

Appeal No. 2009AP728

Cir. Ct. No. 2007CV4035

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

**WISCONSIN MEDICAL SOCIETY, INC. AND DAVID M.
HOFFMANN, M.D.,**

PLAINTIFFS-APPELLANTS,

v.

MICHAEL L. MORGAN,

DEFENDANT-RESPONDENT.

FILED

DEC 10, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, P.J., Lundsten and Fine, JJ.

In this appeal, the Wisconsin Medical Society and David Hoffman (the health care providers) raise multiple challenges to the validity of recent legislation which transferred \$200 million dollars from the Injured Patients and Families Compensation Fund to the Medical Assistance Trust Fund. The health care providers first argue that this transfer, conducted pursuant to 2007 Wis. Act 20, § 9225, constituted an unconstitutional taking of their property without due process of law, in violation of the United States and Wisconsin constitutions. They further seek declaratory judgment and injunctive relief based on contentions that the transfer impaired their contractual rights and effectively constituted an unlawful tax against them by virtue of the additional premiums they will now need to pay into the Compensation Fund. The trial court determined on summary judgment that the health care providers did not have a protectable property interest

in the Compensation Fund, and that their remaining claims were barred by sovereign immunity.

Whether health care providers do or do not have a protectable property interest in the Fund is an issue of first impression.¹ As we will explain, we believe resolving that question requires clarification of the standard set forth in *Wisconsin Professional Police Association, Inc. v. Lightbourn*, 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, for determining the existence and scope of property interests arising from legislatively created trust funds. Additionally, clarification is needed because the Supreme Court has recognized that there may be constitutional problems with a statute that retroactively repudiates the government's contractual obligation. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005).

The resolution of this case also will have broad statewide implications. For instance, the four amicus curiae briefs filed in this matter contend that the transfer at issue—which they characterize as a “raid” amounting to more than a quarter of the Compensation Fund’s net worth—not only affects the current financial health of the Fund and impairs the ability of the Fund’s Board of Governors to manage it, but also will impede physician recruitment due to significant increases in annual assessments needed to replace the transferred money. It is also argued that the transfer will adversely affect the availability,

¹ Whether sovereign immunity bars the other declaratory judgment and injunctive relief claims brought here against the Secretary of the Department of Administration is also an issue in this case. We do not address the particulars of the sovereign immunity issue in this certification, however, because we believe it can be resolved in accordance with existing precedent. We do not address the substance of the other claims because, if sovereign immunity does apply, they are barred, and if it does not, those claims could be remanded for trial.

cost, and quality of medical care in the state because resources will be diverted from investment in personnel, equipment, and facilities to pay the higher assessments.

Given the well-developed arguments in the briefs, the need for clarification from the supreme court on the meaning of *Lightbourn*, and the broad statewide effect of a decision in this case, both as it applies to the Compensation Fund and to possible property interests in other State funds, we believe the Wisconsin Supreme Court is the proper forum for this case.

BACKGROUND

Because this appeal arises in the context of summary judgment, we recite the pertinent undisputed facts. The Compensation Fund was created by statute for the purpose of paying excess medical liability claims for health care providers who comply with the terms of the statute. Compliance with the statute includes paying annual assessments to the Fund. WIS. STAT. § 655.27(1) and (3) (2007-08).² The statute provides in relevant part:

The fund, including any net worth of the fund, is held in irrevocable trust for the sole benefit of health care providers participating in the fund and proper claimants. Money in the fund may not be used for any other purpose of the state.

WIS. STAT. § 655.27(6).

In October, 2007, in response to lost federal funding for the state's Medical Assistance programs, the legislature passed a biennial budget which

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

directed the transfer of \$200 million in two installments from the Compensation Fund to the Medical Assistance Trust Fund. 2007 Wis. Act 20, § 9225. The statute authorized a future appropriation of \$100 million in the event that the money in the Compensation Fund became insufficient to pay claims. *Id.*, § 212p.

Department of Administration Secretary Michael Morgan recorded a transfer of \$71.5 million the following day against the Compensation Fund's net worth of over \$700 million. Because the Fund did not have cash on hand to cover the transfer, the Secretary reallocated money from a different state fund and began charging the Fund interest. According to the Medical Society's reading of a report of the Fund's actuary, the actuary has determined that the transfer threatens the soundness of the Fund. The actuary recommended that the annual assessments for providers be increased 25% each year for five years, and projected that, even with that increase, the Fund would be reduced by \$400 million after the five-year period.

DISCUSSION

The primary question presented by this appeal is whether health care providers covered by the Fund have a constitutionally protected property interest in the Fund that was violated when the legislature transferred money out of the Fund for a non-Fund purpose.

Although some property interests are protected by the constitution, the constitution does not create them. Rather, property interests are created and defined by independent sources which entitle individuals to certain benefits. *See Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 558, 544 N.W.2d 888 (1996). Property interests can take many forms, essentially encompassing any "legitimate claim of entitlement." *Board of Regents v. Roth*,

408 U.S. 564, 576-77 (1972). In *Lightbourn*, the Wisconsin Supreme Court identified three independent sources for the property interests enjoyed by participants in the Wisconsin Retirement System. First, the court noted that certain accrued benefits were granted to Retirement System participants as contractual rights related to their individual accounts. *Lightbourn*, 243 Wis. 2d 512, ¶¶108-12. Such contractual rights would create different property interests in various parts of the Retirement System Trust Fund depending upon the status of the participants, such as active employees, former employees not yet drawing benefits, and annuitants.

Second, the court observed that all participants had a property interest in the entirety of the Retirement System trust fund, beyond just their individual accounts, arising from the stated purpose of the trust fund. Specifically, the court explained that all participants had an interest in ensuring that the board would use trust fund money only for proper trust fund purposes; that legislative action affecting the Retirement System would be consistent with the stated objectives of the trust fund; and that the board would administer the trust fund in accordance with the general principles of diligence, prudence and fidelity applicable to managing trusts. *Id.*, ¶¶113-20.

Third, the court determined that all participants also shared a general property interest in protecting the “integrity and security” of the trust fund as a whole against actions that would threaten the actuarial soundness of the trust fund or likely result in the nonpayment of, or a decrease in, any accrued benefits. *Id.*, ¶121; *see also Association of State Prosecutors*, 199 Wis. 2d at 563.

The health care providers analogize their interests in the Compensation Fund to the participants’ interests in the Retirement System Trust

Fund in *Lightbourn*. Specifically, they claim they have protectable interests in ensuring that money from the Compensation Fund be used only for Fund purposes and in maintaining the integrity and security of the Fund. They acknowledge that they do not have an entitlement to the Compensation Fund's assets in terms of actual payouts. However, they point out that they do enjoy direct benefits from appreciation in Fund assets because their annual assessments are reduced in proportion to the amount of investment income generated by the Fund.

The Secretary contends that the health care providers have no protectable property interests in the Compensation Fund because they have no *contractual right* to any distribution of the money. Rather, Fund money may be paid only to persons injured by covered participants; participants may not transfer their interests therein and they may not be held liable for judgments for amounts covered by the Fund. The Secretary argues that the decision in *Lightbourn*, and the line of pension cases which preceded it, hinged on contractual rights that are not present here. The Secretary argues that there cannot be any property interest in ensuring that money be used only for fund purposes or in maintaining the integrity and security of the fund *standing alone*. Rather, such rights should only be understood in relation to protecting other, accrued benefits.

Additional arguments are well set forth in the briefs. Because the briefs present well-developed arguments, because of the need for clarification from the supreme court on the meaning of *Lightbourn*, and because of broad statewide implications of a decision in this case, both as it applies to the Compensation Fund and health care generally and as it may apply to property interests in other State funds, we believe the Wisconsin Supreme Court is the proper forum for this case.

