sup. Ct. Order No. 03-06 [supplement], 2005 WI 86, but the substance of the subscription requirement was unchanged. *Compare Schaefer*, 2002 WI 18, ¶¶ 16-17 (interpreting former Section 802.05(1)(a)) *with* Wis. Stat. § 802.05(1) (2006).

B. Because The IRS's Notice Of Appeal Is Not Signed By An Attorney Admitted To Practice Law In Wisconsin, This Court Lacks Jurisdiction Over The Appeal

1. The Notice of Appeal has a fundamental defect

The IRS's Notice of Appeal is defective because it is signed by a non-resident attorney who is not licensed to practice law in Wisconsin.[4] Thus, the Notice of Appeal is defective.

In *Brown*, this Court held that the failure to comply with the Section 802.05 subscription requirement in a notice of appeal was a fundamental defect:

> In this appeal, we hold that in order to confer jurisdiction on this court, a notice of appeal filed by counsel on behalf of another must contain the *handwritten signature of an attorney authorized to practice law in Wisconsin*. Counsel cannot delegate the duty to affix a signature on a notice of appeal to a person not authorized to practice law in Wisconsin.
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> * * *
>
> When a notice of appeal is not signed by an attorney when an attorney is required, the notice of appeal is *fundamentally defective and cannot confer jurisdiction* on this court.

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[4] No Wisconsin-licensed attorney is listed on the IRS's Notice of Appeal. *See Schaefer*, 2002 WI 18, ¶ 22 ("[O]ne of the fundamental requirements of granting a motion for pro hac vice admission is that the nonresident counsel proceeds in connection with an attorney who is licensed to practice in Wisconsin and that the Wisconsin attorney appears and takes part in the proceeding.").

Brown, 2004 WI App 122, ¶¶ 1, 6 (emphases added).

Because the IRS's Notice of Appeal suffers from this fundamental defect, "the court does not have jurisdiction over the action, regardless of whether or not prejudice [to the non-pleading party—here, the Commissioner] exists." *Schaefer*, 2002 WI 18, ¶ 14 (citing *Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629, 629 (1992)).

Finally, because the time for appealing the Confirmation Order has run, *see* WIS. STAT. § 808.04, the IRS cannot cure its fundamentally defective Notice of Appeal. As this Court ruled in *Brown*,

> A fundamentally defective notice of appeal cannot be cured by the filing of an amended notice of appeal which is not otherwise timely vis-à-vis the order or judgment appealed from.

Brown, 2004 WI App 122, ¶ 6 (citing *Jadair*, 209 Wis. 2d at 211-12, 562 N.W.2d at 411); *see also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (Solicitor General's attempt to ratify the FEC's timely but defective filing of a petition for certiorari after the time period for filing a petition had expired "simply came too late in the day to be effective").

2. Contrary to the IRS's assertion, 28 U.S.C. § 517 does not alter the fact that the Notice of Appeal has a fundamental, jurisdictional defect

The IRS notes 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," 28 U.S.C. § 517, and argues that requiring a Wisconsin-licensed attorney to sign filings on behalf of the IRS would "be an impermissible restriction on the authority of the Attorney General" under federal law. (*See* IRS Mot. for Waiver of Signature and Fee Requirements, at 4-5.)

To the contrary, nothing in Section 517 alters or effects state law pleading and appellate jurisdiction requirements, which apply to all litigants. Just as the United States is subject to Rule 11 of the Federal Rules of Civil Procedure, *see Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991), it also is subject to the state counterpart to that rule, Section 802.05(1),[5] when federal government attorneys litigate in state court. It would be an absurd result to read Section 517 to exempt government attorneys from complying with Section 802.05(1), given the latter statute's purpose. As the Wisconsin Supreme Court has explained, requiring

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[5] Section 802.05 derives from FED. R. CIV. P. 11. *See* WIS. STAT. ANN. § 802.05 cmt.

someone who is licensed to practice law in Wisconsin to sign a pleading "guarantee[s] 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*, 2002 WI 18, ¶ 33 (emphasis added).

The IRS points to no precedent for dispensing with Wisconsin's statutory signature requirement, and the Commissioner has found none. 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 this Court 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.); 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.

Finally, the IRS mistakenly argues that the signature requirement is a requirement "*in* Supreme Court Rule 10.03(4)(b)." (IRS Mot. for Waiver of Signature and Fee Requirements at 1 (emphasis added).) While there is a $50 fee requirement for non-resident attorneys seeking to appear *pro hac vice* under Supreme Court Rule 10.03(4)(b)(2), the signature requirement is a statutory and jurisdictional requirement under WIS. STAT. § 802.05, which applies to all represented parties.

The IRS's motion seeking waiver of the signature requirement also makes no mention of the fact that its March 8 Notice of Appeal was filed in violation of Section 802.05. Instead, the IRS frames its motion as only seeking the waiver of the signature requirement as it relates to the two new government attorneys entering an appearance (or seeking *pro hac vice* admission) for the first time on March 22, 2011. (IRS Mot. for Waiver of Signature and Fee Requirements at 5.) However, because the Wisconsin Supreme Court and this Court have held that non-compliance with Section 802.05 is a fundamental defect, *see Schaefer*, *Jadair*, *Brown*, discussed *supra*, there is no basis to "waive" that statutory requirement in the Notice of Appeal (or any other filing). Based on this precedent, dismissal is required.

II. BY FAILING TO BRING TO THE REHABILITATION COURT'S ATTENTION ANY OF THE ISSUES IT SEEKS TO RAISE IN THIS APPEAL, THE IRS HAS WAIVED ITS RIGHT TO APPEAL

The IRS's appeal also should be dismissed because it deprived the Rehabilitation Court of the opportunity to address the issues it now seeks to raise in this appeal.

A. Legal Standard

> 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. . . . The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice.

State v. Huebner, 2000 WI 59, ¶¶ 10-11, 235 Wis. 2d 486, 611 N.W.2d 727. This 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 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.").[6]

[6] 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).

To adequately preserve an argument for appeal, a litigant must bring the issue to the trial court's attention with sufficient particularity. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 594, 218 N.W.2d 129, 134 (1974). A party waives a right to appeal a particular theory by failing to adequately articulate it before the trial court, even if it "signal[s] its general interest" in that theory. *State v. Rogers*, 196 Wis. 2d 817, 828, 539 N.W.2d 897, 901 (Ct. App. 1995).

The rationale for this rule is straightforward:

> By forcing parties to make all of their arguments to the trial court, it prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original idea not win favor. We will not . . . blindside trial courts with reversals based on theories which did not originate in their forum.

Id. at 827, 539 N.W.2d at 901 (citation omitted).

B. The IRS Failed To Preserve Any Issues For State Court Review

As explained at the outset, the IRS has repeatedly made the tactical decision to raise its challenges arising out of the rehabilitation proceeding in federal court and to deprive the Rehabilitation Court of the opportunity to address those issues.

- Even though the IRS received notice of the Commissioner's proposed Plan of Rehabilitation and the November 2010 Plan confirmation hearings before the Rehabilitation Court, the IRS did not attend the confirmation hearings;

- Even though the IRS received notice of the Rehabilitation Court's November 8 Supplemental Injunction and notice of its right to challenge that order in the Rehabilitation Court, the IRS failed to make any objections in the Rehabilitation Court and instead removed the entire rehabilitation proceeding to federal court on December 8, 2010;

- Even after the federal district court issued its January 14, 2011 Remand Order, holding that it lacked subject matter jurisdiction over the rehabilitation proceeding and noting that the IRS should raise its issues before the Rehabilitation Court (subject to a right to appeal to this Court), the IRS steadfastly refused to raise its challenges before the Rehabilitation Court;

- After the Rehabilitation Court, on remand, indicated its willingness to hear the IRS's challenges, the IRS refused to avail itself of that opportunity to be heard and instead sued the Rehabilitation Court in federal court, seeking to enjoin it from considering the IRS's own challenges;[7]

- Even after the district court dismissed the IRS's lawsuit *sua sponte* on February 18, 2011 for lack of subject matter jurisdiction, and again suggested that the IRS should pursue its issues in the Rehabilitation Court, the IRS has refused to do so and has instead filed appeals to both this Court and the Seventh Circuit.

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[7] *Wis. State Circuit Ct. for Dane County*, 2011 WL 572406, at *2 ("The rehabilitation court scheduled a hearing for February 23, 2011 to discuss the United States' motion to dissolve the injunction order that had been filed in this [federal] court. The United States filed the present case, . . . seeking [among other things] to enjoin the state court from (1) holding the February 23 hearing on the United States' motion to dissolve the injunction . . . .").

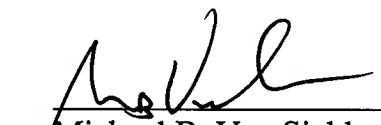
As evidenced by this chronology, the IRS has made the calculated decision to pursue a federal court strategy, and to intentionally avoid presenting any of its challenges to the Rehabilitation Court for resolution in the first instance. Based on the waiver doctrine, the IRS has no arguments to "preserve" in the State courts. (*See* Mot. to Hold Appeal in Abeyance at 5-7 (identifying five issues raised by IRS in its docketing statement, *none of which were presented to the Rehabilitation Court for resolution*).) The IRS cannot sandbag the Rehabilitation Court by seeking reversal of the Confirmation Order based on theories that it did not present to that court, and on arguments that it actively sought to enjoin the Rehabilitation Court from even considering.

CONCLUSION

For the reasons stated, the IRS's appeal should be dismissed.

Dated this 25th day of March, 2011.

FOLEY & LARDNER LLP



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