

WISCONSIN MEDICAL SOCIETY, INC.,
and DAVID M. HOFFMANN, M.D.

Plaintiffs,

vs.

Case No.: 07-CV-4035

MICHAEL L. MORGAN,

Defendant.

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STRIKE

TO: Michael L. Morgan
c/o Christopher J. Blythe, Esq.
Wisconsin Department of Justice
17 W. Main Street
Madison, WI 53707

PLEASE TAKE NOTICE that, pursuant to Wis. Stat. § 904.08, plaintiffs Wisconsin Medical Society, Inc. ("WMS") and David M. Hoffmann, M.D. (collectively, "Plaintiffs"), by their attorneys Whyte Hirschboeck Dudek S.C., hereby move the Court for an order striking Exhibit C attached to the Affidavit of David P. Schmiedicke offered by Defendant Michael L. Morgan ("Defendant") and all portions of Defendant's Brief on Summary Judgment citing to or relying on the Affidavit of David P. Schmiedicke, Exhibit C.

The grounds for this motion are as follows:

1. In support of his Brief on Summary Judgment, Defendant submitted a memorandum addressed to Dan Schooff and Pat Hendersen of the Department of Administration from Dr. Susan L. Turney and Mark Grapentine of the WMS, dated January 18, 2007

("Memorandum"). (See Affidavit of David P. Schmiedicke, Exh. C., a copy of which is attached hereto.) The Memorandum was an offer to furnish a compromise to ward off future legislative raids of the Injured Patients and Families Compensation Fund (the "Fund") by proposing privatization of the Fund in exchange not opposing a \$100 million, one-time transfer of money from the Fund for the Governor's health care initiatives. (*Id.*) The Memorandum provides:

Reorganizing the Injured Patients and Families Compensation Fund (Fund) at this time provides multiple positives: much-needed funding for the state's health care efforts, added flexibility for an important Fund and an end to the conflicts over the Fund's status we experienced in the last two biennial state budgets. Here are the basic tenets regarding our concept:

- √ The Fund would continue to fully protect injured patients and families.
- √ Preservation of the Fund's tax-exempt status.
- √ The Fund would no longer be a line-item in the state budget.
- √ Continued fiscally-sound management.
- √ The Board would have additional flexibility in administrative efforts, investment options and case processing. If \$100 million will go to the state next biennium, the Board will need this flexibility to make up that new deficit in the IPFCF.
- √ A majority of the new entity's board should be made up of those paying into the entity. We believe that government and public representatives should remain on the board.

(See Affidavit of David P. Schmiedicke, Exh. C.)

2. The Defendant relies on the Memorandum to support his contention that the proposal somehow undermines Plaintiffs' claim that the \$200 million transfer from the Fund to the Medical Assistance Trust Fund ("MATF") is unconstitutional. (Def.'s Brf., p. 4.)

3. Offer to compromise are inadmissible as a matter of law:

Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Wis. Stat. § 904.08. WMS presented the Memorandum to the Department of Administration in an effort to reach a compromise with the State to accept \$100 million from the Fund in exchange for allowing the Fund to compromise by privatizing the Fund to permanently take it beyond the reach of the State. The Memorandum constitutes an offer of compromise between the Plaintiffs and the Defendant and is inadmissible. *See* Wis. Stat. § 904.08. The offer was plainly rejected, as the Legislature enacted 2007 Wisconsin Act 20, § 9225, which transferred not \$100 million, but \$200 million from the Fund to the MATF and failed to include any of the statutory changes to privatize the Fund so as to permanently protect it against any future attempted State raid or grant the Board the authority to implement certain administrative, investment and case processing changes that would have allowed the Fund to make up the deficit from a \$100 million transfer.

4. Wis. Stat. § 904.08 creates a privilege based on the public policy of encouraging dispute resolution. *Matter of Ruediger's Estate*, 83 Wis. 2d 109, 125, 264 N.W.2d 604 (1978). “It recognizes that a person ought to be able to buy his peace without fear that his offers of compromise will be used against him if not accepted.” *Id.* *See also State Med. Soc’y v. Associated Hosp. Serv., Inc.*, 23 Wis. 2d 482, 492, 128 N.W.2d 43 (1964) (“This court subscribes to the proposition that proposed settlements and offers of compromise are to be encouraged and that it would contravene desirable public policy to permit such salutary proposals to be utilized in a hostile manner at trial.”).

5. It is precisely for this reason that the Memorandum must be stricken from the record. This offer to furnish a compromise extended by WMS was an attempt to address the State’s repeated attempts to remove monies from the Fund for non-Fund purposes. The Memorandum cannot and should not be deemed an admission on the part of the Plaintiffs, nor

does it reflect an “established practice of interfund transfers,” as the Defendant suggests. (Def’s Br., p. 4.) To permit the admission and use of the Memorandum by the Defendant for this purpose is in contravention of public policy and Wisconsin law.

6. Plaintiffs respectfully request that the Memorandum, and all reference to the Memorandum in Defendant’s Brief in Summary Judgment, be stricken.

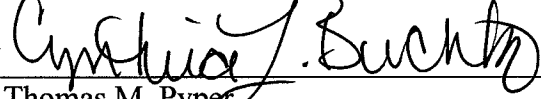
PLEASE TAKE FURTHER NOTICE that, pursuant to the Court’s schedule, this Motion shall be heard in the Branch 13 courtroom of the Dane County Courthouse on August 25, 2008 at 1:15 p.m.

Dated this 8th day of August, 2008.

P.O. ADDRESS:

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WHYTE HIRSCHBOECK DUDEK S.C.

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Inc. and David M. Hoffmann, M.D.



Wisconsin Medical Society

Your Doctor. Your Health.

TO: Dan Schooff, Deputy Secretary, Department of Administration
Pat Henderson, Executive Assistant, Department of Administration

FROM: Susan L. Turney, MD – CEO/Executive Vice President
Mark Grapentine, JD – Senior Vice President, Government Relations

DATE: January 18, 2007

RE: Reorganization of the Injured Patients and Families Compensation Fund

Reorganizing the Injured Patients and Families Compensation Fund (Fund) at this time provides multiple positives: much-needed funding for the state's health care efforts, added flexibility for an important Fund and an end to the conflicts over the Fund's status we experienced in the last two biennial state budgets. Here are the basic tenets regarding our concept:

- ✓ The Fund would continue to fully protect injured patients and families.
- ✓ Preservation of the Fund's tax-exempt status.
- ✓ The Fund would no longer be a line-item in the state budget.
- ✓ Continued fiscally-sound management.
- ✓ The Board would have additional flexibility in administrative efforts, investment options and case processing. If \$100 million will go to the state next biennium, the Board will need this flexibility to make up that new deficit in the IPFCF.
- ✓ A majority of the new entity's board should be made up of those paying into the entity. We believe that government and public representatives should remain on the board.

In order to accomplish the above, amendments to current statutes are undoubtedly needed. Various parts of different authority and protection programs could be utilized for the Fund's reorganization, including the World Dairy Center Authority (ch. 235), the Insurance Security Fund (ch. 646) and others. We would be open to an existing or a creative proposal that accomplishes the above tenets.

The Society is excited to partner with the Governor as he faces a difficult budget, and is pleased to continue collaboration with the Department of Administration. We believe agreement on this issue would allow everyone to concentrate on health care priorities already in line with the Governor's vision: increasing access to quality health care for Wisconsin's citizens. Please feel free to contact us whenever the need arises.