STATE OF WISCONSIN COURT OF APPEALS DIST. IV

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Appeal of the United States of America:
Appeal No. 2011AP561

UNITED STATES' OPPOSITION TO THE WISCONSIN INSURANCE COMMISSIONER'S MOTION TO DISMISS THE UNITED STATES' APPEAL FOR LACK OF JURISDICTION

The United States, an appellant in the above-captioned appeal, through its counsel Richard Humphrey and Anthony T. Sheehan, opposes the Wisconsin insurance commissioner's motion to dismiss the United States' appeal for lack of jurisdiction. Because this is an opposition to a motion to dismiss, we will address the insurance commissioner's factual representations and legal arguments only to the extent necessary to establish this Court's jurisdiction. Our silence on any matter should not be construed as an acceptance of the insurance commissioner's position on that matter.

I. The United States' appeal should not be dismissed for lack of jurisdiction for the reason that the notice of appeal was not signed by a member of the Wisconsin bar

A. Introduction

The Wisconsin insurance commissioner argues that the United States' appeal should be dismissed for lack of jurisdiction because the United States' notice of appeal was signed by Robert J. Kovacev, an attorney who is not admitted to the Wisconsin bar. (Dismissal Mot. 10–17.) Mr. Kovacev is an active member of the bar of the District of Columbia, an inactive member of the bar of California, and in good standing in both. He is employed as an attorney by the Tax Division of the United States Department of Justice.

The insurance commissioner bases his argument on Wis. Stat. § 802.05(1), which 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."

When faced with an issue involving a signature on a filing, a Wisconsin court first considers whether there is a defect. *Schaefer v. Riegelman*, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d 715, ¶14 (Wis. 2002). If there is a defect, then the court considers whether the defect is fundamental or technical. *Ibid.* Fundamental defects render a filing ineffective even if there is no prejudice to the opposing party. *Ibid.* A filing can survive a technical defect, however, if it is not prejudicial. *Ibid.* The Wisconsin Supreme Court has held that a fundamental defect cannot be cured under the last sentence of Wis. Stat. § 802.05(1) (*Jadair, Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 562 N.W.2d 401, 411 (Wis. 1997)), but in at least one decision, the Wisconsin Court of Appeals has, post-*Jadair* (but without mentioning *Jadair*), allowed the correction of a defect regardless of whether it

was fundamental (*Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, ¶¶14, 18 n.3 (Wis. App. 2006)).

B. There was no defect in the United States' notice of appeal

The Wisconsin signature requirement is tied to concerns about the unauthorized practice of law. 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*, 720 N.W.2d 108, ¶¶2, 5, 14–15, 18. 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 v. MR Group, LLC*, 2004 WI App 122, 274 Wis. 2d 804, 683 N.W.2d 481, ¶¶1–2, 3 n.2, 5–7, 10–13 (Wis. App. 2004). The Wisconsin Supreme 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, 25, 36–38 (defect was fundamental, but also defect never properly cured); *see also Jadair, Inc.*, 562 N.W.2d at 402–03, 409–11 (non-attorney officer cannot sign notice of appeal on behalf of corporation).

The issue whether there was a defect in the United States' notice of appeal, therefore, turns on the question whether Mr. Kovacev was authorized to practice law in Wisconsin on behalf of the United States, and thus was able to serve as attorney of record for the United States. Section 517 of Title 28 of the United States Code 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." In the instant case, Mr. Kovacev was authorized by a delegate of the Attorney General to attend to the interests of the United States in this proceeding regarding Ambac Assurance

Corporation (Ambac), including filing a notice of appeal in the Dane County Circuit Court. Thus, the United States complied with Wis. Stat. § 802.05(1) by submitting a notice of appeal signed by its attorney of record, who was authorized by 28 U.S.C. § 517 to practice law in Wisconsin on behalf of the United States.

The Wisconsin insurance commissioner (Dismissal Mot. 11) bases his argument on the Wisconsin Supreme Court's opinion in *Schaefer*, 639 N.W.2d 715, ¶¶17–19, 34–38, which discussed the relationship between authorization and Wisconsin licensure in the context of an attorney in private practice. But the insurance commissioner has not cited, and we have not found, any cases interpreting Wis. Stat. § 802.05(1) in the context of 28 U.S.C. § 517. Moreover, the Attorney General has promulgated regulations that explicitly reject the notion that state requirements regarding licensure or membership in a particular state bar are applicable to Department of Justice attorneys sent by the Attorney General to attend to the interests of the United States. 28 C.F.R. §§ 77.1(b), 77.2(h)(3). *See also Augustine v.*

Department of Veterans Affairs, 429 F.3d 1334, 1341 (Fed. Cir. 2005) ("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").

Moreover, Wisconsin Supreme Court Rule 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 "(h) Activities which are preempted by federal law," and "(n) Governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law." We maintain that 28 U.S.C. § 517 would preempt Wis. Stat. § 802.05(1) if there were a conflict, but those statutes can be harmonized by treating 28 U.S.C. § 517 as authorizing Department of Justice attorneys to serve as attorneys of record

for the United States under Wis. Stat. § 802.05(1), as allowed by Wisconsin Supreme Court Rule 23.02(2)(n) (quoted above).

The United States' notice of appeal was not defective, and the United States' appeal should not be dismissed.

C. If the Court finds the United States' notice of appeal to be defective, the defect was technical, and we are promptly correcting it with an amended notice of appeal

Even if the Court were to hold that the notice of appeal was defective, we maintain that the defect was technical, not fundamental, and has been corrected by the amended notice of appeal submitted with this timely opposition to the motion to dismiss.[1] To determine whether a defect is fundamental or technical, Wisconsin courts look to the purpose of the rule that

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[1] The body text of the amended notice of appeal is identical to the original notice of appeal. The signature blocks have been changed to provide for the signature Richard Humphrey, an Assistant United States Attorney licensed to practice in Wisconsin, and the signature of Anthony T. Sheehan, whom Mr. Humphrey is sponsoring for *pro hac vice* admission in this case. We are submitting an amended notice of appeal out of an abundance of caution, and our submission should not be construed as an admission of a defect in the original notice.

was violated. *Schaeffer*, 639 N.W.2d 715, ¶29; *Jadair, Inc.*, 562 N.W.2d at 409–11. 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. *Schaeffer*, 639 N.W.2d 715, ¶¶22–23, 29–30, 33; *Jadair, Inc.*, 562 N.W.2d at 407; *Rabideau*, 720 N.W. 2d 108, ¶11; *Brown*, 683 N.W.2d 481, ¶11–13. Because of the inherent nature of the representation at issue here, and because of federal statutes and regulations, none of those concerns are present in the instant appeal.

There is no concern here about protecting the public. Mr. Kovacev's client is the United States, a sovereign entity that is capable of attending to its own interests. Moreover, Mr. Kovacev was practicing under the supervision of senior attorneys in the Department of Justice, the entity with primary

responsibility for representing the United States in litigation. 28 U.S.C. § 516.

Second, § 530B(a) of 28 U.S.C. satisfies any concern about Department of Justice attorneys being subject to state ethical 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." Thus, a federal statute requires an "attorney for the Government"[2] to abide by the rules of professional responsibility in each state where he performs his services. *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

[2] 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).

discipline); § 77.4(a) (similar). Section 530B of 28 U.S.C., however, does not require a federal attorney to be licensed in the states where he practices law. 28 C.F.R. § 77.1(b) (§ 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"), § 77.2(h)(3) (phrase "state laws and rules" does not include "[a] statute, rule, or regulation requiring licensure or membership in a particular state bar"). *See also Augustine*, 429 F.3d at 1341.

Third, the Court need not be concerned about Department of Justice attorneys engaging in a "moment of reflection" with regard to the decision to pursue an appeal. *Schaefer*, 639 N.W.2d 715, ¶30. Prosecution of all appeals must be approved by the Office of the Solicitor General. 28 C.F.R. § 0.20(b).

Thus, if the Court decides that the United States' notice of appeal is defective, it should hold that the defect was technical and accept for filing the United States' corrected notice of appeal submitted herewith.

II. The United States has not waived its right to raise the issues noted in its docketing statement

A. Issues involving subject-matter jurisdiction cannot be waived

The insurance commissioner argues (Dismissal Mot. 18–19) that the United States waived the five issues listed in its docketing statement by not first raising them in the Dane County Circuit Court. The insurance commissioner errs because the issues noted in the United States' docketing statement challenge the jurisdiction of the Dane County court, cannot be waived, and can be raised at any time. Those issues largely arise out of: (1) the Dane County court's approval of the purported "allocation" of any liability for an approximately $708 million tentative federal tax refund (as well as other federal tax liabilities) to the segregated rehabilitation account and (2) the court's issuance of injunctions prohibiting the Internal Revenue Service (IRS) from taking any collection actions against Ambac.

"When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be

challenged at any time." *Kohler Co. v. Department of Indus., Labor, and Human Relations*, 81 Wis. 2d 11, 259 N.W.2d 695, 701 (Wis. 1977). "A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for re-opening, appealing from, or modifying orders or judgments." *Ibid.* "[I]t has long been the rule that parties may waive or consent to a court's lack of personal jurisdiction, but not to its lack of subject matter jurisdiction." *B.J.N. & H.M.N. v. Green County Dep't of Human Servs.*, 162 Wis. 2d 635, 469 N.W.2d 845, 853 (Wis. 1991). It is, therefore, an "unassailable proposition that an issue of subject matter jurisdiction cannot be waived by inadvertence or by deliberate failure to raise it at the trial court level, and that such an issue can always be raised as a matter of right for the first time on appeal or review by a higher court" *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 280 N.W.2d 316, 317, 319–20 (Wis. App. 1979).

The first issue is whether the injunctions issued by the Dane County court violated the sovereign immunity of the United States. The United States Supreme Court has held that, "[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Dalm*, 494 U.S. 596, 608 (1990) (Supreme Court edits omitted). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed in a statute enacted by Congress, and, except as Congress has consented, there is no jurisdiction in any court to entertain a suit against the United States. *Ibid.*; *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941). The absence of a federal statute waiving sovereign immunity calls into question the jurisdiction of the Dane County court to enjoin the United States, and the United States can raise this issue on appeal.

The second issue is whether certain injunctions are barred by the federal Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), which states (emphasis added) that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained *in any court* by any person, whether or not such person is the person against whom such tax was assessed." As was the case with sovereign immunity, the Anti-Injunction Act's prohibition of suits for the purpose of restraining the assessment or collection of any tax raises a jurisdictional issue that can properly be considered in the United States' appeal.

The third and fourth issues ask whether the Dane County court exceeded its jurisdiction when it asserted exclusive state court jurisdiction over a potential federal tax liability of Ambac where Ambac itself is not in rehabilitation or receivership (*see* 26 U.S.C. § 6871), and when it stated that the disputed tax allegations are subject to its jurisdiction and to the priority structure of the rehabilitation plan. Those issues state explicit

challenges to the Dane County court's jurisdiction, and the United States can raise them in its appeal.

The last issue is whether the Dane County court otherwise erred in confirming the rehabilitation plan as it relates to the United States and its agencies. Because this issue merely protects the United States' right to raise additional issues later, any objection thereto is premature.

B. At all events, this Court should exercise is discretionary powers under Wis. Stat. § 752.35

To the extent that the issues raised by the United States are not jurisdictional, the Court should exercise its discretion under Wis. Stat. § 752.35 and reverse the order appealed from with respect to those issues. Section 752.35 provides this Court with broad power to make a "discretionary reversal" where there has been a miscarriage of justice. The statute states (emphasis added):

> 752.35. Discretionary reversal
>
> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, *or that it is probable that justice has for any*

> *reason miscarried*, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

The record in this case demonstrates that there has been a miscarriage of justice.

As a member of a consolidated group, Ambac is severally liable for the tax liabilities of the consolidated group of which it elected to be a part. 26 C.F.R. §§ 1.1502-6(a); 1.1502-78(b)(2).[3] On October 8, 2010, the insurance commissioner filed his proposed plan of rehabilitation for the Segregated Account in the Dane County court. At the time, the proposed plan did *not*

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[3] Although Ambac's liability for an improper tentative tax refund does not depend upon whether the consolidated group transferred the funds to it, it nonetheless should be noted that the insurance commissioner represented in the federal court proceedings that the $708 million in tentative tax refunds that are the focus of the instant dispute were, in fact, transferred to Ambac. (Doc. 15 at 3 in W.D. Wis. – No. 3:10-cv-00778-bbc.)

purport to "allocate" Ambac's federal tax liabilities to the Segregated Account. Following an October 14, 2010 hearing of which the United States was not notified, and in which the United States did not participate, the Dane County court entered a scheduling order on October 20, 2010, requiring Ambac and the insurance commissioner to file, and "serve on all parties-in-interest who have appeared in these proceedings," a witness list, proposed order of confirmation, and a brief in support of the motion for confirmation.[4] The scheduling order further provided that "[b]y November 8, 2010, any person wishing to object to the confirmation of the Plan . . . shall file with the Court . . . [w]ritten objections to the Plan . . .." The scheduling order scheduled the hearing on the plan to commence on November 15, 2010, one week after the deadline for filing written objections.

[4] The insurance commissioner in his brief in support of the motion for confirmation (filed October 21, 2010) did not mention that Ambac would make a last-minute "allocation" of Ambac's federal tax liabilities to the Segregated Account. (Ambac did not file a brief.)

On October 28, 2010, the IRS sent a request to Ambac Financial Group, Inc. (Ambac's parent) seeking information needed to examine the $708 million tentative refund that it had paid (and which Ambac's parent had transferred to Ambac).[5] On November 7, 2010, Ambac and the insurance commissioner (without notifying the IRS) purported to "allocate" the federal tax liabilities to the Segregated Account through an amendment to the plan of operation for the Segregated Account.[6] The insurance

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[5] Section 6411 of the Internal Revenue Code provides a special procedure under which a taxpayer with a net operating loss can circumvent the audit procedures that are usually applied when a taxpayer files a claim for refund. The special procedure allows a taxpayer to make an "application for a tentative carryback adjustment" (26 U.S.C. § 6411(a)) which is subject only to "limited examination" to discover errors of computation or omissions (26 U.S.C. § 6411(b)). The IRS is required to act on the application within 90 days. *Ibid.* It is only after the expedited refund is paid that the IRS makes a full examination of the return under its regular auditing procedures. M. Saltzman, *IRS Practice and Procedure*, ¶ 11.03 (Rev. 2d ed. 2005).

[6] Ambac did *not* allocate the tax refund money that it received to the Segregated Account. It also did *not* allocate any tax liability that it has or may have to the State of Wisconsin.

commissioner found, without explanation, that the allocation "is not contrary to the law."[7] (Nov. 7, 2010 Dilweg affidavit, Ex. D.)

The allocation has the effect of making a material change to the rehabilitation plan.[8] Yet, Ambac and the insurance commissioner did not file notice of the allocation in the Dane County court until November 8, 2010, the *deadline* for objecting to the plan. The insurance commissioner does not contend that

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[7] The so-called allocation clearly violated 26 C.F.R. §§ 1.1502-6(a); 1.1502-78(b)(2). In addition, it violated Wisconsin law. Wis. Stat. § 611.24 provides that an allocation can be made for a "part of [the insurance company's] business." A federal income tax liability, however, is not imposed on various parts of a business. (Assuming, *arguendo*, that the federal tax liability were deemed to be associated only with a "part of [Ambac's] business," then the corresponding tentative tax refunds would also be part of the business, and they, too, would have to be allocated to the Segregated Account.)

[8] The purported allocation was done in a document entitled "Amendment No. 1 to Plan of Operation" executed on November 7, 2010. The rehabilitation plan, in turn, provides that it "pertains . . . to the Segregated Account" (Rehabilitation Plan at 1 (Introduction to Plan)) and defines the Segregated Account as "The Segregated Account of Ambac Assurance Corporation, established pursuant to the Plan of Operation in accordance with Wis. Stat. § 611.24(2)" (Rehabilitation Plan ¶ 1.58). The Plan of Operation for the Segregated Account is thus effectively part of the rehabilitation plan.

he served the United States with notice of the *de facto* amendment of the plan *in time for it to make the required written objection*. Rather, he states only that on November 10, 2010 (*i.e.*, 2 days after the plan-objection deadline expired), he "sent the IRS written notice regarding the dates of the Plan confirmation hearings." (Dismissal Mot. 3.) Contrary to the what the insurance commissioner contends, it was the United States that was "blindside[d]" and "sandbag[ged]" (Dismissal Mot. 2, 21), not the Dane County court. The United States plainly did not have an opportunity to file the written objection that was a prerequisite to participating in the plan-confirmation hearings. Accordingly, a miscarriage of justice has occurred, and this Court should exercise its broad powers under Wisc. Stat. § 752.35.[9]

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[9] Contrary to the insurance commissioner's argument (Dismissal Mot. 19-20), there was nothing improper about the United States' seeking relief in the federal courts in the first instance. "The removal law, 28 U.S.C. §§ 1441 and 1442, gives [federal defendants] an absolute right to remove the case to the appropriate federal district court." *Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir. 1996); *see also Melo v. Hafer*, 912 F.2d 628, 641 (3d Cir. 1990), *aff'd*, 502 U.S. 21 (1991). That the

(continued...)

For the foregoing reasons, the Wisconsin insurance commissioner's motion to dismiss the United States' appeal should be denied.

Respectfully submitted,

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April 4, 2011.

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[9](...continued)
insurance commissioner has been able to persuade a single district court judge to adopt the insurance commissioner's position with respect to the United States' removal rights, as well as its right to injunctive relief when its sovereign immunity has been violated, and when the Tax Anti-Injunction Act, I.R.C. § 7421(a) is applicable, is not the end of the matter. As is explained in our motion to hold proceedings in abeyance in this case, these issues should be resolved in the appeals before the Seventh Circuit.

STATE OF WISCONSIN COURT OF APPEALS DIST. IV

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

Appeal of the United States of America:
Appeal No. 2011AP561

DECLARATION

Anthony T. Sheehan, of the Department of Justice, Washington, D.C., states as follows:

1. I am an attorney employed in the Appellate Section, Tax Division, United States Department of Justice.

2. The facts recited in the foregoing motion are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed this 4th day of April, 2011, in Washington, D.C.

/s/ Anthony T. Sheehan
ANTHONY T. SHEEHAN
Attorney

STATE OF WISCONSIN COURT OF APPEALS DIST. IV

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

Appeal of the United States of America:
Appeal No. 2011AP561

DECLARATION OF ROBERT J. KOVACEV

I, Robert J. Kovacev, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney employed by the United States Department of Justice, Tax Division, in Washington, D.C. I have been employed by the Tax Division since 2006. My current position within the Tax Division is Senior Litigation Counsel. In that capacity, I am authorized to represent the interests of the United States in civil proceedings in federal and state courts in order to enforce the nation's tax laws, as provided in 28 C.F.R. § 0.70. During my employment with the Tax Division, I have

appeared on behalf of the United States in several federal and state courts across the country.

2. I have been an active member of the District of Columbia Bar in good standing since 2001. I am also a member of the bars of several federal courts including the United States Supreme Court, and an inactive member of the bar of the State of California.

3. On or about December 15, 2010, I was specifically directed by Acting Deputy Assistant Attorney General of the Tax Division D. Patrick Mullarkey, under the authority delegated to him under 28 C.F.R. § 0.13(a), to represent the interests of the United States in the matter captioned *In re Rehabilitation of the Segregated Account of Ambac Assurance Corporation* that is the subject of this appeal.

3. On March 8, 2011, I signed the Notice of Appeal of the United States in this action, and caused this Notice of Appeal to be filed in the Dane County Circuit Court on or about March 9, 2011. I signed this Notice of Appeal in the course of my duties as

an attorney employed by the Department of Justice representing the interests of the United States, as part of my representation of the United States in connection with this matter.

I declare under penalties of perjury that the foregoing is true and correct.

Executed this 4th day of April, 2011 in Washington, District of Columbia.

/s/ Robert J. Kovacev
ROBERT J. KOVACEV
Attorney

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Case No. 10 CV 1576

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

AMENDED 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.

Original dated March 8, 2011

Respectfully submitted,

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April 4, 2011.

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April 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April, 2011, that a true and correct copy of the foregoing document has been served upon counsel for the Wisconsin insurance commissioner via First Class Mail, with postage prepaid, in an envelope properly addressed as follows:

Matthew R. Lynch, Esquire
Michael B. Van Sicklen, Esquire
Naikang Tsao, Esquire
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I further certify that a true and correct copy of the foregoing document (except for replacing handwritten dates and signatures with typed versions of the same) has been served on all counsel of record using the e-mail distribution list established by the Circuit Court for Dane County for that purpose, as listed below:

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