

# Injured Patients and Families Compensation Fund Lawsuit Overview

July 22, 2010

The State Legislature passed the 2007-2009 biennial budget on October 26, 2007, which contained a provision mandating the transfer of \$200 million from the Injured Patients and Families Compensation Fund. The State took \$71.5 million from the Fund on October 29, 2007 and \$128.5 million on July 1, 2008.

The Society sued on October 29, 2007, to protect the interests of injured patients, their families and health care professionals by recovering the money the State wrongfully took from the Fund. David M. Hoffmann, MD, joined the case as a plaintiff on February 29, 2008, underscoring the harm the raid would cause to physician practices by undermining physician recruitment and retention efforts, particularly in rural communities. The Society and Dr. Hoffmann (referred to collectively as the Society) asked the court to strike down the legislation authorizing the raid because it was an unconstitutional taking of private property without just compensation and an unconstitutional impairment of contract. The Society sought the return of the \$200 million along with lost earnings, interest and attorney fees.

The Society filed a motion for summary judgment seeking return of the money and asking the trial court to decide the case on the law, without a trial, because the key issues in the case were legal in nature. The State also filed a motion for summary judgment seeking the dismissal of the lawsuit.

Dane County Circuit Court Judge Michael Nowakowski issued a decision on December 19, 2008, granting the State's motion for summary judgment and dismissed the case. The Society appealed the Circuit Court decision on March 17, 2009, and the Court of Appeals certified the case directly to the Supreme Court. The Supreme Court accepted the case and held oral argument on April 15, 2010. Click [here](#) for an overview of the case and [here](#) to view the court documents.

## The Court's Decision

A taking of property is unconstitutional when an individual or group has a property interest and a governmental authority takes the property interest for a public use without just compensation. The property interest of health care providers who participate in the Fund stems from Wisconsin Statute § 655.27(6), which provides:

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 ensure 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. Moneys in the fund may not be used for any other purpose of the state. (Emphasis added)

The above statute creates an irrevocable trust. Health care professionals who participate in the Fund and proper claimants are beneficiaries of the trust. Wisconsin law obligates the Fund's Board of Governors to manage the Fund for the sole benefit of the named beneficiaries.

The Court rejected the state's argument that it is free to transfer money from the Fund as it does with many other state funds, including the transportation fund, to satisfy budgetary needs. The Court noted that a key element distinguishing the Fund from other state funds set aside for a specific purpose is the fact that the statute creating the Fund identifies specific beneficiaries. Because the statute identifies specific beneficiaries, it is a formal trust and not merely a trust in name only. The Court, in its analysis, discussed

the fact that there is no taxpayer money in the Fund, stating, "...the legislature, by enacting Chapter 655, facilitated the pooling of private money in the trust and recognized and protected the health care providers' property interests in the resulting estate."

The Court concluded that health care providers' property interest in the Fund gives them the following rights:

1. an interest in the integrity and security of the Fund
2. a right to realize investment earnings in the form of lowered assessments
3. health care providers and proper claimants have a right to the assurance that excess judgments will be paid by the Fund, to avoid additional litigation and serve the interests of justice

The State, having created the Fund as a formal trust, was not free to simply amend the statute to use the trust money for non-trust purposes, to reduce the budget deficit. The Court stated:

We are sensitive to the changing needs of state government and the basic principle that one legislature cannot bind another. But that cannot mean that anything goes, that recognized property interests evaporate when the winds shift. The legislature created a 'trust' for health care providers and their patients and families, and it pronounced that trust 'irrevocable.' We take the legislature at its word.

The Supreme Court reversed the Circuit Court decision that dismissed the Society's lawsuit and remanded the case back to the Circuit Court to issue an order requiring the State to replace the \$200 million taken from the Fund, together with lost earnings and interest. The Court also issued a permanent injunction preventing the State from transferring money out of the Fund.

### **The Dissenting Opinion**

Chief Justice Shirley Abrahamson wrote the dissenting opinion in the case. According to the dissent, health care providers receive a benefit from Fund in the form of excess medical liability insurance coverage, but they do not have a vested property interest in the Fund. The dissent characterized the Fund as a "mandatory state insurance scheme entrusted to the care of the Fund's governing entity and the insurance commissioner. The statutory purpose of the fund is fulfilled by ensuring that excess malpractice coverage is provided and that proper claims are paid." The dissent alleges that the majority opinion is a "creative attempt to re-craft the law of trusts to locate a nonexistent vested property interest in this case."