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May 3, 2011

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You are hereby notified that the Court has entered the following order:

2010AP1291	Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)
2010AP2022	Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)
2010AP2835	Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)
2011AP300	Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)
2011AP561	Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)

Before Higginbotham, P.J., Sherman and Reilly, JJ.

We have seven motions currently pending in these consolidated appeals arising out of the Ambac rehabilitation proceeding: (1) a motion by the Insurance Commissioner to dismiss the appeal of the United States for lack of jurisdiction; (2) a motion from Attorney Anthony Sheehan of the Tax Division of the United States Department of Justice to appear *pro hac vice* on behalf of the United States; (3) a motion from Attorney Sheehan to waive the requirements that he pay a $50 *pro hac vice* application fee under SCR 10.03(4)(b)2 (2009)[1] and that his filings be co-signed by a sponsoring attorney licensed to practice in this state pursuant to SCR 10.03(4)(b); (4) a motion by the United States to unconsolidate its appeal from the rest of the pending Ambac appeals; (5) a motion by the United States to stay its appeal pending a decision on its request to remove the rehabilitation proceeding to federal court; (6) a joint motion to amend the captions; and (7) a joint motion to amend the briefing requirements. For the reasons discussed below, we grant the Commissioner's motion to dismiss the appeal of the United States, rendering the motions of the United States moot. We also grant the joint motions to amend the caption and the briefing requirements, but with some modifications from the proposals submitted by the parties.

[1] All references in this order to SCR 10.03(4) refer to the version amended by Supreme Court Order 06-06, 2008 WI 109, filed July 30, 2008 and effective January 1, 2009.

Jurisdiction Over the Appeal of the United States

The Insurance Commissioner moves to dismiss the appeal of the United States for lack of jurisdiction because its notice of appeal was not signed or co-signed by an attorney licensed to practice law in this state. The parties agree that the notice of appeal was signed by Robert Kovacev, an attorney employed in the Tax Division of the United States Department of Justice who is licensed to practice in Washington D.C. and California, but not Wisconsin. Nothing in the materials before us indicates that Attorney Kovacev ever requested permission from either the circuit court or this court to appear *pro hac vice* in this matter prior to signing and filing the notice of appeal, and there is no co-signature by a sponsoring Wisconsin attorney.

It is well established that a timely and fundamentally compliant notice of appeal is necessary to give this court jurisdiction over an appeal. WIS. STAT. RULE 809.10(1)(e) and (f) (2009-10);[2] ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 211-12, 562 N.W.2d 401 (1997). One of the rules with which a notice of appeal must comply is the subscription requirement of WIS. STAT. § 802.05, stating that a paper "shall be signed by at least one attorney of record in the attorney's individual name," on behalf of a represented party. ***Jadair***, 209 Wis. 2d 187, ¶17, 37-38.

Ordinarily, only an attorney who is licensed to practice law in this state may appear as an attorney of record. ***Schaefer v. Riegelman***, 2002 WI 18, ¶17, 250 Wis. 2d 494, 639 N.W.2d

[2] All references in this order to the Wisconsin statutes, including provisions created by Supreme Court rule, refer to the 2009-10 version.

715; *see also* SCR 23.02(1) (authorizing licensed Wisconsin attorneys with active bar memberships to practice law in this state) and WIS. STAT. § 757.30 (providing penalties for the unauthorized practice of law). The Wisconsin Supreme Court Rules set forth a number of exceptions to the general rule against the unauthorized practice of law, including: (1) for attorneys licensed in other states who have been authorized to appear *pro hac vice* under the sponsorship of a Wisconsin attorney; (2) for persons engaged in "activities which are preempted by federal law;" and (3) for employees of governmental agencies who are "carrying out responsibilities provided by law." SCR 10.03(4) and SCR 23.02(2)(a), (h), and (n). However, we conclude that none of the potential exceptions apply here.

As noted above, the record before us does not show that Attorney Kovacev had been admitted to appear *pro hac vice* when the notice of appeal was filed, and the notice of appeal does not contain the co-signature of a sponsoring Wisconsin attorney. Therefore, Kovacev plainly did not qualify as an attorney of record with the authority to sign the notice of appeal by virtue of the *pro hac vice* admission exception.

Nor are we persuaded that Attorney Kovacev was authorized to appear in a Wisconsin court without *pro hac vice* admission by virtue of the preemption doctrine. The United States contends that 28 U.S.C. § 517, which provides that Department of Justice attorneys "may be sent by the Attorney General 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 a State" preempts any state law or regulation that would otherwise preclude a Department of Justice attorney from appearing in state court. The United States relies primarily upon ***Augustine v. Department of Veteran Affairs***, 429 F.3d

1334, 1341 (Fed. Cir. 2005) for the proposition that "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." *See also* 28 U.S.C. § 530B (subjecting federal government attorneys to state laws and rules governing attorneys) and 28 C.F.R. § 77.1(b) and 77.2(h)3 (defining laws and rules governing attorneys to include ethical requirements but exclude licensure or bar membership requirements).

The main problem with the United States' preemption theory is that the Wisconsin rules do not require a Department of Justice attorney to have a Wisconsin law license or bar membership in order to practice law in our state courts. Instead, SCR 10.03(4) and 23.02(2) (2011)[3] explicitly permit nonresident attorneys to appear under the sponsorship of a Wisconsin attorney. The United States cites no authority from any federal or state jurisdiction holding that 28 U.S.C. § 517 preempted any similar sponsorship requirement for a *pro hac vice* appearance in this or any other state. Indeed, the Insurance Commissioner points out that not only has it been the longstanding practice of Department of Justice attorneys to obtain the sponsorship of Wisconsin-licensed attorney when appearing in our state courts, the Department of Justice itself directs that a local U.S. Attorney or Assistant U.S. Attorney should be listed as counsel of record in civil tax cases, even when a Tax Division attorney has primary responsibility for the case. *See* United States Attorneys' Manuel § 6-1.120. Because Wisconsin's procedures for allowing

[3] All references in this order to SCR 23.02 refer to the rule adopted by Supreme Court Order 07-09, 2010 WI 101, filed July 27, 2010 and effective January 1, 2011.

federal government attorneys to appear *pro hac vice* do not appear to be inconsistent with either federal law or practice, we do not see any basis to apply the preemption doctrine here.

Next, we are similarly unconvinced that the exception to the rule against the unauthorized practice of law for employees of governmental agencies who are carrying out their responsibilities has any application here. The responsibilities to which the United States refers again relate to the ability of Department of Justice attorneys to appear in any state court pursuant to 28 U.S.C. § 517. But again, we see nothing in the sponsorship and co-signature requirements for *pro hac vice* appearances that would prevent federal government attorneys from carrying out their responsibilities as provided by law. Rather, federal government attorneys can easily carry out their responsibilities to appear on behalf of the United States while at the same time complying with this state's *pro hac vice* requirements. In short, Wisconsin's procedures for *pro hac vice* admission did not prevent Attorney Kovacev from carrying out his responsibilities; he simply failed to carry out his responsibilities according to the applicable rules.

Finally, the United States contends that if its attorneys are subject to the *pro hac vice* sponsorship and co-signing requirements, it should be allowed to file an amended notice of appeal in compliance with those requirements.[4] However, the failure by a nonresident attorney to obtain a *pro hac vice* admission under the sponsorship of a co-signing Wisconsin attorney cannot be remedied once the time to file a jurisdictional document has already expired.

[4] The United States has attached an amended notice of appeal to its response in opposition to the Insurance Commissioner's Motion to Dismiss. The notice is ineffective, however, because it has not been filed with the clerk of the circuit court as required by WIS. STAT. RULE 809.10(1)(a). A party cannot initiate an appeal by filing a notice of appeal, or an amended notice of appeal, with this court.

Schaefer, 250 Wis. 2d 494, ¶¶22-23; *see also* ***Brown v. MR Group, LLC***, 2004 WI App 122, ¶¶6 and 13, 274 Wis. 2d 804, 683 N.W.2d 481. This is not a situation where there was simply a missing signature, which WIS. STAT. § 802.05 allows to be promptly corrected. *Cf.* ***State v. Seay***, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437 (pro se litigant was allowed to provide missing signature on notice of appeal); ***Rabideau v. Stiller***, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108 (attorney was allowed to provide missing signature on summons and complaint). This is a situation where the notice of appeal was signed by someone who was not authorized to do so without first taking additional measures to obtain *pro hac vice* status. This is a fundamental defect which cannot be corrected.

Because the notice of appeal filed by the United States was fundamentally flawed, we grant the Insurance Commissioner's motion to dismiss the appeal of the United States for lack of jurisdiction. Although it is not strictly necessary, we will also unconsolidate the United States' appeal from the remaining Ambac matters pending before us, and assign it a separate case number to make clear that this is a final and appealable order with respect to the United States. In light of the dismissal, we do not address the other pending motions of the United States.

Caption

The parties jointly move to amend the caption to replace Sean Dilweg with the current commissioner, Ted Nickel. We agree that the substitution is appropriate because the Insurance Commissioner is participating in these appeals in his official capacity.

We note that the proposed caption submitted by the parties also changes the circuit court designation of multiple participants from "proposed intervenor" or "defendant" to "party in

interest," and does not include those parties who are not participating in one or more of the appeals. We agree that the terms in our current caption do not accurately reflect the nature of a rehabilitation proceeding, which generally has a petitioner and a subject. Because our computerized database system has a code for "interested party," we will use that term rather than "party in interest." It is also our practice to include parties who participated in the lower court proceedings in our caption, even when they do not participate on an appeal. We will therefore keep all the circuit court parties in our official caption, but will permit the participants on these appeals to list only the participating parties on the captions of their briefs and other papers filed with this court.

Modifications to the Briefing Requirements and Schedule

The parties jointly propose that the appellants for Appeal Nos. 11AP561, 2010AP2835 and 11AP300 be permitted to file a joint brief of up to 22,000 words (i.e., 100 pages), plus optional supplemental briefs of up to 5,000 words (about 23 pages) to allow each individual appellant who joins the joint brief to address any issues which are not covered in the joint brief. Under the proposal, any appellant who opts out of the joint brief could file its own brief subject to the standard rules. The parties would wait until the last appellant's brief is filed, then confer, and provide this court with a proposal for the response and reply briefs. In addition, the appellants in Appeal Nos. 10AP1291 and 10AP2022 (the cases that have already been briefed and screened) would each be permitted to file a supplemental brief of up to 1500 words, and any opposing party could then file a supplemental response of up to 1500 words.

While we greatly appreciate the parties' efforts in putting forth a joint proposal, we are not persuaded that the appeals will require briefs of the length requested. We note that the court already has a basic understanding of the nature of the litigation from the previously filed briefs, and that the relevant facts for the additional appeals should be set forth only once in the joint brief, unless there is a specific factual issue unique to a party or set of parties that may require some supplementation. We therefore modify the parties' proposal as follows.

The appellants for Appeal Nos. 11AP561, 2010AP2835 and 11AP300 may file a joint opening brief of up to 16,500 words (or 75 pages if a monospaced font is used). Parties who join the joint brief may file individual or joint supplements of up to 2,200 words (10 monospaced font pages) that address any issues that are not already included in the joint brief or in the supplemental or individual brief of any other party, unless a different position is taken.

Any party who does not join the joint opening brief shall be limited to filing an individual brief of 5,500 words (or 25 monospaced font pages), unless that party provides this court with good cause to file a larger brief. Any individual briefs do not need to contain a separate statement of facts unless required to address a specific supplemental factual issue. Any party writing separately should also avoid duplicating any materials already contained in the appendix of the joint opening brief.

The respondents shall have up to 16,500 words (or 75 monospaced font pages) to respond to all of the opening briefs of the Appellants.

The appellants may file a joint reply brief of up to 3,300 words (or 15 pages if a monospaced font is used). Any party who does not join the joint reply brief shall be limited to

filing an individual brief of up to 1,540 words (or 7 monospaced font pages), and should not repeat any arguments contained in the joint reply brief.

No supplemental briefing in 10AP1291 and 10AP2022 will be allowed without a specific showing from a party as to why it is necessary.

We will extend the briefing schedule to facilitate the coordination of the joint briefs, as described below. We ask that the parties submit briefs that are double spaced and printed on only one side of the page, and remind them that pinpoint and subsequent citations should be made to the official Wisconsin reporter page.

Upon the foregoing reasons,

IT IS ORDERED that the United States' motion to unconsolidate its appeal from the other appeals in 11AP561 is granted. The United States' appeal shall be assigned its own case number, 11AP987.

IT IS FURTHER ORDERED that the Insurance Commissioner's motion to dismiss the United States' appeal for lack of jurisdiction is granted. In light of the dismissal, we do not address the other pending motions from the United States.

IT IS FURTHER ORDERED that the joint motions to amend the caption and the briefing requirements are granted with the modifications described in this order. The appellants' joint opening brief shall be due within 45 days of the date of this order. Any other supplemental or individual briefs filed by an appellant or group of appellants shall be due 15 days after the joint opening brief is filed. The respondents' brief shall be due 35 days after the last appellant's

opening brief is filed. The appellants' joint reply brief shall be due 20 days after the respondents' brief is filed, and any appellant not joining the joint reply brief shall have an additional 10 days to file an individual reply brief.

A. John Voelker
Acting Clerk of Court of Appeals