SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2011 AP 987

In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation:

Theodore Nickel and Office of the Insurance Commissioner,
Petitioners-Respondents,

Ambac Assurance Corporation,
Interested Party-Respondent,

United States of America,
Interested Party-Appellant-Petitioner,

Access To Loans For Learning Student Loan Corporation, Assured Guaranty Corporation, Aurelius Capital Management LP, Bank Of America, N.A., Bank of New York Mellon, Countrywide Home Loans Servicing L.P., Customer Asset Protection Company, Depfa Bank, Plc, Deutsche Bank National Trust Company, Deutsche Bank Trust Company Americas, Eaton Vance Management, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Fir Tree Inc., Goldman Sachs & Co., Inc., HSB Bank USA, National Association, King Street Capital Master Fund, Ltd., King Street Capital, L.P., Lloyds TSB Bank plc, Monarch Alternative Capital LP, Nuveen Asset Management, One State Street LLC, PNC Bank, Restoration Capital Management LLC, Stone Lion Capital Partners LP, Stonehill Capital Management LLC, Treasurer of the State of Ohio, U.S. Bank National Association, Wells Fargo Bank, N.A., Wells Fargo Bank, National Association, as Trustee for Certain LVM Bondholders, Wilmington Trust Company and Wilmington Trust FSB,
Interested Parties.

Review Of The Dismissal Of Appeal By
The Wisconsin Court of Appeals, District IV

Appeal From The January 24, 2011 Order of
The Dane Court Circuit Court, Case No. 2010-CV-1576,
Honorable William D. Johnston, Presiding by Judicial
Assignment

COMMISSIONER'S RESPONSE BRIEF AND APPENDIX

SUBMITTED ON BEHALF OF RESPONDENTS THE OFFICE OF THE WISCONSIN COMMISSIONER OF INSURANCE AND COMMISSIONER THEODORE K. NICKEL, AS THE COURT-APPOINTED REHABILITATOR OF THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

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INTRODUCTION

This appeal arises out of the complex insurer rehabilitation proceeding pertaining to the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac"). The rehabilitation was commenced on March 24, 2010 before the Dane County Circuit Court (the "Rehabilitation Court"), the Honorable William D. Johnston, presiding by judicial appointment. The Wisconsin Commissioner of Insurance, as the court-appointed rehabilitator (the "Commissioner"), is handling the rehabilitation under the specialized procedures in WIS. STAT. CH. 645 governing "delinquency proceedings" of Wisconsin-domiciled insurers like Ambac.

The appeal is before this Court on the petition of the United States, on behalf of the Internal Revenue Service (the "IRS"). The IRS seeks review of orders entered by the Rehabilitation Court, even though the IRS elected for tactical reasons not to appear in the Rehabilitation Court, not to file a claim in the rehabilitation, and not to make any objection in the Rehabilitation Court as to any aspect of the orders it is now appealing. The IRS's strategic decision to bypass the Rehabilitation Court disregarded two published decisions by

United States District Judge Crabb, which directed the IRS to pursue its arguments in the Rehabilitation Court. *See In re Rehab. of Seg. Acct. of Ambac Assurance Corp.*, 782 F. Supp. 2d 743 (W.D. Wis. 2011) ("*IRS I*") (R-App.1-21); *United States v. Wis. State Circuit Court for Dane County*, 767 F. Supp. 2d 980 (W.D. Wis. 2011) ("*IRS II*") (R-App.22-32).[1]

Although not discussed in its opening brief, the reason the IRS is pursuing litigation in both the federal court system and on appeal in the Wisconsin state court system is because it disagrees with the statutory claim-priorities set by Wisconsin insurance law, under which policyholder claims are paid ahead of IRS or other governmental entity claims. *Compare* WIS. STAT. § 645.68(3) *with* (3)(c). The subordination of IRS claims to policyholder claims in state insurer rehabilitation and liquidation proceedings was approved in *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993).[2]

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[1] "R-App." refers to the Commissioner's appendix. "A-App." refers to the IRS's appendix.

[2] In *Fabe*, the United States Supreme Court held that state insurance statutes may prioritize policyholder claims ahead of the claims of the United States Treasury or other federal claimants. 508 U.S. at 508-09. As explained in Judge
(Continued)

The present appeal reflects the IRS's continuing antipathy towards the Wisconsin rehabilitation proceeding, the Rehabilitation Court, the Commissioner, and the Wisconsin rules governing appellate practice and procedure. Dissatisfied with Judge Crabb's remand decision and her direction that the IRS should pursue its arguments before the Rehabilitation Court, the IRS sued the Rehabilitation Court and the Commissioner in federal court. (R.602-04.) When Judge Crabb dismissed that improper collateral attack upon her first decision and the rehabilitation process, and reiterated that the IRS should pursue any arguments it may have relating to the rehabilitation in the Rehabilitation Court, *see IRS II*, 767 F. Supp. 2d at 983-85 (R-App.27-31), the IRS again refused to do so.

The Commissioner served the IRS with timely notices about the opportunity to contest the November 8, 2010 supplemental injunction at issue (the "Injunction") and to

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Crabb's two decisions against the IRS, Congress intended through the McCarran-Ferguson Act to reverse preempt any federal statute or regulation that would interfere with the orderly rehabilitation or liquidation of insurers under state law. *See IRS I*, slip op. at 9-14 (R-App.9-14); *IRS II*, 767 F. Supp. 2d at 983-84 (R-App.26-29).

participate in the confirmation hearings on the Plan of Rehabilitation for the Segregated Account (the "Plan") (R.605, ¶¶ 3-4 & Exs. 1-2), and the Rehabilitation Court later scheduled a specific hearing to address the IRS's issues (R.575), but the IRS spurned those opportunities. Additionally, the IRS has chosen not to file a claim against Ambac or its Segregated Account in the rehabilitation proceeding. Instead, the IRS initiated this appeal, admitting that its notices of removal and appeal were the only documents it ever filed in the Rehabilitation Court.

Like its prior actions of not complying with the rules and procedures of the Rehabilitation Court or the directions of Judge Crabb, the IRS filed the subject notice of appeal without having it properly subscribed (*i.e.*, signed) by a Wisconsin–licensed attorney, as required by WIS. STAT. § 802.05. The IRS asserts that its non-compliance with § 802.05 was based on its view that state rules governing practice and procedures in state court should not apply to the United States Department of Justice ("DOJ") attorney who signed its notice of appeal. However, the IRS's brief fails to identify a single case from any jurisdiction in the country where a state court has held that the statutes governing

practice and procedure in state courts do not apply to DOJ attorneys when they practice in those courts.

The IRS's tactics have had a prejudicial effect on the rehabilitation proceeding and the literally thousands of beneficial holders of insured interests, policyholders and other creditors desiring to have the rehabilitation proceed efficiently and expeditiously. As noted by Judge Crabb: "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 the issues that are similar to those raised by other creditors and have the potential *to impair the rehabilitation plan*." *IRS II*, 767 F. Supp. 2d at 985 (R-App.31) (emphasis added).

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Was there a fundamental defect in the IRS's notice of appeal because it was not subscribed by an active member of the Wisconsin bar or by a nonresident attorney admitted to appear in this proceeding *pro hac vice* with the support of a sponsoring member of the Wisconsin bar, as required by WIS. STAT. § 802.05?

> Disposition Below: Yes, the Court of Appeals held that the § 802.05 subscription requirement applies with equal force to any party, including the federal government, which elects to avail itself of the privilege of litigating in Wisconsin state courts. The Court of Appeals also noted that "it has been the longstanding practice of Department of Justice attorneys to obtain the sponsorship of a Wisconsin-licensed attorney when appearing in our courts." (*See* Order at 5-10, A-App.18-23.)

2. Did the IRS waive its right to pursue this appeal by virtue of its tactical decision to not appear in the Rehabilitation Court and to not give that court the opportunity to address the issues the IRS wishes to argue for the first time in this appeal?

> Disposition Below: This issue was not reached by the Court of Appeals, because it chose to dismiss the IRS's appeal on the alternative ground that the IRS's notice of appeal was fundamentally defective under § 802.05. This was one of the two grounds the Commissioner

raised in his motion to dismiss the IRS's appeal, and the Commissioner presented this issue in his response to the IRS's Petition for Review to this Court. The Commissioner reiterates the argument below.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

This Court has set the matter for oral argument on December 2, 2011. Unless this Court determines that it improvidently granted review of this case because of the IRS's intentional waiver of its right to appeal, the Commissioner assumes that this Court will publish its decision consistent with its normal practice.

COUNTER-STATEMENT OF THE CASE

Much of the factual and procedural background relating to this Wisconsin insurer rehabilitation proceeding, and the IRS's role relative to it, is set forth in the two decisions Judge Crabb issued earlier this year against the IRS, which are discussed below.

The overall rehabilitation proceeding is discussed in detail in the Rehabilitation Court's January 24, 2011 order confirming the Plan (the "Confirmation Order") (R.556, R-App.33-96),[3] as well as in the Commissioner's consolidated response brief in 2011AP561.[4]

The following discussion therefore focuses solely on the factual and procedural history relevant to the IRS's present appeal.

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[3] Although the IRS is ostensibly appealing the Confirmation Order, it includes only limited excerpts from it in its appendix. (*See* A-App.94-104.) For this Court's convenience, the full Order is included in the Commissioner's appendix.

[4] This brief is available on WSCCA, as well as the Commissioner's comprehensive public Web site for the rehabilitation proceedings (ambacpolicyholders.com), which was established consistent with the Rehabilitation Court's March 24, 2010 Order on Notices. The brief is available at http://ambacpolicyholders.com/storage/courtfilings/08092011/Respondents%20Response%20Brief%208-9-11.pdf.

I. THE POTENTIAL IRS CLAIM AND ITS ALLOCATION

In November 2010, eight months into the rehabilitation, the Commissioner learned that Ambac's parent company, Ambac Financial Guaranty, Inc. ("AFGI"), had received inquiries from the IRS regarding approximately $708 million in tax refunds that Ambac had received prior to the rehabilitation. (R.435 ¶ 9, A-App.73.) The Commissioner became concerned that the IRS might try to improperly "jump the line" of claimants awaiting equitable distribution of assets under the claim-priority statute, WIS. STAT. § 645.68, by taking premature enforcement action (such as a pre-judgment lien or levy) to seize the refunds. (R.434 ¶ 15, A-App.68.) Such action by the IRS would violate the United States Supreme Court's decision in *Fabe* and § 645.68, and disadvantage the higher-priority policyholders in the Segregated Account.

The Commissioner took immediate action to protect the rehabilitation. He directed Ambac to allocate any contingent tax liability related to the refunds to the Segregated Account, and moved the Rehabilitation Court on November 8, 2010 to extend the pre-existing, first-day

injunction in the rehabilitation to cover this newly allocated contingent liability, thus preventing the IRS from pursuing collection against those assets outside the rehabilitation. (R.434-37, A-App.64-93.)

The question of whether the IRS has any basis for reversing its prior refund payments is being litigated in federal bankruptcy court in New York, *Ambac Financial Group, Inc. v. United States*, No. 10-04210-scc (Bankr. S.D.N.Y. filed Nov. 9, 2010). If the IRS establishes a claim in those proceedings, the allocation requires the IRS to seek recovery through the equitable distribution processes of the rehabilitation pursuant to WIS. STAT. § 645.68. As Judge Crabb noted,

> The Commissioner is not arguing that the United States cannot collect taxes from insurance companies in general or from Ambac in particular or that it can never pursue return of the refund if it determines it was improper; he argues only that under the McCarran-Ferguson Act, the United States must conform its efforts to the restrictions necessary to the effectiveness of the state's rehabilitation proceedings.

IRS I, slip op. at 11[5] (R-App.11).

[5] Although *IRS I* is published at 782 F. Supp. 2d 743, the pagination for the reporter citation was not available as of the date of filing this brief. Therefore, this brief cites to Judge (Continued)

As with the initial injunction in place since the commencement of the rehabilitation, the Commissioner gave immediate notice of the allocation and the temporary injunctive relief to all parties-in-interest, including, in this instance, the IRS, the local U.S. Attorney's Office, and all entities that had previously appeared in the proceeding. (R.605, Ex. 2.) Also as before, the Injunction invited any party-in-interest, including the IRS, "to seek modification or dissolution of part or all of this Order by filing a written motion with [the Rehabilitation] Court" within 45 days. (R.436, ¶ 5 (A-App.91).)

The Commissioner also provide notice to the IRS in several different forms about the upcoming hearings on the Plan, which were set to commence one week after the allocation of the potential tax claim. (R.605, ¶¶ 2-4 & Exs. 1, 2, 3 at 6:19-21.) Contrary to statements in the IRS's brief (at 11-12), the Commissioner did not make an eleventh-hour amendment to the Plan to address the new allocation. Instead, as the Rehabilitation Court noted:

Crabb's slip opinion in *IRS I*, which is included in the Commissioner's appendix.

> The Plan anticipates claims arising in three classes designated by Wis. Stat. § 645.68: administrative claims (Class 1); policy claims (Class 3); and general creditor claims (Class 5). Other claims that fall into other classes are possible—for example, a federal government claim for taxes . . .—and OCI has assured the Court that it will take necessary steps to ensure the appropriate treatment of such claims under Wis. Stat. § 645.68 *if and when such liabilities become less speculative*.

(R.556, ¶ 91 (R-App.66) (emphasis added).)

Also contrary to the IRS's brief (at 12), filing a written objection was not a "prerequisite" for participation in the lengthy hearings. As the Commissioner's advance notice to the IRS clearly stated, "[t]he hearings on confirmation shall be conducted in open court and are open to the public and to all parties in interest." (R.605, Ex. 1.)

II. REMOVAL AND REMAND

The IRS did not attend the November 15-19, 2010 Plan confirmation hearings or the November 30 closing arguments, and filed no objections to the Plan or the Injunction with the Rehabilitation Court. Instead, on December 8, 2010—eight days after closing arguments in the Plan confirmation hearings, but before the Rehabilitation Court had ruled on confirmation—the IRS removed the

rehabilitation to the United States District Court for the Western District of Wisconsin. (R.548.)

The Commissioner immediately moved to remand the case, pointing out that the McCarran-Ferguson Act, 15 U.S.C. § 1012, required the IRS to raise its challenges in the Rehabilitation Court. Judge Crabb agreed with the Commissioner in full. She rejected the IRS's arguments that the Injunction swept too broadly, acknowledging that allocation of the IRS contingent liability to the Segregated Account was consistent with the larger purposes of the Commissioner's rehabilitation of Ambac. *IRS I*, slip op. at 13-14 (R-App.13-14).

Judge Crabb also agreed with the Commissioner that the Rehabilitation Court was the proper forum for the IRS to raise its challenges. *Id.* at 18 (R-App.18) (noting that "[t]he Wisconsin statutes contemplate that rehabilitation proceedings should be conducted almost exclusively in the state rehabilitation court," and that "[u]ltimately, claims against the segregated account will be collected in the rehabilitation court and paid according to Wisconsin's priority statutes"). Therefore, she advised the IRS to raise its challenges in the Rehabilitation Court: "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." *Id.* at 19-20 (R-App.19-20) (emphasis added).

The IRS did not heed Judge Crabb's advice. Although the Rehabilitation Court informed all parties-in-interest in a December letter that it was prepared to rule on the Plan if and when the case was remanded (R.551), the IRS again chose not to appear and filed nothing in the Rehabilitation Court following the January 14, 2011 remand order. The Rehabilitation Court entered its order confirming the Plan on January 24, 2011. (R.556 (R-App.33-96).)

III. THE IRS'S DELIBERATE AVOIDANCE OF THE REHABILITATION COURT

After waiting almost a month for the IRS to follow Judge Crabb's instructions on remand, on February 7, 2011, the Commissioner asked the Rehabilitation Court to set a hearing to address the IRS's concerns about the Injunction. (R.569.) The Rehabilitation Court scheduled a February 23, 2011 hearing on this request. (R.575.)

Rather than appear at the hearing to raise its challenges in the Rehabilitation Court—as the Injunction, Judge Crabb's

remand order, and the Rehabilitation Court's hearing notice all invited the IRS to do—the IRS instead *sued* the Rehabilitation Court and the Commissioner in federal court and sought an "emergency" order to enjoin the Rehabilitation Court from hearing the IRS's challenges to the Injunction, and from issuing or enforcing rehabilitation orders affecting the IRS. (R.602; R.603 at 2.)

Judge Crabb dismissed the IRS's lawsuit against the Rehabilitation Court and the Commissioner. *See generally IRS II* (R-App.22-32). After noting that her prior remand order had "advis[ed] the United States to 'present its challenges to the state court,'" *id.* at 981 (R-App.23-24), Judge Crabb concluded that the IRS had "disregarded" that advice, *id.* at 984 (R-App.30), to the detriment of the rehabilitation proceeding and the state court overseeing it:

> 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 985 (R-App.31) (emphasis added).

Even after the dismissal of its suit, the IRS took no steps to raise its objections or file any claim in the

Rehabilitation Court. Instead, it appealed Judge Crabb's decisions to the Seventh Circuit, without seeking any stay or other relief pending appeal. The IRS's appeals are still being briefed in the Seventh Circuit.

To date, the IRS has never raised any challenges to the Injunction, the Plan or any other aspect of the rehabilitation in the Rehabilitation Court. In fact, the IRS's only visit to the Rehabilitation Court occurred when its agent personally served Judge Johnston with the federal summons and complaint for the IRS's lawsuit against the Rehabilitation Court and the Commissioner, which was dismissed by Judge Crabb in *IRS II*.

IV. NEITHER AMBAC NOR ITS SEGREGATED ACCOUNT OWE THE IRS ANY MONEY

It is undisputed that Ambac and its Segregated Account are current on their federal taxes. The $708 million the IRS references (IRS Br. at 9, 12 n.5) is the aggregate principal amount of several tax refunds which Ambac, through its non-insurer parent corporation (AFGI) properly applied for and received from the IRS prior to the rehabilitation. (R.435, ¶¶ 4-7, 9 (A-App.72-73).)

The IRS filed a timely proof of claim concerning the refunds against AFGI in AFGI's chapter 11 proceeding pending in New York. AFGI is actively disputing that claim. However, despite the claims-filing provisions of the confirmed Plan (*see* R.567, Art. 4) and Judge Crabb's repeated directions that any relief the IRS wishes to seek against Ambac or its Segregated Account should be pursued in the Rehabilitation Court, the IRS has never submitted a claim.

V. THE IRS'S STATE COURT APPEAL

A. The Notice of Appeal

Although the IRS never raised its objections about the Injunction or Plan in the Rehabilitation Court, and never appeared in that court, the IRS nevertheless filed a notice of appeal on March 9, 2011, seeking to overturn the Injunction and Confirmation Order. (R.583.) As the IRS admits, "[o]ther than a copy of a notice of removal . . . , the notice of appeal was the first [and only other] document filed by the United States in the Circuit Court." (IRS Br. at 4.) The IRS's notice of appeal was signed only by Robert Kovacev, an attorney from the DOJ's Tax Division in Washington, D.C.,

who "was not admitted to the Wisconsin bar and had not sought admission *pro hac vice*." (*Id*. at 5.)

B. Dismissal Of The IRS's Appeal

The Commissioner moved to dismiss the IRS's appeal on two independent grounds. *First*, the Commissioner argued that the IRS's notice of appeal was fundamentally defective because it was not subscribed by a Wisconsin-licensed attorney, as required by WIS. STAT. § 802.05. (Comm'r Mot. at 10-17.)

Second, the Commissioner argued that the IRS's appeal violated this state's waiver rule, which "is not merely a technicality or a rule of convenience" but rather "an essential principle of the orderly administration of justice." (*Id.* at 18 (citation omitted).)

The Court of Appeals dismissed the IRS's appeal on the first of the two grounds. It concluded that the IRS's notice of appeal failed to comply with the § 802.05(1) subscription requirement because it did not contain the signature of a Wisconsin-licensed attorney. (Order at 7, A-App.20.) The Court of Appeals noted that this omission was contrary to "the longstanding practice of Department of Justice attorneys to obtain the sponsorship of a Wisconsin-

licensed attorney when appearing in our state courts," as well as internal DOJ procedures about the inclusion of local attorneys in state court matters. (Order at 8, A-App.21.)

The Court of Appeals also concluded that 28 U.S.C. § 517, which provides that DOJ attorneys "may be sent by the Attorney General to any State or district to attend to the interests of the United States in a suit pending in court," did not preempt Wisconsin's subscription requirement because it did not conflict with that requirement. (Order at 7-9, A-App.20-22.) After noting that "[t]he United States cites no authority from any federal or state jurisdiction holding that 28 U.S.C. § 517 preempted any similar state sponsorship requirement for a *pro hac vice* appearance in this or any other state," the Court of Appeals held that Wisconsin's requirements "did not prevent Attorney Kovacev from carrying out his responsibilities [to represent the IRS]; he simply failed to carry out his responsibilities according to the applicable rules." (Order at 8-9, A-App.21-22.)

In light of the Court of Appeals' dismissal for lack of jurisdiction based on the subscription requirement, that court did not reach the Commissioner's alternative ground for dismissal on the basis of waiver.

ARGUMENT

This Court should affirm the dismissal of the IRS's appeal on both of the independent grounds discussed below.

I. THE COURT OF APPEALS PROPERLY DISMISSED THE IRS'S APPEAL FOR FAILURE TO COMPLY WITH THE STATUTORY SUBSCRIPTION REQUIREMENT

Under WIS. STAT. § 802.05(1), a notice of appeal must be subscribed by a Wisconsin-licensed attorney. *Schaefer v. Riegelman*, 2002 WI 18, ¶¶ 33, 37, 250 Wis. 2d 494, 639 N.W.2d 715. *See also Brown v. MR Group, LLC*, 2004 WI App 122, ¶¶ 1, 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481. Because the IRS failed to comply with this requirement, and because an improper subscription is a fundamental defect, *see Schaefer*, 2002 WI 18, ¶¶ 33-34, which cannot be corrected after the time for appeal has expired, *see Brown*, 2004 WI App 122, ¶ 6, the Court of Appeals dismissed the IRS's appeal for lack of jurisdiction. (Order at 9-10, A-App.22-23.)

In its opening brief, the IRS does not dispute the following:

- the United States' longstanding practice, both historically and now, is to have a Wisconsin-licensed attorney (typically, an attorney from the local U.S.

Attorney's office) subscribe pleadings, motions and other papers filed in Wisconsin state courts;[6]

- the DOJ attorney (Robert Kovacev) who subscribed the notice of appeal in this case was not a Wisconsin-licensed attorney;[7]
- there is no evidence that Attorney Kovacev was familiar with the procedural and substantive laws of Wisconsin when he subscribed the notice of appeal;[8]
- there is no evidence that any Wisconsin-licensed DOJ attorney reviewed and approved the notice of appeal before it was filed;[9] and
- the IRS did not correct the subscription defect in its notice of appeal before the time for appeal had expired.[10]

The IRS also does not challenge the holdings in *Schaefer* or *Brown* (Order at 6, 9 & n.4 (A.App.19, 22)), or the import of those holdings if the subscription requirement is held to apply to DOJ attorneys. Instead, the IRS argues only that the subscription requirement does not apply to DOJ attorneys *at all*, based on SCR 23.02(2)(h) & (n) and 28 U.S.C. § 517. (IRS Br. at 17 n.8.) Thus, if this Court agrees

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[6] Order at 8 (A-App.21).

[7] *Id.* at 5-6 (A-App.18-19).

[8] *See* A-App.33-35.

[9] *Id.*

[10] Order at 9 (A-App.22).

with the Commissioner and the Court of Appeals that the subscription requirement applies to DOJ attorneys, then the decision below should be affirmed because the IRS's notice of appeal contained a "fundamental" defect, which was not corrected before the time for appeal had expired.

A. The IRS's Position Is Contrary To The Plain Language Of Section 802.05(1)

Section 802.05 provides, in part, that:

> **(1) Signature.** Every pleading . . . and other paper shall be signed by at least one attorney of record in the attorney's individual name . . . . Each paper shall state the signer's address and telephone number, and state bar number, if any. . . .
>
> **(2) Representations to Court**. By presenting to the court, . . . a pleading . . . or other paper, an attorney . . . is certifying that . . . :
>
> * * *
>
> (b) The . . . legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. . . .

WIS. STAT. § 802.05(1)-(2). This Court has interpreted § 802.05(1) to require that a Wisconsin-licensed attorney subscribe papers filed in state court. *Schaefer*, 2002 WI 18, ¶¶ 33, 37.

Section 802.05 is the state law counterpart to Federal Rule of Civil Procedure 11, *see* WIS. STAT. ANN. § 802.05 cmt., and, as written, it applies to all attorneys, whether they work for the federal government or not. Just as DOJ attorneys are subject to Rule 11 when they sign pleadings and other papers in federal court, *see Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991), they also are subject to § 802.05 when they litigate in state court.[11]

B. The IRS's Position Is Contrary To The Plain Language Of SCR 10.03(4)

SCR 10.03(4) sets forth the requirements for "membership" (*i.e.*, licensure) in the Wisconsin State Bar. The Rule provides that "no individual other than an enrolled active member of the state bar may practice law in this state," except:

> (b) A court . . . may allow a nonresident counsel to appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin

[11] Attorneys who practice in federal court are subject to that tribunal's authority to regulate them. *See Silicon Graphics, Inc. v ATI Technologies, Inc.*, 741 F. Supp. 2d 970, 980 (W.D. Wis. 2010). The IRS points to no precedent to suggest that the same does not hold true for attorneys who practice in state court.

> who appears and participates in the action or proceeding. . . .

SCR 10.03(4)(b); *see also 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.").

Although SCR 10.03(4)(c) contains a narrow exception for "nonresident military counsel" to appear in actions "representing military personnel without being in association with an active member of the state bar," there is no general exception for government attorneys from the strictures of SCR 10.03(4). Thus, pursuant to SCR 10.03(4), the IRS's attorneys must either be active members of the state bar or be admitted *pro hac vice* in a specific matter in order to comply with the subscription requirement in § 802.05(1).

C. State Law Does Not Exempt DOJ Attorneys From Compliance With The Subscription Requirement

Unable to point to any other Wisconsin state court case in which the government has taken the position the IRS advocates here, and unable to cite to any case in which a court

in any jurisdiction has excused the government from compliance with a similar state practice rule or statute, the IRS nevertheless contends that its attorneys are "shielded from state regulation"—including § 802.05(1) and SCR 10.03(4)—when they appear in state courts. (IRS Br. at 46.)

The Court of Appeals properly rejected this severe departure from both the law and the government's prior practice in Wisconsin state courts. As the Court of Appeals correctly noted, nothing in state or federal law exempts DOJ attorneys from "carry[ing] out [their] responsibilities according to the applicable rules" of the court in which they appear. (Order at 9, A-App.22.)

1. The IRS's alleged compliance with SCR 23.02 is irrelevant to its noncompliance with Section 802.05

The IRS first argues that it satisfied the subscription requirement under Wisconsin law because Attorney Kovacev was not committing the unauthorized practice of law when he signed the notice of appeal. (IRS Br. at 18-45.) However, this argument incorrectly assumes that the § 802.05(1) subscription requirement serves the same purpose as the criminal prohibition on the unauthorized practice of law, WIS. STAT. § 757.30, as defined by SCR Chapter 23. In other

words, the IRS assumes that mere compliance with SCR Chapter 23 (entitled "Regulation of Unauthorized Practice of Law")—specifically SCR 23.02—is sufficient to satisfy the subscription requirement.

The IRS is focusing on the wrong rule. Although SCR 23.02 lists certain general "activities" for which a law license is not required, § 802.05(1) describes a specific activity that *does* require a license. *See Schaefer*, 2002 WI 18, ¶ 17; *Brown*, 2004 WI App 122, ¶ 6. As the Court of Appeals properly held, SCR 10.03(4)—which states that "[n]o individual other than an enrolled active member of the state bar may practice law in this state" unless admitted *pro hac vice*—establishes the heightened threshold necessary to meet the subscription requirement. Only by requiring compliance with SCR 10.03(4) can one "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," the fundamental purpose of the subscription requirement. *Schaefer*, 2002 WI 18, ¶ 33.

Contrary to the IRS's assertion, the Court of Appeals did not "engraft[]" the requirements of SCR 10.03(4) onto SCR 23.02. (IRS Br. at 20-25.) It simply rested its decision

on the IRS's failure to meet the requirements of the rule that matters for the purposes of the subscription requirement—SCR 10.03(4)—rather than the requirements for a rule that does not.

a. SCR 23.02 and Section 802.05 address different concerns

The subscription requirement of § 802.05(1) is an independent, freestanding statute that reflects broader concerns than simply reminding individuals not to commit the unauthorized practice of law:

> [T]he subscription requirement is not simply putting ink on paper. Rather, it is a deliberate process by which the lawyer guarantees the validity of a claim. When a lawyer signs a pleading, it is not merely a pro forma act of notarization. Before affixing a signature to pleadings, the lawyer is expected to engage in a moment of reflection, review the facts, consider the law, and satisfy himself or herself that there is a good faith basis on which to commence the action. . . .
>
> . . . [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.

Schaefer, 2002 WI 18, ¶¶ 30, 33 (emphasis added).

The mere fact that the signing attorney is not committing unauthorized practice of law, as defined by SCR 23.02, does not provide the level of guarantee required by *Schaefer*. The State Bar of Wisconsin sought enactment of SCR 23.02 in order to address "the inadequacies of Section 757.30"—namely its failure to provide "a clear definition of what constitutes the practice of law"—to protect "[m]embers of the public who seek help and advice regarding legal matters from unlicensed persons engaged in the practice of law[.]" (*In the Matter of the Definition of the Practice of Law and the Administration of a Rule Defining the Practice of Law*, Petition for Supreme Court Rule, ¶¶ 3-4 (R-App.112-13).)

By contrast, § 802.05(1)—like its federal counterpart, Fed. R. Civ. P. 11—is *not* aimed at protecting members of the public who seek advice from unlicensed attorneys; its purpose is to provide adverse parties and the court the assurance that the person subscribing a state court filing is familiar with the substantive and procedural laws of this state and, based on that understanding of Wisconsin law, "guarantee[s]" the validity of the claim. *See Schaefer*, 2002 WI 18, ¶ 33.

Failure to comply with the subscription requirement "jeopardizes judicial economy, erodes attorney accountability, and lessens the essential protection that the subscription requirement affords to defendants." *Id*.

SCR 23.02 does not (and was not meant to) provide the guarantee that § 802.05 promotes. For example, SCR 23.02(2)(m) provides that a person "[a]cting as a nonlawyer assistant under the supervision of a lawyer" is not engaged in the unauthorized practice of law. SCR 23.02(2)(m); *see also* SCR 20:5.3, ABA cmt. (defining "assistants" to include secretaries and paraprofessionals). But the signature of a nonlawyer assistant does not meet the § 802.05 subscription requirement, even when that assistant affixes the signature under the supervision of a Wisconsin-licensed attorney. *Brown*, 2004 WI App 122, ¶¶ 11-13. This is because the activity of the nonlawyer assistant, which would be generally authorized by SCR 23.02(2)(m), does not provide the guarantee that the subscription requirement demands:

> Counsel's argument [that the subscription requirement was met when he directed his assistant to sign a pleading on his behalf] gives short shrift to the . . . subscription requirement and potentially creates a situation where fact-finding may be required on the question of whether the attorney actually prepared the

> notice of appeal and engaged in the "deliberate process by which the lawyer guarantees the validity of a claim."

Brown, 2004 WI App 122, ¶ 12 (quoting *Schaefer*, 2002 WI 18, ¶ 30).

Similarly, even assuming *arguendo* that other exceptions in SCR 23.02(2) were read to mean that Attorney Kovacev—like the nonlawyer assistant in *Brown*—was not engaged in the unauthorized practice of law when he subscribed the IRS's notice of appeal, that does not absolve his non-compliance with the § 802.05(1) subscription requirement, which has broader purposes than the prevention of the unauthorized practice of law.

b. SCR 10.03(4) and Section 802.05(1) address the same concern

The Court of Appeals correctly held that the purpose underlying the § 802.05(1) subscription requirement is met only through licensure or *pro hac vice* admission under SCR 10.03(4). Holding a Wisconsin law license (or being admitted to practice *pro hac vice* with the support of a sponsoring state-licensed attorney) ensures involvement in the case by one who has Wisconsin-specific legal training and experience and is therefore "familiar with the procedural and

substantive laws of this state." Indeed, SCR 23.02 itself recognizes that this heightened level of qualification is distinct from mere authorization to engage in activities that might constitute the practice of law. *See* SCR 23.02(3) & cmt. (only those who meet the requirements of SCR 10.03(4) may represent that they are "authorized to practice law in this state or otherwise qualified to provide professional legal services or advice").

2. Even if SCR 23.02 were relevant to the subscription requirement, it does not support the IRS's position

Setting aside the fact that the IRS's compliance with SCR 23.02 is not at issue (because this is not a proceeding to enforce the statutory prohibition on the unauthorized practice of law, WIS. STAT. § 757.30), Attorney Kovacev's act of signing the notice of appeal is not one of the activities exempted under SCR 23.02.[12]

Under SCR 23.02, the practice of law is limited to Wisconsin-licensed attorneys, unless an exception for certain specified "activities" applies. Only one of those exceptions—

[12] The Commissioner joins the arguments set forth in Ambac's response brief, which addresses the exceptions to SCR 23.02(2) in greater detail.

the exception for attorneys admitted *pro hac vice* under SCR 10.03(4)—is applicable to the activity of "[p]racticing law" generally. SCR 23.02(2)(a). The other exceptions do not permit individuals to "practice law" without restriction; they instead clarify that a law license is not required for certain specific "activities," regardless of whether those "activities" might arguably fall within the definition of practicing law. SCR 23.02(2). There are a number of specific activities excluded from SCR 23.02, ranging from lobbying, to serving as a court clerk, to teaching the law, to preparing another's taxes, but none of the excluded activities include subscribing pleadings in a state court action.

The IRS argues that Attorney Kovacev's act of signing the notice of appeal fell within: (1) the exception for "[a]ctivities which are preempted by federal law," SCR 23.02(2)(h); or (2) the exception for "[g]overnmental agencies, Indian tribes and their employees carrying out responsibilities provided by law," SCR 23.02(2)(n). Neither exception applies.

First, the activity of subscribing a state court pleading is not preempted by federal law. Although the history of this exception is not altogether clear, it appears to be aimed at

addressing the situation described in *Sperry v. Florida*, 373 U.S. 379 (1963)—namely, the practice of law before exclusively federal agencies and tribunals. In *Sperry*, the named appellant was authorized to practice before the United States Patent Office, which by statute expressly permitted non-lawyers to practice before it—but he was not admitted to practice law in his state of employment, Florida. 373 U.S. at 381-84. The Florida Bar sought to enjoin him from conducting activities in Florida related to his practice before the Patent Office, because his exclusively federal patent practice fell within the state definition of the practice of law. *Id.* at 381-82. The United States Supreme Court overturned the injunction, holding that because patent practice is an exclusively federal activity, and because "patent practitioners are authorized to practice only before the Patent Office," the injunction was preempted by federal patent law. *Id.* at 384, 401-02. Thus, *Sperry* holds that when the federal government creates an exclusively federal office and expressly authorizes non-lawyers to practice before it, a state has no business enjoining individuals from activities related to their practice before that federal office.

There is no precedent, however, for the IRS's contention that non-compliance with practice rules in *state* courts is an "activity" preempted by federal law. Just as the State cannot impose its subscription requirement on attorneys who sign (or electronically sign) pleadings in federal district courts located in Wisconsin, Congress cannot consistent with principles of federalism rewrite state court rules of civil procedure.[13] Moreover, as discussed below, Congress has neither attempted nor effected any preemption of the subscription requirement.

Second, the SCR 23.02(2)(n) exception for activities of "governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law" does not exempt DOJ attorneys from the § 802.05(1) subscription requirement. As described more fully *infra*, the "responsibilities provided by law" for DOJ attorneys include

[13] *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) ("[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.")

compliance with state laws and rules when practicing in state courts. 28 U.S.C. § 530B(a); SCR 20:3.4(c).

The IRS's attempts to draw parallels to the practice of Wisconsin Indian tribes sending non-lawyer tribal officials to represent their interests in proceedings under the state and federal Indian Child Welfare Acts ("ICWA") are unavailing. ICWA proceedings are governed by the state's Juvenile Justice Code, WIS. STAT. § 938.028, which has its own specialized, comprehensive rules of procedure, *see generally* WIS. STAT. CH. 938, including a far more informal subscription requirement: "A petition initiating proceedings under this chapter shall be signed by a person who has knowledge of the facts alleged or is informed of them and believes them to be true." WIS. STAT. § 938.25. The IRS offers no indication that the more demanding subscription requirement of § 802.05(1) even applies in such proceedings.

D. Federal Law Does Not Excuse Federal Attorneys From Compliance With The Subscription Requirement

The IRS argues that 28 U.S.C. § 517—a statute that authorizes the Attorney General to send any DOJ officer to any court "to attend to the interests of the United States"—overrides § 802.05(1) on the basis of "conflict preemption."

(IRS Br. at 33-58.) But, as the Court of Appeals held, nothing in Wisconsin's subscription requirement prevents the Attorney General from sending any DOJ attorney he sees fit to attend to the interests of the IRS in this rehabilitation, including those who are not licensed to practice in our courts. (Order at 8-9, A-App.21-22.) The subscription requirement merely demands that such non-licensed DOJ attorneys be accompanied by "an attorney who is familiar with the procedural and substantive laws of this state" who can subscribe pleadings or sponsor *pro hac vice* admission. *Schaefer*, 2002 WI 18, ¶ 33. As explained below, there is no actual conflict between state and federal law that would trigger preemption.

1. Legal standard

Conflict preemption is a doctrine of implied preemption, existing only where "there is an actual conflict between state and federal law" such that (1) it is impossible to comply with both state and federal law, or (2) the state law actually impedes the objectives of the federal law at issue. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77, 87 (2008); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quotation omitted). Preemption "is ordinarily not to be implied absent

an actual conflict." *English*, 496 U.S. at 90 (quotation omitted). Courts may not "seek[] out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 130 (1978) (quotation omitted).

"[T]he starting point for determining whether a state law is pre-empted is a presumption against pre-emption." *Aurora Med. Group v. Dep't of Workforce Dev.*, 2000 WI 70, ¶ 13, 236 Wis. 2d 1, 612 N.W.2d 646; *see also Megal Dev. Corp. v. Shadof*, 2005 WI 151, ¶ 37, 286 Wis. 2d 105, 705 N.W.2d 645 ("[T]he U.S. Supreme Court has articulated a 'strong presumption' against preemption.") (citation omitted). "The burden of establishing pre-emption rests with the party seeking the benefit of pre-emption. That burden is a considerable one, which requires overcoming the starting presumption that Congress does not intend to supplant state law." *Aurora*, 2000 WI 70, ¶ 15 (internal citation and quotation omitted). Preemption is limited "to only those situations obviously intended by Congress" in enacting the federal law at issue. *Megal*, 2005 WI 151, ¶ 37 n.12.

This burden applies to those seeking preemption of any state law, including state rules of civil procedure. *See id*.

¶¶ 47, 49 (concluding that the application of WIS. STAT. § 806.19(4) in state court "is not in conflict with, and therefore is not preempted by, federal bankruptcy law"); *Hartman v. Winnebago County*, 216 Wis. 2d 419, 428, 574 N.W.2d 222, 227 (1998) (concluding that WIS. STAT. § 806.06(4), rather than federal law, "sets forth the appropriate time requirement for a request for attorneys' fees pursuant to 42 U.S.C. § 1988(b) in an action venued in a Wisconsin circuit court").[14]

2. There is no conflict between 28 U.S.C. § 517 and Section 802.05

a. The IRS points to no evidence of any congressional intent to exempt DOJ attorneys from state court procedural rules

The IRS does not come close to overcoming the presumption that 28 U.S.C. § 517 was not intended to override Wisconsin's subscription requirement. Although the IRS argues that the subscription requirement stands as an obstacle to the purposes of Congress in enacting § 517 (IRS Br. at 34, 51), the only congressional purpose it identifies is to assign the DOJ the task of representing the interests of the

[14] This Court's decisions in *Megal*, *Aurora* and *Hartman* were all authored by Justice Crooks, and were all unanimous.

United States in court. (IRS Br. at 22, 29.) That purpose is undisputed, but irrelevant. Wisconsin has not expressly or effectively banned DOJ attorneys from representing the United States in state court, or imposed any burdens on them not also borne by every other attorney who appears in state court.

Nothing in § 517 or any of the other statutes the IRS cites (28 U.S.C. §§ 515 to 519 and 530B) immunizes DOJ attorneys from state procedural requirements or other state law when appearing in state courts. In fact, § 530B reveals the opposite intent:

> An 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*.

28 U.S.C. § 530B (emphasis added). Though it is entitled "[e]thical standards for attorneys for the Government" and has been applied more often in the context of ethical violations rather than violations of state procedural requirements, nothing in the history and broad language of § 530B suggests that Congress ever intended to give DOJ attorneys license to ignore state procedural requirements in

state court. On the contrary, Congress sought to rein in DOJ attorneys from ignoring state practice requirements.

Section 530B was enacted in part in response to a DOJ policy "instruct[ing] assistant United States Attorneys to ignore state ethical rules and instead adhere exclusively to the policy of the Department of Justice," at least to the extent state rules conflicted with DOJ objectives. *United States v. Tapp*, No. CR107-108, 2008 WL 2371422, at *6 (S.D. Ga. June 4, 2008). Courts responded by soundly criticizing the practice and refusing to extend to DOJ attorneys such immunity from state rules. *See id.* at *7, *13; *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 132-33 (D.D.C. 2003), *aff'd*, *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457 (D.C. Cir. 2005). Finally, "in the face of the Justice Department's repeated attempts to exclude its attorneys from compliance with state bar rules," Congress enacted § 530B, which broadly subjected DOJ attorneys to "State laws and rules." *N.Y. State Bar*, 276 F. Supp. 2d at 133.

In its brief, the IRS attempts to preemptively address the broad scope of § 530B by noting that 28 C.F.R. § 77.2(h), a DOJ rule promulgated in response to the passage of

§ 530B,[15] defines "state laws and rules" to include only ethical standards. (IRS Br. at 54.) But such rules cannot change the congressional intent, as reflected by § 530B's broad language. One of the few courts to consider 28 C.F.R. § 77.2(h) held that it conflicted with the plain language of § 530B, and required a government attorney to comply with state licensure requirements to appear in *federal* court. *Straub*, 1999 WL 33495606, at *6-*8 (R-App.102-03).

Straub's holding goes beyond what the Commissioner is arguing here, and at least one federal court has reached a different conclusion with regard to whether appearances in federal tribunals require compliance with state licensing rules. *See Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005) (cited in IRS Br. at 54-55). But the very fact that there could be such disagreement regarding appearances in *federal* courts—combined with the language and history of § 530B—illustrate that the true "purposes and objectives" of the laws at issue did not include the sweeping immunization

[15] *See United States v. Straub*, No. 5:99-10, 1999 WL 33495606, at *4-*5 (N.D. W.Va. June 14, 1999) (R-App.97-104), *vacated as moot based on subsequent bar membership*, No. 99-2194, 2000 WL 35892562 (4th Cir. July 13, 2000) (R-App.105.)

from state rules that the IRS urges here, particularly when its attorneys are litigating in state courts. In sum, Congress' swift and sweeping denunciation of the government's efforts to ignore state rules in *any* court, state or federal, weighs heavily against any implication that Congress intended § 517 or any other statute to absolve DOJ attorneys from state procedural requirements when practicing in *state* court. *See Megal*, 2005 WI 151, ¶ 37 n.12.

b. The subscription requirement does not conflict with 28 U.S.C. § 517

There also is no conflict between § 517 and the subscription requirement, because the latter does not prevent a DOJ attorney from representing the interests of the United States in state court. It only requires that, if the attorney is not licensed in Wisconsin and therefore not familiar with state law and procedure, the DOJ attorney must obtain admission *pro hac vice* under SCR 10.03(4).

This is the same responsibility imposed on every attorney not licensed to practice in Wisconsin courts. Indeed, virtually all of the dozens of litigants in this rehabilitation are represented by out-of-state counsel, who have associated with local counsel and appeared *pro hac vice*. Local counsel are

not particularly burdensome to find, for the IRS or anyone else. The Wisconsin State Bar directory lists more than 24,000 state-licensed attorneys, including two United States Attorneys, dozens of Assistant United States Attorneys in Wisconsin (including ones assigned to civil litigation), and at least four attorneys practicing in the DOJ's Tax Division in Washington, D.C. Normal *pro hac* fees also are waived for the government.

There was no actual conflict between the subscription requirement and federal law in this case. The IRS has never alleged that it was incapable of following state law when it filed its notice of appeal, or that the subscription requirement imposed an obstacle to the DOJ's representation here. As the Court of Appeals noted, "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." (Order at 9, A-App.22.) *See also Straub*, 1999 WL 33495606, at *8 (R-App.103) (holding that state licensing requirement "does not conflict with the statutes cited by the government nor does it hinder the Attorney General's ability to appear in any

court through any litigator she wishes. Such problems are readily resolved by *pro hac vice* admissions.").

Rather than pointing to an actual conflict, the IRS invents hypotheticals in which the subscription requirement *might* inconvenience the DOJ, such as being required to drive from Madison to Eau Claire for a state court hearing. (IRS Br. at 40.) Setting aside the fact that such speculation cannot form the basis of preemption, *Exxon*, 437 U.S. at 130-31, the IRS points to no case that has ever held that state courts must conform their local practices to fit the administrative convenience of the DOJ.

Likewise, the IRS's speculation that Wisconsin courts could theoretically revoke the *pro hac* admissions for its out-of-state attorneys is without basis. The IRS cites no example of that happening and, under SCR 10.03(4)(e), a court may revoke a *pro hac* admission only after a hearing, and only if the attorney "manifests incompetency" or an "unwillingness to abide by the rules of professional conduct for attorneys or the rules of decorum of the court."

Finally, the federal government's own practice belies the IRS's contention that the subscription requirement imposes an unconstitutional burden upon DOJ attorneys. As

the Court of Appeals noted, it has "been the longstanding practice of Department of Justice attorneys to obtain the sponsorship of Wisconsin-licensed attorney[s] when appearing in our state courts[.]" (Order at 8, A-App.21.)[16]

Moreover, the chapter of the U.S. Attorneys Manual dealing specifically with the Tax Division states:

- For civil tax cases, "Generally, *even when a Tax Division attorney has primary responsibility for the litigation*, the United States Attorney will be listed as an attorney on the case. Depending on local practice, and after consultation, an Assistant United States Attorney may be listed as counsel of record in a particular case." *Id.* § 6-1.120 (emphasis added) (R-App.107).

- For receivership proceedings (which would presumably include this rehabilitation), "In state court proceedings, the courts generally require the United States to follow the procedural rules and time limits applicable in those proceedings." *Id.* § 6-5.630 (R-App.108).

[16] 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 Wisconsin state courts as an appellant or respondent and has always had a state-licensed attorney as counsel of record. *See*, *e.g.*, 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.).

Thus, contrary to the IRS's assertion, the involvement of a Wisconsin-licensed attorney in government matters pending in state courts is routine.

The IRS cannot dispute that Wisconsin is also a sovereign entity that must attend to its own interests, including establishing rules of procedure in its state courts. *Megal*, 2005 WI 151, ¶ 37 n.12. The IRS points to no way in which applying the subscription requirement to all litigants who avail themselves of Wisconsin courts for civil litigation, including the federal government, conflicts with any federal statute. Therefore, the IRS has failed to meet its "considerable" burden of showing that federal law preempts the subscription requirement. *Aurora*, 2000 WI 70, ¶ 15.

II. THE IRS HAS WAIVED ANY RIGHT TO PURSUE THIS APPEAL

The IRS contends that this Court should pursue "the simplest way to resolve this appeal" and avoid reaching complex legal issues if possible. (IRS Br. at 32.) The Commissioner agrees. But the simplest way to resolve this appeal may be the one that was all but ignored in the IRS's opening brief: dismissal based on the IRS's intentional waiver of the right to pursue a state court appeal by

strategically avoiding all opportunities to raise its arguments in the Rehabilitation Court.

Though the Court of Appeals dismissed the IRS's appeal on other grounds, this Court can affirm that dismissal on any ground. *See N. Air Servs., Inc. v. Link*, 2011 WI 75, ¶ 80, --- Wis. 2d ---, --- N.W.2d --- ("We affirm the Court of Appeals' [partial dismissal of an appeal], but on different grounds."); *State v. Koput*, 142 Wis. 2d 370, 375, 418 N.W.2d 804, 806 (1988) ("[W]e justify our affirmance on a rationale different from that utilized by the court of appeals."); *State v. Wyss*, 124 Wis. 2d 681, 689-91, 370 N.W.2d 745, 749-50 (1985) (prevailing party before Court of Appeals may raise "its issues upon this court's granting of the losing party's petition for review").[17]

The IRS essentially ignores the waiver issue in both its Petition for Review and opening brief to this Court. (*See* IRS

[17] Because waiver is an independent state law ground for affirmance, reaching the waiver issue here would prevent the IRS from potentially further delaying the rehabilitation by seeking review of its conflict preemption challenge to the § 802.05 subscription requirement in the United States Supreme Court.

Pet. at 43-46; IRS Br. at 6 n.3.)[18] It would be a disservice to the Commissioner and the literally thousands of persons and entities with a stake in the underlying rehabilitation proceeding if this Court were to prolong the problems the IRS's appeal is causing the rehabilitation by sending the waiver issue back to the Court of Appeals for further proceedings.

Although the IRS has tried to obfuscate the waiver defect in its appellate position with vague references in its Court of Appeals briefing about sovereign immunity and the Anti-Injunction Act, those provisions have no bearing on whether a litigant—in any state or federal court in this country—must appear in the trial court and object to the relief being granted by the trial court as a condition precedent to later appealing the trial court's decision. As detailed below, that basic, common sense principle of jurisprudence applies to the IRS the same as it does to any other party seeking appellate review.

[18] Consistent with WIS. STAT. § 809.62(3)(d), the Commissioner's Response to the IRS's Petition for Review noted that the Court of Appeals' Order can and should be affirmed on the alternative waiver ground.

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.

The waiver rule is designed to prevent parties "from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* at ¶ 12. The 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.").[19]

[19] 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 the 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's Conduct Constituted An Intentional Waiver, Not Merely A "Forfeiture" Of The Right To Pursue The Issues It Raises In This Appeal

As this Court recently observed, the terms "forfeiture" and "waiver" are sometimes used interchangeably by courts in discussing whether an issue has been preserved for appeal, but the terms actually reflect different legal concepts. *See*

Schill v. Wis. Rapids Sch. Dist., 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 786 N.W.2d 177. "The forfeiture rule gives the parties and the circuit court notice of the issue and a fair opportunity to address it; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* n.21 (citations omitted). In *Schill*, this Court enforced the forfeiture rule to prevent consideration of an issue on appeal which had not been presented to the trial court.

Waiver is more egregious than forfeiture. Waiver is the intentional relinquishment or abandonment of the right to pursue an issue, while forfeiture is a rule of judicial administration. *Id.* It would be hard to imagine a clearer case of intentional waiver of an appellate right than the situation here.

C. The IRS's Conduct Also Satisfies The Test For Estoppel

The IRS not only waived any right to pursue this state court appeal, but also should be held to be affirmatively estopped from doing so. Waiver may be a defense to an

appeal without having to show detriment to the adverse party. Estoppel against a government entity requires the additional elements of showing that the adverse party relied to its detriment and/or changed it position in reliance on the action or omission of the government, and showing that the balance of public interests warrants application of estoppel. *See*, *e.g.*, *State v. City of Green Bay*, 96 Wis. 2d 195, 208, 210, 291 N.W.2d 508, 514-15 (1980).

The Commissioner has proceeded with the rehabilitation in good faith reliance on the finality of the Injunction and the subordinate classification of the IRS's potential claim as confirmed in the Confirmation Order. It was appropriate for the Commissioner to rely on the finality of those orders because the IRS chose not to challenge them in the Rehabilitation Court.

As Judge Crabb found, the IRS's tactical decision to collaterally attack the rehabilitation through its improper federal court filings rather than raising its issue in the Rehabilitation Court has been disruptive to the rehabilitation. *IRS II*, 767 F. Supp. 2d at 985 (R-App.31). The IRS should be held to be estopped from intentionally waiting to raise its

issues for the first time on appeal given the unfair prejudice its tactics are causing the rehabilitation.

Whether based on "forfeiture," "waiver," or "estoppel," the result should be the same: the IRS should not be permitted to "sandbag"[20] by seeking reversal of the Rehabilitation Court's orders based on arguments it intentionally never presented to that court.

D. The IRS's Defenses To Waiver And Estoppel Are Unpersuasive

The IRS attempted to avoid dismissal on the waiver issue in the Court of Appeals by arguing in its opposition brief ("IRS Opp'n") that the issues it never presented to the Rehabilitation Court for consideration involve subject matter jurisdiction, which it claims cannot be waived on appeal. (IRS Opp'n at 12.) However, the IRS's argument is 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

[20] *State v. Huebner*, 2000 WI 59, ¶ 12.

not implicate a court's subject matter jurisdiction. (IRS Opp'n 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).[21]

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 ("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) (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

[21] *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.") (citations omitted).

U.S.C. § 7421(a), is a jurisdictional issue that can be raised for the first time on appeal. (IRS Br. at 6 n.3.) However, the IRS ignores where and how this issued was litigated. Specifically, the IRS litigated this issue in the federal removal action, and Judge Crabb rejected the IRS's argument. *IRS I*, slip op. at 10 (R-App. 10). The proper place to object to Judge Crabb's ruling is in the Seventh Circuit, not by continuing to pursue this appeal.

Third, the IRS contended before the Court of Appeals 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 Opp'n 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 really state law merits challenges, which a litigant must bring to the trial court's attention first in order to adequately preserve for appeal. *Terpstra*, 63 Wis. 2d at 594, 218 N.W.2d at 134.

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 waived the right to pursue this appeal.

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

The IRS suggests that this Court should exercise its discretionary reversal power under WIS. STAT. § 752.35 to hear the waived issues. (IRS Br. at 6 n.3; IRS Opp'n 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, § 752.35 applies to situations where the real controversy was not "fully tried" below or the record reflects that the case resulted in an obvious miscarriage of justice. In either situation, the case was at least litigated in the court below, rather than strategically circumvented by the appellant.

The IRS should not be heard to 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.").

2. The stringent standard for summary reversal is not met

An appellate 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 § 752.35 involve inadvertent waivers by trial counsel, not intentional strategic choices. *See, e.g., Steinberg v. Jensen*, 204 Wis. 2d 115, 123-25, 553 N.W.2d 820, 823-24 (Ct. App. 1996).

The IRS's deliberate avoidance of the Rehabilitation Court for tactical reasons bears no resemblance to the

"extraordinary" cases in which this Court has granted relief under § 752.35. Indeed, it would be "contrary to fundamental principles of justice and orderly procedure" to relieve a litigant of the consequences of a strategy, purposefully taken. *Gove*, 148 Wis. 2d at 944, 437 N.W.2d at 221.

CONCLUSION

For the reasons stated above, the Court of Appeals' Order dismissing the IRS's appeal should be affirmed.

Dated this 19th day of October, 2011.

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CERTIFICATION AS TO FORM AND LENGTH OF BRIEF

I certify under WIS. STAT. § 809.19(8)(d) that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c). The brief was produced using proportional serif font with minimum printing resolution of 200 dots per inch, 13 point body text and quotes, 13 point for footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. Consistent with § 809.19(8)(c)1., those portions of the brief described in § 809.19(1)(d), (e) and (f) contain 10,796 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19.(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that this appeal is not taken from a circuit court order or judgment entered in a judicial review of an administrative decision and no part of the record is required by law to be confidential.

Dated this 19th day of October, 2011.

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted a separate electronic copy of this brief and appendix, which complies with the requirements of WIS. STAT. § 809.19(12).

I further certify that the submitted electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of the brief and appendix filed with the court and served on all opposing parties.

Dated this 19th day of October, 2011.

FOLEY & LARDNER LLP

/s/ Michael B. Van Sicklen

Michael B. Van Sicklen

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2011, I caused three true and correct copies of the Respondents' Response Brief and Appendix to be served by first-class mail, postage prepaid, upon the persons listed below

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All other counsel who have entered an appearance in the underlying rehabilitation proceeding have been served today electronically (via email).

Dated this 19th day of October, 2011.

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