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 OPPOSITION TO UNITED STATES' MOTIONS TO STAY ITS APPEAL, FOR RECONSIDERATION OF THE MARCH 16, 2011 CONSOLIDATION ORDER, AND TO WAIVE GENERALLY APPLICABLE STATE LAW REQUIREMENTS

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Respondents Theodore Nickel, the Wisconsin Commissioner of Insurance, and the Wisconsin Office of Commissioner of Insurance (collectively, the "Commissioner"), submit this opposition to three motions filed by the United States, on behalf of the Internal Revenue Service ("IRS"), on March 22, 2011:[1]

(1) a motion to stay the IRS appeal;[2]

(2) a motion for reconsideration of this Court's March 16, 2011 consolidation order;[3] and

(3) a motion to waive the signature requirement imposed on all litigants under state law.[4]

For the reasons discussed below, the IRS's motions should be denied.

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[1] In each of the motions, the IRS mistakenly lists the case number as "Appeal No. 2011AP516," instead of the actual number, Appeal No. 2011AP561.

[2] This motion is styled the "United States' Motion to Hold The Instant Appeal in Abeyance Until The Resolution of the United States' Pending Appeals In The United States Court of Appeals For The Seventh Circuit." For ease of reference, it is referred to here as the IRS's "motion to stay."

[3] This motion is styled the "United States' Motion for Reconsideration of the Court's March 16, 2011 Order Consolidating The United States' Appeal (No. 2011AP5[61]) With The Other Appeals Filed In This Proceeding."

[4] This motion is styled "Motion for Waiver of the Signature and Fee Requirements of Supreme Court Rule 10.03(4)."

ARGUMENT

As a threshold matter, on March 25, 2011, the Commissioner filed a motion to dismiss the IRS's appeal. Because the arguments made in support of the Commissioner's motion to dismiss are relevant to the consideration of the IRS's three motions filed on March 22, 2011, the Commissioner incorporates its motion to dismiss by reference.

As explained in the Commissioner's motion to dismiss, this Court lacks appellate jurisdiction over the IRS's appeal because of a fundamental defect in the Notice of Appeal, and because the IRS has waived all of the challenges it seeks to raise in its appeal by failing to present those challenges to the State Rehabilitation Court in the first instance. The three IRS motions should be denied as moot in light of the required dismissal of the IRS's appeal.

If the Court finds reasons to reach these motions, however, they should be denied on their merits, because the IRS fails to articulate any justifiable grounds for granting them.

I. THE IRS'S MOTION TO STAY ITS APPEAL SHOULD BE DENIED

The IRS argues that its appeal should be stayed pending the resolution of two separate appeals the IRS has pending in the Seventh Circuit.

However, the IRS does not even mention—much less come close to satisfying—the state law standard for obtaining a stay of a state court proceeding when there are parallel state and federal proceedings.

Under Wisconsin law, a state court proceeding should be stayed only where the federal court proceeding was brought first, and where both cases concern the same parties and issues. *See N. Cent. Dairymen's Coop. v. Temkin*, 86 Wis. 2d 122, 127-29, 271 N.W.2d 890, 892-93 (1978). Here, the state rehabilitation proceeding predated the IRS's efforts to undermine it in federal court by months: the rehabilitation proceeding commenced in March 2010; the IRS did not remove the rehabilitation proceeding to federal court until December 2010.

Moreover, a stay of a state court proceeding is disfavored where the state proceeding "raises issues peculiarly of state character" and where the "federal forum cannot dispose of the entire controversy." *Id.* at 128, 271 N.W.2d at 892. The federal district court (Judge Crabb, presiding) already has answered these questions, in no uncertain terms:

> 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 [now 12] months and includes nearly 1,000 financial guaranty policies insuring approximately $60 billion of financial obligations. . . .
>
> . . . [T]his 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. . . .
>
> 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* [*v. Sun Oil Co.*, 319 U.S. 315 (1943)] require abstention in this case to permit resolution of the United States' claims through the available mechanisms in the state rehabilitation proceedings.

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The federal district court was equally emphatic in response to the IRS's second federal court action brought against the State Rehabilitation Court itself, as well as the Commissioner and Ambac:

> Despite the court's substantial discussion regarding abstention in the remand order, the United States does not explain why the court's analysis of the doctrine would be any different in this case. This is likely because the United States' decision to file this lawsuit shows that it *disregarded* the . . . remand order[.] . . . 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 . . . have the potential to impair the rehabilitation plan.*

United States v. Wis. State Cir. Ct. for Dane County, No. 11-cv-99-bbc, 2011 WL 572406, at *4-*5 (W.D. Wis. Feb. 18, 2011) (emphasis added).

The IRS offers no reason, other than its belief that the district court was wrong in these two recent decisions, for this Court to stay its state-court appeal in deference to the Seventh Circuit. The IRS's motion does not dispute the district court's description of the IRS's repeated collateral attacks on the rehabilitation proceeding. Nor does the IRS consider the impact of the federal government's ongoing willingness to disrupt the rehabilitation proceeding, which affects thousands of potential claimants as well as the IRS.

Finally, the IRS notes that the Solicitor General has not even decided whether or not to prosecute the state court appeal. (Motion to Stay ¶ 1 ("His office is currently considering whether to authorize prosecution of the appeal in this case.").) Of course, this is not a reason to stay an appeal. If the Solicitor General decides not to pursue this appeal, a decision that presumably would be made before the IRS's opening brief is filed, then the IRS can simply dismiss its appeal. It would be an odd result to permit a stay of an appeal filed by the government based on an internal timing and approval process the government itself controls.

Because the IRS has failed to meet the standard for obtaining a stay, and because the IRS's appeal is subject to dismissal for the reasons

stated in the Commissioner's pending motion to dismiss, the IRS's stay motion should be denied.

II. THE IRS'S MOTION FOR RECONSIDERATION OF THE MARCH 16, 2011 CONSOLIDATION ORDER SHOULD BE DENIED

The IRS also has filed a motion seeking reconsideration of this Court's March 16, 2011 Order, which establishes administrative procedures for the 15 newly filed appeals, including a consolidated record and coordinated briefing deadlines. Specifically, the IRS seeks to de-consolidate its appeal from the other appeals assigned Appeal No. 2011AP561.

In its motion, however, the IRS makes clear that its request for de-consolidation is based primarily on its motion to stay its appeal. (*See* Motion for Reconsideration ¶ 7 ("Retaining the [IRS's] appeal as a separate appeal (*and holding it in abeyance*) would both eliminate that duplication" of judicial effort arising out of "this Court and the Seventh Circuit considering the same issues") (emphasis added).) Because the motion to stay the IRS's appeal should be denied (for the reasons stated above), the key rationale for the IRS's motion for de-consolidation evaporates.

The effect of the March 16 Order is to ensure that all of the recent appeals are handled in a efficient and consistent way. The March 16 Order does not impair or limit the IRS in any respect. It does not subject the IRS to different time limits for filing briefs than other appellants who

are challenging the same Rehabilitation Plan Confirmation Order. It does not prevent the IRS from filing its own briefs and making its own arguments; in fact, the IRS notes in its motion that it intends to do that. (Mot. for Reconsideration ¶ 9.) Therefore, the IRS lacks any basis for disrupting this Court's orderly administration of the appeals, as established by the March 16 Order.

III. THE IRS'S MOTION FOR WAIVER OF STATE LAW SIGNATURE REQUIREMENTS SHOULD BE DENIED

The IRS also has filed a "Motion for Waiver of the Signature and Fee Requirements of Supreme Court Rule 10.03(4)."

As explained in the Commissioner's motion to dismiss the IRS appeal, the statutory requirement that a Notice of Appeal (or other court filing) must be signed by an attorney of record licensed to practice in Wisconsin applies to all represented parties. *See* WIS. STAT. § 802.05(1); *Schaefer v. Riegelman*, 2002 WI 18, ¶ 17, 250 Wis. 2d 494, 639 N.W.2d 715; *Brown v. MR Group, LLC*, 2004 WI App 122, ¶¶ 1, 6, 12-13, 274 Wis. 2d 804, 683 N.W.2d 481. Because this requirement implicates a court's jurisdiction, it cannot be waived. *See, e.g.*, *State v. Smith*, 2008 WI App 148, ¶ 6, 314 Wis. 2d 261, 757 N.W.2d 849 ("Unlike most defects in briefing or procedure that may be waived at our discretion, an appellate

court's lack of subject matter jurisdiction cannot be waived."). Therefore, the IRS's motion to waive the signature requirement should be denied.[5]

CONCLUSION

For the reasons stated above, and in the Commissioner's motion to dismiss the IRS's appeal, which is incorporated herein by reference, the IRS's motions to stay its appeal, to de-consolidate its appeal from other appeals challenging the same order, and to waive the signature requirement in WIS. STAT. § 802.05(1), should be denied.

Dated this 25th day of March, 2011.

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[5] The Commissioner takes no position on the IRS's request to waive the $50 *pro hac vice* application fee under Supreme Court Rule 10.03(4).