

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ___

DANE COUNTY

WISCONSIN MEDICAL SOCIETY, INC.
330 East Lakeside Street
Madison, Wisconsin 53715,

COPY

Plaintiff,

07CV4035

vs.

Case No.: 07-CV-_____
Case Code: 30301

SEAN DILWEG,
in his official capacity as Commissioner of the
Office Of The Commissioner Of Insurance
125 South Webster Street
Madison, Wisconsin 53703-3474,

MICHAEL L. MORGAN
in his official capacity as Secretary of the
Wisconsin Department of Administration
101 East Wilson Street
Madison, Wisconsin, 53702,

DAWN MARIE SASS
in her official capacity as
Wisconsin State Treasurer
1 South Pinckney Street, Suite 550
Madison, Wisconsin, 53703,

and

INJURED PATIENTS AND FAMILIES COMPENSATION
FUND BOARD OF GOVERNORS
125 South Webster Street
Madison, Wisconsin 53703-3474,

Defendants.

2007 OCT 29 PM 2:54
DANE COUNTY
CIRCUIT COURT

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE CLERK
COUNTY CLERK OF CIRCUIT COURT
CARLO ESQUEDA
CLERK OF CIRCUIT COURT

COMPLAINT

The Plaintiff, Wisconsin Medical Society, Inc, by its attorneys, Thomas M. Pyper, Cynthia L. Buchko and Kelly Dvorak of Whyte Hirschboeck Dudek S.C., for its Complaint against Defendants alleges as follows:

PARTIES

1. Plaintiff Wisconsin Medical Society, Inc., (“WMS”) is a Wisconsin corporation with its principal office at 330 East Lakeside Street, Madison, Wisconsin 53715. WMS has existed since 1841 and is the largest association of medical doctors in the state, with a membership exceeding 11,000. Most of WMS’s member physicians are “health care providers,” as that term is defined in Wis. Stat. § 655.001(8). WMS has standing in this case as an association whose members have standing to sue in their own right and because the interests it seeks to protect are germane to WMS’s purpose.

2. Defendant Sean Dilweg is the Commissioner of the Office of the Commissioner of Insurance (“Commissioner”), an entity created by Wis. Stat. § 15.73, with its principal office at 125 South Webster Street, Madison, Wisconsin 53703-3474.

3. Defendant Michael L. Morgan is the Secretary of the State of Wisconsin Department of Administration, with his principal office at 101 East Wilson Street, Madison, Wisconsin, 53702.

4. Defendant Dawn Marie Sass is the Wisconsin State Treasurer with her principal office at 1 South Pinckney Street, Suite 550, Madison, Wisconsin, 53703.

5. The Defendant Injured Patients and Families Compensation Fund Board of Governors (“Board”) is the governing body of the Injured Patients and Families Compensation Fund (“Fund”) with its principal office at 125 South Webster Street, Madison, Wisconsin 53703-3474.

FACTUAL ALLEGATIONS

6. The Fund was created in 1975 in response to the deleterious effects on the cost and quality of health care in Wisconsin due to increased insurance costs caused by lawsuits over patient care. *See* L. 1975, c. 37, §1. From 1975-2003, the Fund was known as the Wisconsin Patients Compensation Fund.

7. The Fund was created “for the purpose of paying that portion of a medical malpractice claim which is in excess of the limits expressed in s. 655.23(4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, paying future medical expense payments under s. 655.015, and paying claims under sub. (1m).” *See* Wis. Stat. § 655.27(1). The Fund was established to “curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to ensure that proper claims are satisfied.” Wis. Stat. § 655.27(6).

8. Participation in the Fund is mandatory for each physician and nurse anesthetist for whom this state is a principal place of practice and who practices his or her profession more than 240 hours in a fiscal year *except* that physicians and nurse anesthetists employed by the state, a county, a municipality or the federal government (*e.g.*, University of Wisconsin Hospital physicians and nurse anesthetists) are exempt from participating in the Fund. *See* Wis. Stat. §§ 655.002 and 655.003.

9. As of December 31, 2006, the Fund had 14,308 participants, approximately 84% of which were physicians.

10. As of December 31, 2006, 10,620 health care providers were exempt from participation in the Fund because: they practiced part-time or had temporarily ceased practice; they had retired; the location of their principal place of practice was outside this state; they were

employed by the state, a county, a municipality or the federal government; or they were not yet practicing or had never practiced.

11. The Fund is obligated to provide occurrence coverage for claims against health care providers that have complied with Wis. Stat. ch. 655. Wis. Stat. § 655.27(1). For this occurrence coverage, health care providers must pay fees that are set and assessed by the Commissioner, after approval by the Board. *See* Wis. Stat. § 655.27(3).

12. Assessments set by the Commissioner and approved by the Board must be based on, among other factors, the past and prospective loss and expense experience of the fund. *See* Wis. Stat. § 655.27(3)(a)2.

13. The Commissioner is responsible for the collection of fees for deposit into the Fund. *See* Wis. Stat. § 655.27(3)(c).

14. “Moneys shall be withdrawn from the fund by the commissioner *only upon* vouchers approved and authorized by the board of governors.” *See* Wis. Stat. § 655.27(4) (emphasis added).

15. Since 1980, the Fund has been operated on an accrual basis, meaning that in a fiscal year, health care providers are assessed fees sufficient to cover the estimated loss liabilities (*e.g.*, estimated medical malpractice occurrences in that year); however, the loss liabilities are discounted to take into account future investment returns.

16. Accrual accounting attempts to ensure that the Fund has sufficient assets to pay all outstanding liabilities (reported and unreported) if the Fund were to be discontinued.

17. It is a policy of the Board to approve fee assessments at levels that will result in a zero accounting surplus/deficit. Because of this policy, the Fund is currently collecting fees in an amount less than the amount being paid out for claims and expenses. As a result, investment

income is being used to pay claims and expenses. Thus, the Fund is reaching a “break even” status with no surplus monies over the amount necessary for the payment of losses.

18. The Fund has paid more than \$633.6 million in claims from its inception in 1975 through December 31, 2006.

19. A small number of large-value claims can significantly affect the Fund’s operations and cash flow, but the uncertainty and long-term nature of medical malpractice claims makes it difficult to predict when large claims will be settled and paid from the Fund.

20. The Fund has played an important role in contributing to Wisconsin’s reputation as a desirable place for health care providers to practice. According to the Legislative Audit Bureau, “[t]he Injured Patients and Families Compensation Fund is often cited as an important factor in Wisconsin’s relatively stable environment for health care providers in comparison to other states. Its solid financial position provides flexibility to readily respond to changes that may occur in the medical malpractice environment in the future.”

21. Health care providers, patients and consumers all benefit by having confidence in the reliability and soundness of the Fund’s financial operations.

22. Prior to 2003, the inviolability of the Fund was protected by a provision within the governing statute, which provided that: “[t]he fund shall be held in trust for purposes of this chapter and may not be used for purposes other than those of this chapter.” *See Wis. Stat. § 655.27(6) (2001-2002).*

23. In 2003, Wis. Stat. § 655.27(6) was amended and the inviolability of the Fund was further established. The new language of Wis. Stat. § 655.27(6) provides that:

The fund is established to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to insure that proper claims are satisfied. **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. Monies in the fund may not be used for any other purpose of the State.

Wis. Stat. § 655.27(6) (emphasis supplied).

24. Two of the legislature’s objectives for the Fund are to keep annual health care provider assessments at a low rate and to protect the Fund’s financial status.

25. 2007 Wisconsin Act 20 (the “Act”) is the codification of Governor James Doyle’s 2007-2009 biennial budget proposal.

26. The Act finances, in part, the Medical Assistance Trust Fund (“MATF”) with the transfer of \$200 million from the Fund. Section 9225 of the Act provides:

(2) MEDICAL ASSISTANCE TRUST FUND.

Notwithstanding section 655.27(6) of the statutes, there is transferred from the injured patients and families compensation fund to the Medical Assistance trust fund \$71,500,000 in fiscal year 2007–08 and \$128,500,000 in fiscal year 2008–09.

27. The MATF, *see* Wis. Stat. § 20.435(4)(w), is used to pay for services under Wis. Stat. §§ 46.27 (Long Term Care community options program), 46.275(5) (community integration program for residents of state centers), 46.278 (6) (community integration program and brain injury waiver program for persons with developmental disabilities), 46.283(5) (family care resource centers), 46.284(5) (family care management organizations), 49.45 (Medicaid), and 49.472 (6) (Medical Assistance Purchase Plan).

28. None of the programs funded by the MATF relate to the Fund purpose of paying excess medical malpractice claims.

29. The transfer of \$200 million from the Fund, approximately 25% of the Fund’s net worth, will put the Fund in a serious deficit accounting position.

30. In addition to the loss of \$200 million, the Fund will not realize investment earnings on this amount.

31. If \$200 million is transferred from the Fund, the Fund will not have funds sufficient to cover the claims of injured patients and families that have occurred but have not yet been paid.

32. Transfer of \$200 million from the Fund will result in the Commissioner and the Board having to increase fee assessments on health care providers to bring the Fund back to a zero accounting surplus/deficit.

33. The WMS has provided the Defendants with the written notice required by Wis. Stat. §§ 893.80 and/or 893.82, in the event compliance is found to be necessary, which WMS disputes.

CAUSES OF ACTION

First Cause Of Action--Unconstitutional Taking Without Just Compensation

34. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

35. Article I, Section 13 of the Wisconsin Constitution provides that “the property of no person shall be taken for public use without just compensation.”

36. The U.S. Constitution, Amendment V provides in part: “nor shall private property be taken for public use without just compensation.”

37. Health care providers and injured patients and families have a property right in the full net worth of Fund monies being used in accordance with the purpose Fund.

38. Health care providers and injured patients and families have a property right to protect the integrity and security of the Fund.

39. Health care providers and injured patients and families have a right to have all monies in the Fund withdrawn only by the Board in accordance with the statutes governing Fund withdrawals.

40. Health care providers and injured patients and families have a property right in the level of contributions by health care providers being determined by the Board based on loss projections and investment performance rather than as a need to replace monies unlawfully withdrawn from the Fund by the State.

41. The taking of Fund money is for the MATF, which is a valid public purpose.

42. The transfer of money from the Fund to the MATF under the Act constitutes a taking of the health care providers' and injured patients' and families' property interests in the Fund without just compensation.

43. Because the Act constitutes a taking of health care providers' and injured patients' and families' property interests without just compensation, § 9225 of the Act is unconstitutional.

Second Cause Of Action--Unconstitutional Impairment Of Contract

44. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

45. Article I, Section 12 of the Wisconsin Constitution provides: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. . . ."

46. Article I, Section 10 of the United States Constitution provides: "No state shall ... pass any ... law impairing the obligations of contracts...."

47. Pursuant to Wis. Stat. § 655.27(1) and (3), the State provides excess medical malpractice liability coverage on an occurrence basis in exchange for payment of fees by health care providers.

48. Pursuant to Wis. Stat. § 655.27(6), the full net worth of monies in the Fund must be held in an “irrevocable trust” for the benefit of health care providers participating in the Fund and injured patients and families.

49. Pursuant to Wis. Stat. § 655.27(6), Fund monies may only be used for proper Fund purposes.

50. Pursuant to Wis. Stat. § 655.27(4)(e), all income derived from the investment of Fund monies must be credited to the Fund.

51. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of the health care providers and injured patients and families in the full net worth of the Fund.

52. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have all monies in the Fund distributed only by the Board in accordance with the statutes governing Fund withdrawals.

53. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have the level of contributions by health care providers determined by the Board based on loss projections and investment performance rather than as a need to replace monies unlawfully withdrawn from the Fund by the State.

54. By enacting Wis. Stat. § 655.27, the State created contractual rights in favor of health care providers and injured patients and families to have the entire net worth of the Fund held in an irrevocable trust, to have all Fund monies used solely for the specific Fund purposes and not to have any Fund monies used for any other State purpose.

55. The State transfer of \$200 million out of the Fund substantially impairs the contractual rights of the health care providers and injured patients and families in the Fund.

56. For the reasons set forth in paragraph nos. 44-55, *supra*, § 9225 of the Act constitutes an unconstitutional impairment of contract in violation of Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the United States Constitution.

Third Cause Of Action--Breach of Contract

57. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 and 44-55 above.

58. By enacting Wis. Stat. § 655.27, the State created contractual obligations in favor of the health care providers.

59. The State transfer of \$200 million out of the Fund will constitute a breach of contract by the Defendants.

60. Defendants' breach of contract has caused damage to the WMS's members, all health care providers that must participate in the Fund and injured patients and families.

Fourth Cause Of Action--Invalid Tax

61. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

62. Pursuant to Article VIII, Section 1 of the Wisconsin Constitution, the State may impose taxes on persons and property.

63. A tax is an enforcement of proportional contributions from persons and property, imposed by the State in its governmental capacity for the support of its government and its public needs.

64. A tax may not be imposed absent clear and express statutory language for that purpose, with all ambiguity and doubt resolved against the one who seeks to impose a tax.

65. The language of Wis. Stat. § 655.27 does not clearly and expressly impose a tax on health care providers.

66. The State transfer of \$200 million from the Fund to be used for purposes that are for the general support of the State and public needs is a disguised tax on health care providers and injured patients and families.

67. At the same time the State is transferring \$200 million from the Fund to the MATF, it is diverting general purpose revenue funds used to fund the MATF for other State purposes. Accordingly, the State is taxing health care providers and injured patients and families for a wide variety of State general purposes.

68. Absent clear and express language imposing a tax on health care providers and injured patients and families, the State may not transfer Fund monies to the MATF as a substitute for the monies collected as a tax for the general support of its government and its public needs.

69. For the reasons set forth in paragraph nos. 61-68, *supra*, § 9225 of the Act is invalid.

Fifth Cause Of Action--Unconstitutional Tax Classification

70. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

71. The Wisconsin Constitution permits taxation on income, privileges and occupations. *See* Wis. Const. Art. VIII, § 1.

72. In imposing taxes based on privileges or occupations, classifications may be made and different rates may be applied to different classes; however, the classifications must bear a

rational relationship to a legitimate government interest. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

73. The natural and reasonable effect of the Act is to tax only certain classifications of health care providers and injured patients and families.

74. The Act § 9225 creates two classifications of health care providers, health care providers that must participate in the Fund and health care providers that do not have to participate in the Fund.

75. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability claims, the tax classifications set forth in the paragraph no. 74, *supra*, bear a rational relationship to a legitimate public purpose.

76. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the tax classifications set forth in paragraph no. 74, *supra*, do not bear a rational relationship to a legitimate government interest.

77. The Act § 9225 creates tax classifications of health care providers that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

78. The Act § 9225 creates two classifications of injured persons and families; persons and families injured by negligent medical care and persons and families injured by other types of negligent conduct.

79. The Act § 9225 affects only one member of a class described in paragraph no. 78, persons and families injured by negligent medical care.

80. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability claims, the classifications set forth in paragraph no. 77, *supra*, bear a rational relationship to a legitimate public purpose.

81. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the tax classifications set forth in paragraph no. 78, *supra*, do not bear a rational relationship to a legitimate government interest.

82. The Act § 9225 creates tax classifications of injured persons and families that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

Sixth Cause of Action--Violation of Equal Protection

83. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

84. Classifications that do not bear a rational relationship to a legitimate government interest violate the Equal Protection Clauses of the Wisconsin and United States Constitutions. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

85. The Act § 9225 creates several classifications.

86. There are two classifications of health care providers, health care providers that must participate in the Fund and health care providers that do not have to participate in the Fund.

87. When applied to the purpose of the Fund, *i.e.*, to pay excess medical malpractice liability, the classifications set forth in the preceding paragraph bear a rational relationship to a legitimate public purpose.

88. When applied to the purpose of the Act, to fund Medicaid programs under the umbrella of the MATF, the classifications set forth in paragraph no. 86, *supra*, do not bear a rational relationship to a legitimate government interest.

89. The Act § 9225 creates classifications of health care providers that do not bear a rational relationship to a legitimate government interest; therefore, the Act is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

90. The Fund is only one member of a class of several statutorily-created risk and liability sharing insurance plans. Other similar plans include the Wisconsin Health Insurance Risk Sharing Plan and the State Self-Funded Liability Program.

91. The Act § 9225 affects only one member of a class described in paragraph no. 90, *supra*, *i.e.*, the Fund.

92. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the classifications set forth in paragraph no. 90, *supra*, do not bear a rational relationship to a legitimate government interest.

93. The Act § 9225 creates classifications within several statutorily-created risk and liability sharing insurance plans that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

94. The Act § 9225 creates two classifications of injured persons and families: persons and families injured by negligent medical care and persons and families injured by other types of negligent conduct.

95. The Act § 9225 affects only one member of a class described in paragraph no. 94, *supra*, persons and families injured by negligent medical care.

96. When applied to the purpose of the Act § 9225, *i.e.*, to fund the various Medicaid programs under the umbrella of the MATF, the classifications set forth in paragraph no. 94, *supra*, do not bear a rational relationship to a legitimate government interest.

97. The Act creates classifications of injured persons and families that do not bear a rational relationship to a legitimate government interest; therefore, the Act § 9225 is unconstitutional. *See* Wis. Const. Art. I, § 1 and U.S. Const. Amend. 14.

Seventh Cause Of Action--Breach of Fiduciary Duty

98. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 33 above.

99. The Commissioner, as a trustee of the Fund, and the Board owe fiduciary duties to the Fund, Fund health care providers and proper Fund injured patient and family claimants.

100. Monies may only be taken out of the Fund by the Commissioner upon Board approval. *See* Wis. Stat. § 655.27(4)(a).

101. The transfer of monies out of the Fund to the MATF violates the purpose of the Fund to provide excess medical malpractice insurance coverage to health care providers and medical malpractice claim payments to proper injured patient and family claimants. Wis. Stat. §§ 655.27(1) and (6).

102. The transfer of money out of the Fund to the MATF violates the requirement that the entire net worth of the Fund be “held in irrevocable trust for the sole benefit of health care providers participating in the [F]und and proper claimants ... [and that] [m]onies in the fund may not be used for any other purpose of the State.” Wis. Stat. § 655.27(6).

103. Approving the transfer of money out of the Fund to the MATF constitutes a breach of the Commissioner’s and the Board’s fiduciary duties to the Fund, its participating

health care providers and injured patients and families, which will or has caused damage to the WMS's members, all health care providers that must participate in the Fund and injured patients and families in the \$200 million amount of the transfer and lost earnings on such amount until returned to the Fund.

Eighth Cause of Action--Permanent Injunction

104. Plaintiff realleges and incorporates herein fully by reference the allegations set forth in paragraph nos. 1 through 103 above.

105. Because the Act is unconstitutional or otherwise invalid or unenforceable, the Defendants must be permanently enjoined from transferring monies out of the Fund pursuant to the Act and ordered to return all monies wrongfully withdrawn together with lost earnings.

WHEREFORE, the Wisconsin Medical Society, Inc. respectfully requests the following relief:

- a. A declaration that the Act constitutes an unconstitutional taking in violation of Article I, Section 13 of Wisconsin Constitution;
- b. A declaration that the Act constitutes an unconstitutional impairment of contract in violation of Article I, Section 13 of Wisconsin Constitution and Article I, Section 10 of the United States Constitution;
- c. A judgment that, by transferring money out of the Fund pursuant to the Act, Defendants have breached a contract between the state and health care providers participating in the Fund;
- d. A declaration that the transfer of Fund monies to the MATF constitutes an unlawful tax and is, accordingly, invalid and void *ab initio*;

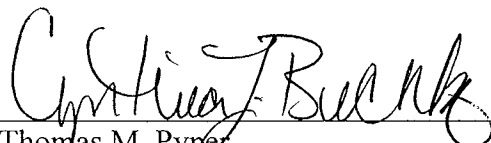
- e. A declaration that the Act § 9225 creates tax classifications that bear no rational relationship to a legitimate government purpose in violation of Article VIII, Section 1 and Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment of the United States Constitution;
- f. A declaration that the Act § 9225 creates classifications that bear no rational relationship to a legitimate government purpose in violation of Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment of the United States Constitution;
- g. A judgment against the Defendants directing them to replace all funds removed from the Fund pursuant to the Act § 9225, with lost earnings at the actual earnings rate established by the Wisconsin Investment Board;
- h. A judgment against the Commissioner and the Board finding that they breached their fiduciary duty to the Fund and its participating health care providers and injured patients and families;
- i. A permanent injunction precluding the Defendants from transferring monies out of the Fund under the provisions of the Act and ordering immediate return of all monies taken with lost earnings;
- j. Recovery of all Wisconsin Medical Society, Inc.'s attorneys' fees and costs from the Fund on the common fund grounds that:
 - The Wisconsin Medical Society, Inc. is pursuing this litigation for the benefit of all health care providers that participate in the Fund and proper Fund claimants;

- those benefiting from this litigation are small in number and easily identifiable (*i.e.*, health care providers that participate in the Fund and proper Fund claimants);
- the benefits of this litigation to health care providers that participate in the Fund and proper Fund claimants are traceable; and
- the attorney fees and costs are capable of being shifted with some exactitude to those benefiting by being paid out of the money returned to the Fund;

k. Such other relief as this court deems just and equitable.

Dated this 29th day of October, 2007.

WHYTE HIRSCHBOECK DUDEK S.C.

By: 
Thomas M. Pyper
State Bar No. 1019380
Cynthia L. Buchko
State Bar No. 1036102
Kelly M. Dvorak
State Bar No. 1049549
Attorneys for Wisconsin Medical Society,
Inc.

P.O. ADDRESS:

One East Main Street, Suite 300
Madison, WI 53703
Tel: 608-255-4440
Fax: 608-258-7138