

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 13

DANE COUNTY

WISCONSIN MEDICAL
SOCIETY, INC.,

Plaintiff,

v.

Case No. 07-CV-4035

MICHAEL L. MORGAN, in his
official capacity as Secretary of
the Wisconsin Department of
Administration, and
DAWN MARIE SASS, in her
official capacity as
Wisconsin State Treasurer,

Defendants.

**ANSWER OF DEFENDANTS MICHAEL L. MORGAN
AND DAWN MARIE SASS**

Defendants Michael L. Morgan, in his official capacity as Secretary of the Wisconsin Department of Administration, and Dawn Marie Sass, in her official capacity as Wisconsin State Treasurer, by their counsel, Attorney General J.B. Van Hollen and Assistant Attorneys General Charlotte Gibson, John S. Greene and F. Thomas Creeron, III, pursuant to Wis. Stat. § 802.06(1), hereby answer the complaint in this action as follows:

Answering paragraph 1 of the complaint, defendants ADMIT the allegations contained in the first sentence; state they lack knowledge or information sufficient to form

a belief as to the truth of the allegations in the second sentence; and state that the third and fourth sentences assert conclusions of law to which no response is required.

Answering paragraphs 2-5 of the complaint, defendants ADMIT. Defendants AFFIRMATIVELY ALLEGE that the Commissioner and the Board have now been dismissed from this case.

Answering paragraph 6 of the complaint, defendants state that the Legislature's findings contained in the cited statutory provisions speak for themselves, and that no response is required; further, DENY to the extent this paragraph suggests that the two purposes cited are the sole reasons for the Fund's existence.

Answering paragraph 7 of the complaint, defendants state that the cited statutory provisions speak for themselves, and that no response is required.

Answering paragraph 8 of the complaint, defendants state that the cited statutory provisions speak for themselves, and that no response is required. Defendants DENY that the allegations accurately reflect the cited statutes.

Answering paragraphs 9 and 10 of the complaint, defendants ADMIT.

Answering paragraph 11 of the complaint, defendants state that the cited statutory provision speaks for itself, and that no response is required, but DENY any implication that participation in the Fund is voluntary, or in the nature of a contract.

Answering paragraphs 12-13 of the complaint, defendants ADMIT.

Answering paragraph 14 of the complaint, defendants state that the cited statutory provision speaks for itself, so that no response is required, and DENY any implication that the statute limits the Legislature's ability to transfer public monies among funds.

Answering paragraph 15 of the complaint, defendants ADMIT that the Fund has been operated on an accrual basis since 1980 and that loss liabilities take into account future investment returns; DENY that health care providers are assessed fees sufficient to cover estimated loss liabilities; AFFIRMATIVELY ALLEGE that the Board can and has approved assessments deviating from that methodology; and DENY that liabilities have always been defined as estimated medical malpractice occurrences in that year.

Answering paragraph 16 of the complaint, defendants DENY; defendants AFFIRMATIVELY ALLEGE that accrual accounting attempts to measure the outstanding liabilities of the Fund were the Legislature to discontinue it.

Answering paragraph 17 of the complaint, defendants ADMIT the allegations in the first sentence; ADMIT that the Fund is currently collecting fees in an amount less than the amount being paid out for claims and expenses, but lack knowledge or information sufficient to form a belief as to the truth of the allegation as to the rationale alleged by the plaintiff; ADMIT the allegations in the third sentence as to practices in 2006 but lack information as to other time periods; and DENY the fourth sentence.

Answering paragraphs 18-19 of the complaint, defendants ADMIT.

Answering paragraph 20 of the complaint, defendants state they lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence, and ADMIT that the second and third sentences accurately quote the Legislative Audit Bureau report.

Answering paragraph 21 of the complaint, defendants lack knowledge or information as to the type or degree of “confidence” that providers, patients and

consumers have in the Fund's reliability, and as to the "benefit" any such confidence provides.

Answering paragraph 22 of the complaint, defendants state that the cited statutory provision speaks for itself, so that no response is required; defendants DENY that the Fund has ever been "inviolable" as plaintiff asserts, and DENY any implication that the statute limits the Legislature's ability to transfer public monies among funds.

Answering paragraph 23 of the complaint, defendants DENY that the Fund has ever been "inviolable" as plaintiff asserts and DENY any implication that the statute limits the Legislature's ability to transfer public monies among funds. As to the remaining allegations, defendants state that the cited statutory provision speaks for itself, so that no response is required.

Answering paragraph 24 of the complaint, defendants ADMIT that this was one of the objectives identified by the Wisconsin Supreme Court in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125; defendants AFFIRMATIVELY ALLEGE that the court identified additional objectives.

Answering paragraph 25 of the complaint, defendants DENY.

Answering paragraph 26 of the complaint, defendants state that the cited statutory provision speaks for itself, so that no response is required.

Answering paragraph 27 of the complaint, defendants ADMIT that the MATF is used to pay for these programs and AFFIRMATIVELY ALLEGE that plaintiff's list is not a complete list of the programs funded by the MATF.

Answering paragraph 28 of the complaint, defendants ADMIT; defendants AFFIRMATIVELY ALLEGE that the Legislature has additional objectives for the Fund to which the MATF relates.

Answering paragraph 29 of the complaint, defendants DENY.

Answering paragraph 30 of the complaint, defendants ADMIT.

Answering paragraph 31 of the complaint, defendants DENY.

Answering paragraph 32 of the complaint, defendants state they lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in that paragraph.

Answering paragraph 33 of the complaint, defendants state that plaintiff asserts conclusions of law to which no response is required.

Answering paragraph 34 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraphs 35 and 36 of the complaint, defendants state that the cited constitutional provisions speak for themselves and that no answer is required.

Answering paragraphs 37-40 of the complaint, defendants DENY.

Answering paragraph 41 of the complaint, defendants DENY that there was a taking of money and state that it is therefore irrelevant that the MATF was enacted for a valid public purpose.

Answering paragraphs 42-43 of the complaint, defendants DENY.

Answering paragraph 44 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraphs 45-46 of the complaint, defendants state that the cited constitutional provisions speak for themselves, and that no answer is required.

Answering paragraph 47 of the complaint, defendants DENY that the State provides coverage “in exchange” for assessments paid by health care providers, and DENY that the providers’ compliance with the statute is in the nature of a contract. Defendants AFFIRMATIVELY ALLEGE that health care providers pay mandatory assessments under a statutory scheme.

Answering paragraphs 48-50 of the complaint, defendants state that the cited statutes speak for themselves and that no answer is required. Defendants DENY any implication that the statutes limit the Legislature’s ability to transfer public monies among funds.

Answering paragraphs 51-56 of the complaint, defendants DENY.

Answering paragraph 57 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 and 44-55 of the complaint.

Answering paragraphs 58-60 of the complaint, defendants DENY.

Answering paragraph 61 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraph 62 of the complaint, defendants state that the cited constitutional provision speaks for itself and that no answer is required.

Answering paragraphs 63-65 of the complaint, defendants state that the paragraphs state conclusions of law to which no answer is required.

Answering paragraphs 66-69 of the complaint, defendants DENY.

Answering paragraph 70 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraph 71 of the complaint, defendants state that the cited constitutional provision speaks for itself and that no answer is required.

Answering paragraph 72 of the complaint, defendants state that the paragraph states conclusions of law to which no answer is required.

Answering paragraphs 73-74 of the complaint, defendants DENY.

Answering paragraph 75 of the complaint, defendants DENY that the Act constitutes a tax, that it creates classifications of taxed groups, and that the purpose asserted in the paragraph is the sole purpose of the Fund.

Answering paragraph 76 of the complaint, defendants DENY that the allegation describes all the purposes of the Fund, that the Act creates tax classifications, that the Act is a tax and that the Act lacks a legitimate governmental interest.

Answering paragraphs 77-79 of the complaint, defendants DENY.

Answering paragraph 80 of the complaint, defendants DENY that the allegation describes all the purposes of the Fund and that the Act creates the classifications plaintiffs assume.

Answering paragraph 81 of the complaint, defendants DENY that the allegation describes all the purposes of the Fund, that the Act creates tax classifications, that the Act is a tax and that the Act lacks a legitimate governmental interest.

Answering paragraph 82 of the complaint, defendants DENY.

Answering paragraph 83 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraph 84 of the complaint, defendants state that the paragraph states conclusions of law to which no answer is required.

Answering paragraphs 85-86 of the complaint, defendants DENY.

Answering paragraph 87 of the complaint, defendants DENY that the Act creates the classifications asserted in the complaint and DENY that the purpose asserted in the paragraph is the sole purpose of the Fund.

Answering paragraphs 88-89 of the complaint, defendants DENY.

Answering paragraph 90 of the complaint, defendants DENY that the Wisconsin Health Insurance Risk Sharing Plan and the State Self-Funded Liability Program are “similar” to or part of a “class” with the Fund for equal protection purposes.

Answering paragraph 91 of the complaint, defendants DENY the existence of the class implied by the paragraph.

Answering paragraphs 92-93 of the complaint, defendants DENY that the Act creates classifications among similarly situated state funds. Defendants AFFIRMATIVELY ALLEGE that a difference in treatment between state funds can state no possible cause of action on equal protection grounds, as state funds have no rights under the state or federal equal protection clauses.

Answering paragraphs 94-97 of the complaint, defendants DENY.

Answering paragraph 98 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 33 of the complaint.

Answering paragraph 99 of the complaint, defendants state that the paragraph states conclusions of law to which no answer is required

Answering paragraph 100 of the complaint, defendants state that the cited statutory provision speaks for itself, so that no response is required, and DENY any implication that the statute limits the Legislature's ability to transfer public monies among funds.

Answering paragraphs 101-102 of the complaint, defendants DENY.

Answering paragraph 103 of the complaint, defendants DENY. Defendants AFFIRMATIVELY ALLEGE that the Commissioner and the Board took no action to effectuate the transfer required by the Legislature under the Act, and that they are statutorily immune from all civil liability. Defendants further state that the plaintiff has now dismissed the Commissioner and the Board from this case, and that this entire cause of action thus fails to state a claim.

Answering paragraph 104 of the complaint, defendants reallege and incorporate by reference their answers to paragraphs 1 through 103 of the complaint.

Answering paragraph 105 of the complaint, defendants DENY.

AFFIRMATIVE DEFENSES

Plaintiff's claims, in whole are in part, are barred by the following affirmative defenses:

1. Sovereign immunity;
2. Failure to state a claim upon which relief can be granted;
3. Lack of standing;

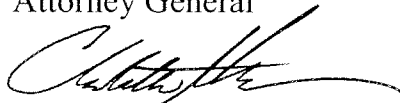
4. Lack of ripeness;
5. Separation of powers.

WHEREFORE, the defendants demand judgment dismissing the complaint and for such further relief as the court finds just and proper.

Dated this 14th day of December, 2007.

Respectfully submitted,

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