



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

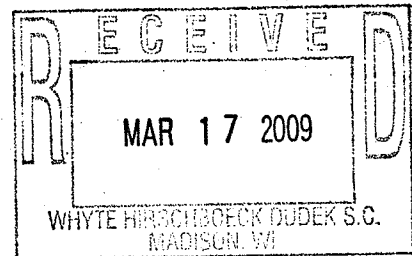
17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Charlotte Gibson
Assistant Attorney General
gibsoncj@doj.state.wi.us
608/266-7656
FAX 608/267-8906

March 16, 2010

David R. Schanker
Clerk of Supreme Court
110 E. Main St., Ste. 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *WMS v. Morgan*
Case No. 2009AP00728



Dear Mr. Schanker:

This letter is Defendant-Respondent Michael Morgan's response to the petitioners' March 5, 2010, letter to the Court, citing *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association*, 2010 WL 313403.

Morgan agrees that *Tuttle* is relevant to the petitioners' impairment-of-contract¹ and takings claims. The distinctions between the program at issue in *Tuttle* and the Wisconsin fund at issue here, however, illustrate precisely why the petitioners in this case lack a vested interest cognizable under the state or federal constitution.

In *Tuttle*, the New Hampshire Medical Malpractice Joint Underwriting Association, made up of insurance underwriters of medical malpractice insurance in New Hampshire, was a voluntary insurance program through which medical providers could obtain medical malpractice insurance. When a state law passed that would require the Association to transfer monies to New Hampshire's general fund, a policyholder sought a writ of mandamus to prevent the transfer. *Tuttle*, 2010 WL 313403, at *2-3. A majority of the New Hampshire Supreme Court held that the transfer would constitute an unconstitutional impairment of contract. *Id.* at *1.

The grounds for the holding in *Tuttle* rely on the very principles that Morgan has argued throughout this case. In the voluntary program at issue in *Tuttle*, insureds who chose to participate were issued insurance policies with the Association. Under the terms of those policies and incorporated regulations, in the event of excess earnings, the insureds had an explicit, mandatory right either to immediate distributions or to reductions in future premiums.

¹ *Tuttle* did not involve the sovereign immunity arguments relevant to the impairment of contract claims in this case.

Id. at *9. Unsurprisingly, the *Tuttle* court concluded that the policyholders had contractual rights:

An insurance policy is a contract. The undisputed facts of this case establish that some of the petitioners have current contractual relationships with the JUA, as documented by their insurance policies. It is these petitioners (hereafter "policyholders") whose Contract Clause claims we examine, because the petitioners whose contracts have expired may not assert such claims.

Tuttle, 2010 WL 313403, at *8. The vested rights flowed directly, and solely, from those contracts: "The vested rights that the petitioners assert as the predicate for their claims are grounded in their contracts with the JUA." *Id.* at *7.

In contrast, in this case, the Injured Patients and Families Compensation Fund is a mandatory program to ensure payment of medical malpractice claims in excess of \$ 1 million. Medical providers must pay annual assessments. They have no right to distribution or refund under any circumstances, regardless of the monies available in the Fund. Because the program is not a voluntary insurance program, the providers receive no policy of any kind.

Because the holding in *Tuttle* is based on the very contracts that WMS's members lack, it does nothing to advance WMS's impairment of contract claim. The *Tuttle* court determined the extent of rights flowed solely and directly from the explicit, contractual rights set forth in the insurance policies. WMS's members have no such rights.

The *Tuttle* court did not reach the issue of whether the act challenged in that case constituted a taking. The distinction between the Injured Patients Fund and the insurance program in *Tuttle*, however, is again instructive. In order to demonstrate a taking, WMS must demonstrate a vested right. A vested right is more than an expectation: it must have become a title, legal or equitable, to the present or future enjoyment of property. *Tuttle*, at *12; *In re Certified Question, Fun 'N Sun RV, Inc. v. Michigan*, 527 N.W.2d 468, 478 (Mich. 1994).

Tuttle held that the policyholders' contractual rights were vested, and not a mere expectancy, because they had a mandatory, contractual right either to distributions or prospective premium reductions, and because New Hampshire bore no possible liability for any deficits of the Association. *Id.* at *9-10. The *Tuttle* court relied on those features to distinguish its facts from cases such as *In re Certified Question*, where there was no explicit, mandatory right to distribution or premium reduction, and *Methodist Hospital of Brooklyn v. State Insurance Fund*, 476 N.E.2d 304 (N.Y. 1985), where the state was required to back-stop payments and where any payment of distributions was discretionary. *Id.* at *10-11. Here, the State has provided a \$100 million guaranty in the event that the Injured Patients Fund lacks funds to pay a claim, see 2007 Wisconsin Act 20, secs. 212p & 3702d, and WMS's members, protected from any liability for

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claims exceeding \$1 million, *see* Wis. Stat. § 655.23(5), have no right of distribution. Given those parameters, the hopes of WMS members for low assessments remain just an expectancy, not a vested right.

Tuttle is another in a long line of cases articulating a straightforward standard: participants in a mandatory governmental program, with no right of distributions if the program experiences surpluses, have no vested property or contractual rights protected under the state or federal constitution.

Sincerely,



Charlotte Gibson
Assistant Attorney General
State Bar #1038845

CG:lf

c: Thomas M. Pyper
Anne B. Kearney
Sean Lanphier
Michael B. Van Sicklen
Peter L. Gardon