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CLIENT/MATTER NUMBER
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April 7, 2011

HAND DELIVERED

A. John Voelker, Acting Clerk
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, Wisconsin 53703

Re: *In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation*; Appeal No. 2010AP561

Dear Mr. Voelker:

On behalf of the Respondents, Commissioner Theodore K. Nickel, the court-appointed Rehabilitator, and the Office of the Wisconsin Commissioner of Insurance, enclosed for filing are the original and four copies of the following documents:

1. Motion for Leave to File Reply in Support of Motion to Dismiss, and

2. Reply in Support of Motion to Dismiss United States' Appeal.

By copy of this letter, all counsel of record are being served with these documents by electronic mail.

Please contact me if you have any questions.

Very truly yours,

FOLEY & LARDNER LLP

Michael B. Van Sicklen

Enclosures
cc: Counsel of Record (with enclosures, *via email*)

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

IN THE MATTER OF THE REHABILITATION OF
SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Appeal No. 2011-AP-561

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

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WISCONSIN COMMISSIONER OF INSURANCE'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS

Theodore Nickel, Wisconsin Commissioner of Insurance, and the Office of the Commissioner of Insurance (collectively the "Commissioner") hereby request leave to file the attached reply brief in support of the Commissioner's March 25, 2011 motion to dismiss the appeal of the United States from the above-captioned proceeding.

1. The Rules of Appellate Procedure "neither prohibit nor authorize the filing of a reply," although in practice the filing of a reply is "acceptable." Michael S. Heffernan, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 13.2 (2011).

2. On April 4, 2011, the United States, on behalf of the Internal Revenue Service ("IRS"), filed a combined reply brief in support of its March 22 motions. The United States filed its combined reply brief without obtaining leave of this Court to do so.

3. To the extent that leave to file the Commissioner's reply brief in support of its motion to dismiss the IRS's appeal is required, the Commissioner requests that such leave be granted because the reply brief will assist the Court in its consideration of the legal and factual arguments the IRS raises in its opposition to the Commissioner's motion to dismiss. For example, the Commissioner's reply explains the interplay between the various federal and state statutes and rules the IRS cites in its opposition, and corrects a number of factual errors in the IRS's opposition.

Dated this 7th day of April, 2011.

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COURT OF APPEALS OF WISCONSIN
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IN THE MATTER OF THE REHABILITATION OF
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WISCONSIN COMMISSIONER OF INSURANCE'S REPLY IN SUPPORT OF 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"), file this reply brief in support of their motion to dismiss the appeal filed by the United States, on behalf of the Internal Revenue Service ("IRS"), in Appeal No. 2011-AP-561.

ARGUMENT

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

The IRS contends that this Court has jurisdiction over its appeal despite its noncompliance with the signature requirement in WIS. STAT. § 802.05(1), arguing that this requirement should not apply to federal government attorneys. None of its points are persuasive.

First, the IRS asserts that "[t]he Wisconsin signature requirement is tied to concerns about the unauthorized practice of law[,]" and federal government attorneys are authorized to practice law in Wisconsin by virtue of 28 U.S.C. §§ 517 and 530B. (IRS Op. at 4, 5-6, 10-11.) However, contrary to the IRS's assertion, the signature requirement is grounded in broader concerns than the unauthorized practice of law. As the Supreme Court has explained, the Section 802.05(1) signature requirement provides a:

> *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 [opposing parties].

Schaefer v. Riegelman, 2002 WI 18 ¶ 33, 250 Wis. 2d 494, 639 N.W.2d 715. Thus, the fact that government attorneys "may be sent" to state courts "to attend to the interests of the United States" (28 U.S.C. § 517)—for example, by filing a "statement of interest" akin to an *amicus curiae* brief[1]—and are subject to state ethics rules (28 U.S.C. § 530B) does not

[1] *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring) ("Further, the United States may enter a statement of interest . . . [pursuant to] 28 U.S.C. § 517."); *City of N.Y. v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.17 (2d Cir. 2006) ("We note that the United States did not on its own initiative file a statement of interest, as it might have done, pursuant to 28 U.S.C. § 517."), *aff'd*, 551 U.S. 193 (2007); *N. Mich. Hosps., Inc. v. Health Net Fed. Servs., LLC*, Nos. 07-039 GMS & 07-069 GMS, 2008 WL 2233964, at *2 (D. Del. May 30, 2008) ("[T]he United States filed a Statement of Interest pursuant to 28 U.S.C. § 517[.]"), *aff'd*, 344 Fed. Appx. 731 (3d Cir. 2009).

conflict with (or preempt) the signature requirement in Section 802.05(1), which serves to enforce this guarantee.[2]

This is not to say that government attorneys need to be licensed in Wisconsin to conduct activities that could be considered the practice of law in this State. *See* Wis. S.C.R. 23.02(2)(n). Rather, the Commissioner's point is that when the United States is a litigant in state court, it must comply with state procedural and jurisdictional rules, including the signature requirement in Section 802.05(1), which is the state law counterpart to Rule 11 of the Federal Rules of Civil Procedure. (*See* Comm'r Mot. at 15 n.5.) Notwithstanding the IRS's arguments to the contrary, there is no conflict between the statutory signature requirement and either federal law or Supreme Court Rule 23.02(2).

Second, the IRS's argument that government attorneys, by virtue of federal law, are exempt from the signature requirement is contrary to the United States' past practice in this Court and the IRS's own actions in this appeal. As explained in the Commissioner's motion to dismiss, the United States has participated in numerous prior appeals before this Court as an appellant or respondent, and has consistently had a state-licensed

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[2] The IRS submits an April 4, 2011 Declaration of Robert J. Kovacev, the non-resident government attorney who signed the IRS's March 8 notice of appeal, but he does not attest that he has appeared in this Court before or that he is "an attorney . . . familiar with the procedural and substantive laws of this state." *Schaefer*, 2002 WI 18 ¶ 33.

attorney (from the local United States Attorney's office) as counsel of record. (Comm'r Mot. at 16.) *See also* U.S. Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL §§ 6-1.120 (noting that the United States Attorney or an Assistant United States Attorney is to be listed as counsel of record in a civil tax-related case "even when a Tax Division attorney has primary responsibility for the litigation"), 6-5.630 (noting, in section entitled "Receivership Proceedings," that "[i]n state court proceedings, the courts generally require the United States to follow the procedural rules and time limits applicable in those proceedings"). In its opposition, the IRS does not dispute the United States' longstanding practice in appeals before this Court.

Moreover, on March 22, 2011, the IRS filed a motion to "*waive*" the statutory signature requirement, and a motion to have a non-resident government attorney admitted *pro hac vice* in this appeal. Neither of these steps would be necessary under the IRS's reading of the federal statutes that it cites. (*See* IRS Op. at 7.) Thus, the IRS's own action in seeking a waiver of the signature requirement is inconsistent with the position it advocates in its opposition brief.

Third, none of the Section 802.05(1) cases cited by the IRS supports its position. For example, the IRS cites *Rabideau v. Stiller*, 2006 WI App 155 ¶¶ 14, 18 n.3, 295 Wis. 2d 417, 720 N.W.2d 108, for the

proposition that a defect may be corrected regardless of whether it is fundamental (IRS Op. at 3-4), but that case is readily distinguishable.

In *Rabideau*, a Wisconsin attorney who failed to sign a complaint was allowed to correct that error. *Rabideau*, 2006 WI App 155 ¶¶ 12-14 (citing *State v. Seay*, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437). The *Rabideau* court's decision was based on the language of Section 802.05, which expressly permits the correction of that specific type of defect. *Id.* ¶ 14; *see* WIS. STAT. § 802.05(1) (2006) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.").

Consistent with the plain language of Section 802.05(1), this Court has recognized the distinction between: (1) the failure to sign a pleading, which is correctable; and (2) the signature by an attorney not admitted to practice law in Wisconsin on a pleading, which is a fundamental defect that divests the court of jurisdiction.

Specifically, similar to *Rabideau*, the issue presented in *Seay* was whether the omission of a signature on a notice of appeal deprived the court of appellate jurisdiction. *Seay*, 2002 WI App 37, ¶ 1. The *Seay* court concluded that "a person's failure to sign the notice of appeal does not deprive this court of appellate jurisdiction if the omission is corrected once it is called to the appellant's attention." *Id.*; *see also id.* at ¶¶ 6-10.

By contrast, in *Brown v. MR Group, LLC*, 2004 WI App 122 ¶¶ 1, 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481, the issue presented was whether a notice of appeal with an attorney's signature affixed by a person not licensed to practice law in Wisconsin was fundamentally defective and deprived the court of jurisdiction. The appellants argued that the court should follow *Seay*, and permit the correction of the subscription defect. However, the *Brown* court distinguished *Seay*, *id.* ¶ 10, and held that "the notice of appeal [was] fundamentally defective and cannot be corrected by the filing of an untimely amended notice of appeal" due in part to "[t]he *Schaefer* court's concerns regarding the § 802.05(1)(a) subscription requirement," *id.* ¶ 13. In sum, the IRS fails to offer any precedent for dispensing with the statutory signature requirement in the situation presented here.

Finally, the IRS argues that: (1) the defect in its notice of appeal is "technical" rather than "fundamental"; and (2) this Court should accept the IRS's April 4 amended notice of appeal, now signed by an attorney (Assistant United States Attorney Humphrey) who is licensed to practice law in Wisconsin. (IRS Op. at 8 & 8 n.1.) However, both of these arguments are foreclosed by *Schaefer*, 2002 WI 18 ¶ 33, and *Brown*, 2004 WI App 122 ¶¶ 1, 6, 13. As those precedents make clear, the signature by an attorney not licensed in Wisconsin on a notice of appeal is a fundamental defect, which cannot be corrected by the filing of an untimely

amended notice of appeal. (*See* Comm'r Mot. at 14 (noting that time for appeal has run); *cf.* IRS Op. at 8-11 (not disputing that amended notice of appeal is untimely).) Therefore, the dismissal of the IRS's appeal is required.

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

In addition to the fundamental defect created by its improperly signed notice of appeal, the IRS waived all of its challenges to the Rehabilitation Plan Confirmation Order (the "Confirmation Order") 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. (Comm'r Mot. at 3-9, 18-21.)

In its opposition, the IRS does not dispute any of the relevant facts: the IRS first attempted to federalize this insurer rehabilitation proceeding by removing the entire proceeding to federal court rather than raising its objections before the Rehabilitation Court; the IRS then "disregarded" the federal district court's remand order,[3] which urged the

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[3] *United States v. Wisconsin State Circuit Ct. for Dane Cty.*, No. 11-cv-99-bbc, 2011 WL 572406, at *4 (W.D. Wis. Feb. 18, 2011) (Judge Barbara B. Crabb, presiding).

IRS to raise its objections before the Rehabilitation Court, and instead appealed the remand order to the Seventh Circuit; the IRS then filed a separate suit in federal court against the Rehabilitation Court itself, as well as the Commissioner and Ambac, in what the district court described as another "collateral attack" on the state rehabilitation proceeding;[4] the IRS then filed a second appeal to the Seventh Circuit, this time appealing the district court's dismissal of the IRS's second action; and now, the IRS has filed this state court appeal, having never presented any of its challenges to the Rehabilitation Court, based on the view that this Court should serve as a backstop for the IRS if its two federal appeals fail. (*See* IRS Docketing Stmt.)

In carrying out its calculated decision to pursue relief in federal court only, the IRS failed to preserve any issues for review in this state court appeal. *See State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727 (The waiver rule "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that error is a ground for reversal."); *State v. Erickson*, 277 Wis. 2d 758, 766, 596 N.W.2d 749, 755 (1999) ("If the waiver rule did

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[4] *Wisconsin State Circuit Ct. for Dane Cty.*, 2011 WL 572406, at *5.

not exist, a party could decline to object for strategic reasons and raise the error only when that party needed an advantage at some point[.]").

A. The United States Has Waived The Right To Raise The Issues Noted In Its Docketing Statement

The IRS attempts to avoid dismissal of its appeal by arguing that the issues it never presented to the Rehabilitation Court for consideration involve subject matter jurisdiction, which cannot be waived on appeal. (IRS Op. at 12.) However, the IRS's arguments are riddled with flaws.

First, the threshold issue the IRS raises on appeal—whether the injunctions issued by the Rehabilitation Court violated the sovereign immunity of the United States—does not implicate a court's subject matter jurisdiction. (IRS Op. at 14.) 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) ("[S]overeign immunity does not diminish a court's subject-matter jurisdiction. The ability of governments to waive the benefit of sovereign immunity demonstrates that the doctrine is non-jurisdictional, for real

jurisdictional limits can't be waived. Sovereign immunity concerns the remedy rather than adjudicatory competence.") (internal citations omitted).

Because the IRS's sovereign immunity defense is an affirmative defense that it failed to raise in the Rehabilitation Court, that defense has been waived. *See Huebner*, 2000 WI 59, ¶ 10 ("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."); *Oetzman v. Ahrens*, 145 Wis. 2d 560, 571-72, 427 N.W.2d 421, 426 (Ct. App. 1988) (noting that affirmative defenses are waived on appeal if not raised below).

Second, the IRS argues that the issue of whether the injunctions are barred by the federal Anti-Injunction Act, 26 U.S.C. § 7421(a), is a jurisdictional issue that can be raised for the first time on appeal. (IRS Op. at 15.) However, the IRS ignores where and how this issued was litigated. Specifically, the IRS litigated this issue in the federal removal action, and the federal district court addressed the IRS's position as follows:

> Contrary to the United States' argument, the McCarran-Ferguson Act does not exempt federal tax laws from its prohibition. It is true that under the Anti-Injunction Act, 26 U.S.C. § 7421(a), no *state* law or *state* court can restrict the assessment or collection of taxes. *Id.* ("no suit for the purpose of restraining the

> assessment or collection of any tax shall be maintained in any court by any person"). However, it does not follow that *federal* law in the form of the McCarran-Ferguson Act cannot override this statute and any others insofar as they threaten to impede or impair the state's regulation of the business of insurance.

In the Matter of Rehab. of Segregated Account of Ambac Assurance Corp., No. 10-cv-778-bbc, 2011 WL 956855, at *5 (W.D. Wis. Jan. 14, 2011).

In its opposition, the IRS unfairly criticizes this ruling (and Judge Crabb) as follows:

> That the insurance commissioner has been able to persuade *a single district court judge* to adopt the insurance commissioner's position with respect to . . . when the Tax Anti-Injunction Act, I.R.C. § 7421(a) is applicable, is not the end of the matter. . . . [T]hese issues should be resolved in the appeals before the Seventh Circuit.

(IRS Op. at 21-22 n.9 (emphasis added).)

This highlights the Commissioner's and the IRS's fundamental disagreement about the disposition of this appeal.

- The IRS's position is that this appeal should be stayed pending the resolution of the Seventh Circuit appeals,[5] and the IRS should be permitted to pursue this appeal if it fails to obtain the relief it seeks in the Seventh Circuit. (IRS Op. at 21-22 n.9.)

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[5] The IRS is seeking to delay not only this appeal, but also its Seventh Circuit appeals. Specifically, the IRS recently moved to delay the briefing schedule in its second federal appeal, and the Seventh Circuit has suspended briefing in that case. As a result, there is no briefing or argument schedule in place in either of the IRS's federal appeals.

- The Commissioner's position is that this appeal should be dismissed now because the IRS has failed to preserve for state appellate court review any issues, and because the IRS's position—that an issue litigated and resolved against the IRS in a *federal district court* can be collaterally challenged by the IRS in a *state appellate court* if its federal appeal of the adverse ruling does not succeed—is not supported by any authority and is facially absurd.

Third, the IRS contends that the other issues raised in its docketing statement—which relate to the allocation of a disputed tax liability to the Segregated Account, the treatment of the tax liability under Wisconsin law, and the Rehabilitation Court's confirmation of the Rehabilitation Plan—are "challenges to the Dane County court's jurisdiction[.]" (IRS Op. at 15-16.) In fact, "a circuit court is never without subject matter jurisdiction," *Village of Trempeleau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis. 2d 76, 681 N.W.2d 190, and the IRS's challenges are in fact state law merits challenges, which a litigant must bring to the trial court's attention first in order to adequately preserve for appeal. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 594, 218 N.W.2d 129, 134 (1974).

In sum, having made the tactical decision to pursue a federal court strategy (and to assiduously avoid presenting *any* of its objections to the Rehabilitation Court for resolution), the IRS has waived the right to pursue this appeal.

B. The IRS's Arguments Based On WIS. STAT. § 752.35 Are Meritless

Next, the IRS contends that this Court could exercise its discretionary reversal power under WIS. STAT. § 752.35 to hear the waived issues. (IRS Op. at 16-21.)

1. Section 752.35 is not intended to relieve parties of the consequences of the tactical choices they make in litigation

By its terms, Section 752.35 applies to situations where the real controversy was not "fully tried" below or the record reflects that the case resulted in a miscarriage of justice. In either situation, the case was at least litigated in the court below, rather than strategically circumvented by the appellant. *See, e.g., Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797, 805 (1990) (requiring the Court of Appeals, as a prerequisite to discretionary reversal for a miscarriage of justice, to "make a finding of substantial probability of a different result on *re*trial") (emphasis added); *State v. Hubanks*, 173 Wis. 2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992) (Section 752.35 "was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at a new trial merely because the defense presented at the first trial proved ineffective").

Here, the Rehabilitation Court invited the IRS to raise its objections there, both before and after the IRS's removal of the entire

rehabilitation proceeding to federal district court; the Commissioner invited the IRS to attend the Plan confirmation hearings and to participate in the Rehabilitation Court; and the federal district court (twice) instructed the IRS to raise its issues in the Rehabilitation Court. Despite these repeated and unequivocal invitations to make its objections in the proper forum, the IRS did not enter any appearance in the Rehabilitation Court, and took no positions in that court on any issue whatsoever. The IRS chose instead to sue the Rehabilitation Court and the Commissioner to enjoin them from moving forward with the time-sensitive process for confirming the Plan of Rehabilitation. *See Wisconsin State Circuit Ct. for Dane Cty.*, 2011 WL 572406, at *2.

Presumably, the IRS concluded that it was in its interest to ignore the Rehabilitation Court, to allow that court to confirm the Plan without objection by the IRS, and then to attempt to collaterally attack the Plan in federal court. That being its strategy, the IRS cannot now claim that the Rehabilitation Court committed "a miscarriage of justice" by entering orders about issues as to which the IRS repeatedly and purposefully declined to voice any position. *See State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218, 221 (1989) ("[A]s demonstrated by the record, Gove affirmatively contributed to what he now claims was trial court error [by consistently failing to raise the issue before the circuit court]. It is contrary to fundamental principles of justice and orderly procedure to permit a party

to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error."). *See also Huebner*, 2000 WI 59, ¶ 12; *Erickson*, 277 Wis. 2d at 571, 427 N.W.2d at 755.

2. The standard for summary reversal is not met

The IRS also fails to mention, much less try to apply, the stringent test for discretionary reversal under Section 752.35. This Court's discretionary authority to hear arguments despite waiver in the circuit court is "exercised sparingly and with great caution," *State v. Williams*, 2006 WI App 212 ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719, and is reserved only for "extraordinary cases," *Trempeleau*, 2004 WI 79 ¶ 38. Issues falling within the scope of Section 752.35 typically involve inadvertent waivers by trial counsel below, such as counsel's failure to object on the record to a clearly erroneous jury instruction, *Steinberg v. Jensen*, 204 Wis. 2d 115, 123-25, 553 N.W.2d 820, 823-24 (Ct. App. 1996), or the failure to timely object to a misstatement of the law in closing argument, *State v. Neuser*, 191 Wis. 2d 131, 137-40, 528 N.W.2d 49, 51-53 (Ct. App. 1995).

The IRS's conscious, wholesale avoidance of the Rehabilitation Court altogether bears no resemblance to the "extraordinary" cases in which this Court has granted relief under Section 752.35. Indeed, it would be "contrary to fundamental principles of justice and orderly

procedure" to relieve a litigant of the consequences of its litigation strategy, purposefully taken. *Gove*, 148 Wis. 2d at 944, 437 N.W.2d at 221.

Finally, a number of the IRS's factual assertions are incorrect. For example, the IRS states that the Commissioner failed to mention in an October 21, 2010 brief in support of Plan confirmation that it would be making a "last-minute" allocation of Ambac's tax liabilities to the Segregated Account. (IRS Op. at 18 n.4.) However, as explained in the Commissioner's November 7, 2010 affidavit filed in the Rehabilitation Court, the IRS first raised the disputed tax issue in an October 28, 2010 document request to Ambac's parent company, and the Commissioner first learned of the tax issue on November 3,[6] *after* the Commissioner made the October 21 court filing the IRS references.

Next, the IRS argues that because the disputed tax liability was allocated to the Segregated Account on November 8, which was also the preexisting deadline for filing written objections to the Rehabilitation Plan, the IRS "did not have an opportunity to file the written objection that was a prerequisite to participating in the plan-confirmation hearings." (IRS Op. at 20-21.) This argument also does not withstand scrutiny. While it is

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[6] *See* Nov. 7, 2010 Aff. of Sean Dilweg in Supp. of Mot. for Temporary Supp. Inj. Relief ¶ 9, at the court-approved website for the rehabilitation proceeding: http://ambacpolicyholders.com/storage/courtfilings/11082010/OCIAFFIDAVIT.PDF.

true that the allocation of the disputed tax liability occurred on the previously established deadline for filing written objections to the Plan, the IRS never sought relief from that deadline to file a belated objection prior to Plan confirmation. If it had done so, the Commissioner would have consented to such a request, and the Court likely would have granted it.

Likewise, the IRS's assertion that the filing of a written objection was "a *prerequisite* to participating in the plan-confirmation hearings" is incorrect. (IRS Op. at 21 (emphasis added).) The Commissioner's November 10, 2010 written notice to all interested persons stated that: "The hearings on confirmation shall be conducted in open court and are open to the public and to all parties-in-interest."[7] The IRS (like all known claimants) received written notice that they could attend the Plan confirmation hearings on November 15-19 and November 30, 2010, and be heard on any issue about the Plan they cared to voice. The IRS cannot fairly suggest that it did not participate in the hearings because it was operating under a mistaken belief that it would not be allowed to do so. As evidenced by its removal of the entire rehabilitation proceeding to federal court a week later, on December 8, 2010, the real reason the IRS did not

[7] *See* http://ambacpolicyholders.com/storage/courtfilings/11102010/Untitled.PDF.

participate in the Plan confirmation process is because it had made the tactical decision to pursue an exclusively federal court strategy.

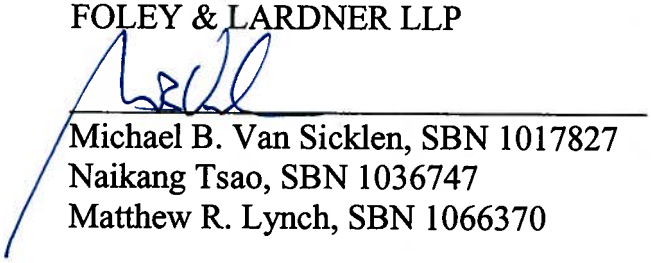
Any time between November 8, 2010 and January 24, 2011 (when the Rehabilitation Court confirmed the Plan), the IRS was free to raise its issues and objections before that court. The IRS's failure to do so bars its appeal here. The extraordinary remedy of discretionary reversal was never intended to relieve a party of the consequences of its tactical choices.

CONCLUSION

For the reasons stated in the Commissioner's motion to dismiss and this reply, the IRS's appeal should be dismissed.

Dated this 7th day of April, 2011.

FOLEY & LARDNER LLP



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