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**VIA HAND DELIVERY**

David R. Schanker, Clerk of Court  
Wisconsin Supreme Court  
110 E. Main St., Ste 215  
Madison, WI 53703

Re: *Wisconsin Medical Society, Inc. and David M. Hoffmann, M.D. v.  
Michael L. Morgan*  
Appeal No. 2009AP000728

Dear Mr. Schanker:

Pursuant to Wis. Stat. § 809.19(10), Plaintiffs-Appellants Wisconsin Medical Society, Inc. and David M. Hoffmann, M.D. (collectively “WMS”) are hereby advising the Court of the recent decision issued by the Supreme Court of New Hampshire, *Georgia Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association*, 2010 N.H. LEXIS 9 (N.H. Jan. 28, 2010) (hereinafter “*Tuttle*”), reconsideration denied, Order (March 4, 2010). The pages of WMS’ Brief and Reply Brief to which the *Tuttle* case pertain are: Brief: 6-22, 32-38; Reply Brief: 1-7, 9-10.

In *Tuttle, supra*, New Hampshire Laws 2009, 144:1 (the “Act”) required the New Hampshire Medical Malpractice Joint Underwriting Association (“JUA”) to transfer \$110 million to the State’s general fund. The trial court had ruled that the Act constituted a taking without just compensation. The New Hampshire Supreme Court affirmed based on a finding that the Act constituted “a retrospective law that results in impairment of contract rights in violation of the New Hampshire Constitution . . . .” *Id.* at \*2.

The JUA was established to make available medical malpractice insurance for health care providers. It is governed by a board of directors, which has “the authority to exercise all reasonable or necessary powers relating to the operation of the association.” *Id.* at \*\*5-6. The actual insuring functions are carried out by an insurer appointed by the commissioner of

insurance, with the JUA board being the servicing carrier if the commissioner does not appoint an insurer. *Id.* at \*6. The State does not contribute funds to the JUA and it is not responsible for any JUA shortfalls. *Id.* at \*7. In the event premiums exceed the amount necessary to pay losses and expenses, the JUA board is directed by regulation to return the surplus to the providers either through a credit against, or a reduction of, future contribution assessments or to distribute the excess in a way the JUA board determines to be “just and equitable.” *Id.* at \*8. Each provider is issued an insurance policy by the JUA, which includes a provision that the provider “shall participate in the earnings of the [JUA], to such extent and upon such conditions as shall be determined by the board of directors of the [JUA] in accordance with law . . . .” *Id.* at \*10.

In March 2009, the New Hampshire Insurance Department (“Department”) concluded that the JUA had a 2008 year-end surplus in the range of \$140 million to \$145 million. *Id.* at \*11. On June 29, 2009, the New Hampshire legislature passed the Act transferring \$110 million from the JUA to the general fund. *Id.* at \*\*12-13.

In addressing whether the Act operated as substantial impairment of contract, the Court first found that “[a]n insurance policy is a contract.” *Id.* at \*21. Although Wisconsin’s health care providers participating in the Injured Patients and Families Compensation Fund, Wis. Stat. § 655.27 (the “Fund”), are not issued individual insurance contracts, they are provided supplemental insurance by the Fund for medical malpractice liability.

The Court next considered whether the Act impaired the relationship between the providers, as insureds, and the JUA, as the insurer. The providers are required to pay premium assessments in the event of a deficit and, conversely, are entitled to participate in the earnings of the JUA. *Id.* at \*\*23-25. The Court noted that insurance regulations provide that in the event of an excess the board shall either return the excess to the providers as a credit against, or a reduction of, future assessments, or distribute the excess to the providers in a manner that the board determined was “just and equitable.” *Id.* at \*\*25-26. The Court found that “the language of the policies and regulations, taken together, confers upon the policyholders a vested contractual right in the treatment of any excess surplus.” *Id.* at \*26. The Court further found that:

The policies entitle the policyholders to “participate in the earnings of the [JUA]” and the incorporated regulations mandate the board’s application of excess funds in one or both of two specified ways: either against future assessments, or distribution to the policyholders. *Under either option*, the policyholders have a direct financial interest, and not a mere expectancy, in any excess surplus. Thus, the policyholders have a vested right not

necessarily in the distribution of the funds, but in the treatment of the funds for their benefit.

*Id.* at \*\*26-27 (emphasis added).

Similarly, the Wisconsin Fund provides the Fund Board discretion in setting contribution levels. Pursuant to that authority, the Board has adopted a zero surplus policy and has been collecting contributions from providers in an amount less than that required to pay annual claims. (A-App. 030-031, 140, 227; R. 19:2, 89; 18:1-2.) Thus, providers share in the earnings of the Fund by the Board returning excess monies to providers through reduced contributions. Like the policyholders in *Tuttle*, therefore, the Wisconsin Fund participants “have a direct financial interest . . . in excess surplus . . . [and] a vested right not necessarily in the distribution of the funds, but in the treatment of the funds for their benefit.” *Id.* at \*\*26-27.

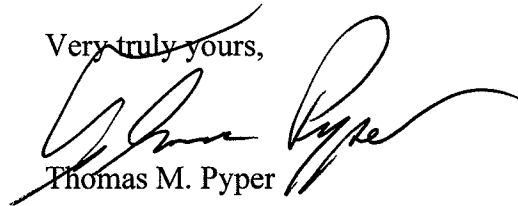
After concluding that the diversion of \$110 million of surplus to the general fund constituted an impairment of contract, the Court found that such impairment was substantial. The Court noted that “the regulations incorporated into their contracts likewise leave no potential outlet for the accumulated funds other than application against future assessments, or distribution to the policyholders” and that “the record does not reflect a basis in law for the policyholders to expect that the funds in which they have a beneficial interest would be transferred from the JUA into the general fund.” *Id.* at \*40. The Court therefore found that the Act substantially impaired the providers’ contract rights because it eliminated their entitlement to participate in the surplus of the fund and because “the Act divests the JUA board of its obligation to the policyholders to treat any excess surplus for their benefit, including protecting against insolvency.” *Id.* at \*\*41-42. The Court further held that “[t]aking JUA funds would decrease investment earnings which are important to the JUA’s ability to meet operating costs and malpractice claims.” *Id.* at \*\*42-43.

Similarly, Wisconsin Fund participants have a beneficial interest not just in the amount of Fund monies needed to pay claims, but in the full “net worth of the fund . . .” Wis. Stat. § 655.27(6). The withdrawal of \$200 million from the Fund eliminated health care providers’ participation rights in earnings both by eliminating the Fund Board’s authority to return the \$200 million taken by the State to providers through reduced contribution assessments and by decreasing investment earnings, which likewise affect the providers’ contribution levels.

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While there are distinctions between the New Hampshire JUA and the Wisconsin Fund, WMS respectfully submits that the *Tuttle* decision supports its argument that health care providers have both a property interest and a contractual interest in the Fund.

Very truly yours,



Thomas M. Pyper

Enclosure

cc: Ruth M. Heitz, Esq. (w/enc.)  
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