COURT OF APPEALS OF WISCONSIN
DISTRICT IV

WISCONSIN MEDICAL SOCIETY, INC.
and DAVID M. HOFFMAN, M.D.,

Plaintiffs-Appellants,

v.

MICHAEL L. MORGAN,

Defendant-Respondent.

Appeal No. 2009AP000728

APPEAL FROM THE DECEMBER 19, 2008 DECISION AND ORDER FROM
THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE MICHAEL N. NOWAKOWSKI PRESIDING

AMICUS CURIAE BRIEF OF THE WISCONSIN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE WISCONSIN CHAPTER OF THE AMERICAN COLLEGE OF PHYSICIANS, THE MILWAUKEE DISTRICT ASSOCIATION OF OSTEOPATHIC PHYSICIANS AND SURGEONS AND THE AMERICAN MEDICAL ASSOCIATION

Peter L. Gardon
WI State Bar ID No. 1013329
pgardon@reinhartlaw.com
Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703
Telephone: 608-229-2200
Facsimile: 608-229-2100

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The Wisconsin Academy of Family Physicians, the American Academy of Family Physicians, the Wisconsin Chapter of the American College of Physicians, the Milwaukee District Association of Osteopathic Physicians and Surgeons and the American Medical Association (collectively, the "Physician Amici") submit this *Amicus Curiae* Brief.

INTRODUCTION

The Injured Patients and Families Compensation Fund created by Wis. Stat. § 655.27(1) has had a positive impact on physician recruitment and the availability of medical care in Wisconsin. The Fund, together with caps on noneconomic damages in medical malpractice cases and the ready availability of liability insurance has, in the past, created a positive atmosphere for doctors to practice medicine, and has drawn doctors to Wisconsin. Each of those three components, however, is at risk. The Fund has been raided by the Governor and the Legislature. The noneconomic damages cap has increased from $350,000 to $750,000, and may be threatened by future challenges. The resulting uncertainty has lead to higher insurance premiums for medical malpractice coverage.

While the integrity of the Fund is more important now than ever, it has been compromised by the recent raid. On

October 26, 2007, the Legislature passed the 2007-2009 budget. Section 9225 of the budget bill transferred $200 million from the Fund to the Medical Assistance Trust Fund (the "Raid"). This reduced the Fund's assets by more than 25%. The Fund's actuary has determined that the Raid threatened the actuarial soundness of the Fund, and recommended that fee assessments for providers paying in to the Fund be increased by 25% annually over the next five years. Even with that increase in assessments, the actuary forecasted that the Fund will have a $400 million deficit.

The Physician Amici believe that the Raid will negatively impact the ability to recruit physicians to Wisconsin. Moreover, the Fund, by statute, was established for a specific purpose, and its monies may be employed only for a limited use. The language of this statute must mean what it says: that the Fund is to be held in *irrevocable trust*, for the *sole benefit* of health care providers and proper claimants, and *may not be used* for any other purpose of the State. The Legislature and the Governor's attempt to use the Fund as general purpose revenue or otherwise is illegal.

ARGUMENT

I. PHYSICIAN RECRUITMENT IN THE STATE OF WISCONSIN WILL BE NEGATIVELY IMPACTED IF THE RAID ON THE FUND BY THE GOVERNOR AND LEGISLATURE IS PERMITTED TO STAND.

The Fund was created by statute in 1975 in response to the deleterious effects of increased insurance expenses on the availability, cost and quality of health care in Wisconsin, brought about by lawsuits over patient care. *See* L. 1975, c. 37, § 1. The Legislature, in 1975, recognized that the increase in lawsuits over patient care caused medical malpractice insurers to raise rates, or not supply insurance at all, which in turn, "discourages and has discouraged young physicians from entering into the practice of medicine in this state . . . and is likely to further affect medical and hospital services available in this state." *Id.* The Fund was implemented in direct response to these concerns and has been in place for the past thirty-four years. The purpose and concerns underlying the Legislature's creation of the Fund have never been questioned and continue to support the Fund's existence, today.

As originally conceived, and as it operates today, the Fund provides supplemental malpractice insurance coverage for

Wisconsin "health care providers" and is funded by fees paid by physicians and health care providers in Wisconsin. *See* Wis. Stat. § 655.27(1), (3). The Fund's essential terms have not been modified, except to implement the Legislature's determination, in 2003, to increase protection of the Fund from raids.

The Fund has worked; as recently as January 2007, ten months prior to the Raid, Wisconsin was rated by the American Medical Association as only one of eight states that was "stable" in terms of the medical liability crisis. American Medical Association, *America's Liability Crisis: A National View*, January 2007.[1] Health care providers have used the Fund as a marketing and recruitment tool to help bring physicians to Wisconsin. Prior to the Raid, in June 2003 there were only 46 job openings for family physicians in rural areas in Wisconsin, 6 openings for pediatricians, and 20 openings for general internal medicine physicians. After the Raid, in June 2009 there are 134 job openings for family physicians, 13 openings for pediatricians, and 71 job openings for general internal medicine physicians. In total, there are 565 openings for doctors across all specialties. WisconsinPhysicianCareers.org, *available at*

[1] This information was available publicly on the AMA's website until 2007. Because AMA no longer maintains this database, it is not currently posted. A true and correct copy of this report is attached.

http://wisconsinphysiciancareers.org/JobSearch.aspx (last updated June 19, 2009). The successful recruitment of physicians to Wisconsin has declined since the Raid was effected.

The Fund, along with caps on noneconomic damages, helped to keep insurance available, and premiums affordable. Affordability of medical malpractice insurance leads to stability in costs of health care, which in turn improves the accessibility of health care. Michael S. Kenitz, *Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on 'Tort Reform,'* 89 Marq. L. Rev. 601 (2006). There is a connection between increased physician liability and availability of health care. In fact, a 10% increase in expected liability costs is associated with a 2.85% decrease in physician hours worked, and $1.00 of liability is associated with a $.0699 to $1.05 increase in malpractice premiums. Eric Helland & Mark H. Showalter, *The Impact of Liability on the Physician Labor Market*, (Rand Institute for Civil Justice, Working Paper WR-384-ICJ, Apr. 2006), *available at* http://www.rand.org/pubs/working_papers/2006/RAND_WR384.pdf.

Noneconomic caps are associated with decreased premiums and increased physician supply. Carol K. Kane & David W. Emmons, *Policy Research Perspectives* (AMA Econ. & Health Policy Research, Dec. 2007) *available at* http://www.ama-assn.org/ama1/pub/upload/mm/363/prp2007-1.pdf. "Counties in states with a cap have 2.2% more physicians per capita . . . and rural counties in states with a cap had 3.2% more physicians per capita." William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased The Supply Of Physicians?* Health Affairs (May 31, 2005), *available at* http://content.healthaffairs.org/cgi/content/abstract/hlthaff.w5.250. Ensuring access to medicine in rural areas is of particular concern in Wisconsin, as 28% of Wisconsin's residents live in rural areas, but only 11% of doctors practice there. WKOWTV.com, Doctors in Short Supply (Jan. 21, 2009), http://www.wkowtv.com/Global/story.asp?s=9712043.

The Fund has become even more essential to the availability of health care in Wisconsin because the cap on noneconomic damages, one of the components of Wisconsin's plan to facilitate physician recruitment and retention, is in peril. In *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation*

Fund, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, the Court struck down the $350,000 cap previously set by the Legislature, and found that the cap failed to satisfy even rational basis review. *Id.*, ¶ 105.[2] The Legislature, aware of the Fund's existence, and, at that time, stability, enacted a $750,000 cap on noneconomic damages in response to *Ferdon*. Wis. Stat. §§ 655.017, 893.55(4)(d), 2005 Wisconsin Act 183. While the Legislature acted quickly, there was a period of approximately eight months between *Ferdon* and the passage of 2005 Wis. Act 183 when there was no cap. The impact of the cap's absence on the Fund is not yet known, and could be drastic. Further, the Court has not yet addressed the constitutionality of the $750,000 cap.

The Fund remained the only assurance insurers have that they will not be responsible for large medical malpractice verdicts. If the Fund is compromised, premiums are likely to increase, which will destabilize the cost of health care, and ultimately, reduce the availability of health care by negatively

[2] The California Supreme Court, in California's *Ferdon* counterpart, reached the exact opposite conclusion. Applying rational basis scrutiny to a $250,000 cap, the California court held: "It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." *Fein v. Permanente Med. Group,* 695 P.2d 665, 680 (Cal. 1985).

impacting Wisconsin's ability to recruit doctors to the state. The Court must avoid this result and protect the integrity of the Fund.

II. THE COURT SHOULD ADOPT A BRIGHT LINE RULE TO PRECLUDE RAIDS ON FUNDS HELD IN IRREVOCABLE TRUST, FOR THE SOLE BENEFIT OF IDENTIFIED BENEFICIARIES, AND CONTAINING PROHIBITIONS ON ANY OTHER USE.

In 1215 at Runnymede, citizens of England confronted King John and required him, in the Magna Carta, to accept that his will was bound by law. Today, eight hundred years later, in this Court, citizens of Wisconsin are required to confront the Governor and the Legislature, to force the government to perform a most simple and fundamental act—follow the law.

The language of the statute that establishes and administers the Fund could not be clearer: it expressly provides three protections, three barriers, to guard the Fund from being swallowed by the sinkhole of general purpose revenue. These statutory provisions were meant to limit the power of the Governor and the Legislature. The Physician Amici subscribe to the American Medical Association's *Principles of Medical Ethics* (June 17, 2001) *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-

medical-ethics/principles-medical-ethics.shtml, which includes the requirement: "A physician shall respect the law." Unfortunately, the Governor and the Legislature have not pursued a similar goal. In raiding the Fund, they have disregarded the law and have mislead Wisconsin's citizens.

Wis. Stat. § 655.27(6) provides, in pertinent part:

> **(6) Purpose and integrity of fund.** 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.***

Wis. Stat. § 655.27(6) (emphasis supplied). This language is unlike the language of most other "trust" statutes and provides multiple layers of protection from raids. That language must be respected and enforced.

The principals of statutory interpretation mandate that Wis. Stat. § 655.27(6) be interpreted in accordance with the plain language of the statute. Courts must first look to the plain language of the statute to ascertain the legislature's intent. *Kelley Co. v. Marquardt,* 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992). In interpreting statutory language, courts "must presume that the legislature chose its words carefully in drafting this statute." *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130,

163, 580 N.W.2d 203 (1998). Moreover, courts must interpret statutes so as not to render any portion of the statute superfluous. *Lake City Corp. v. City of Mequon,* 207 Wis. 2d 155, 162-63, 558 N.W.2d 100 (1997).

The language of Wis. Stat. § 665.27 is clear and unambiguous and has been amended only for the purpose of making the Fund absolutely impenetrable. Prior to 2003, the statute 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). Through 2003 Wisconsin Act 111, in response to a previous attempt by the Governor to raid the Fund, Wis. Stat. § 655.27(6) was amended to enhance the inviolability of the Fund as a trust by including the language that stands today: the Fund is an "***irrevocable trust*** for the ***sole*** benefit of health care providers . . . . Moneys in the fund ***may not be used for any other purpose***." Wis. Stat. § 655.27(6).

An irrevocable trust is a trust "that cannot be terminated by the settler once it is created." *Black's Law Dictionary* 1549 (8th ed. 2004). *Black's* defines "irrevocable" as "[u]nalterable; committed beyond recall." *Id.* at 848. The withdrawal of funds from a trust for non-trust purposes is inconsistent with the

"irrevocable" nature of a trust. *See Becker v. First Wis. Trust Co.*, 274 Wis. 404, 80 N.W. 440 (1957). By taking funds from sources "to be held in trust" for a particular purpose, and misappropriating those funds to another purpose, the Legislature and the Governor are, at the most fundamental level, misleading the people of this State. This is a "bait and switch" scheme on a grand scale.

The raids on other funds that have occurred in the legislative budget process over the years do not support the legality or constitutionality of those raids, but rather establish the absolute necessity for a bright line standard to prevent raids on the Fund. The Wisconsin Constitution created a government of limited powers. *See, e.g., State ex rel. Owen v. Donald,* 160 Wis. 21, 151 N.W. 331 335 (1915) ("Governmental activity, not prohibited . . . so far as it conserves and promotes efficiency of inherent rights, is legitimate: anything further, going to the extent of impairment or destruction of such rights is condemned by the spirit of the constitution.") Nothing in the Wisconsin Constitution or in the statutes gives the Legislature or the Governor authority to disregard and disobey statutes, or to mislead the public.

Given the history and increasing frequency of the Governor and Legislature's raids on funds held in trust, a mandate from this Court is essential to close the floodgates. This Court should create a bright line rule to prohibit the Legislature and the Governor from raiding trust funds, in the interest of restoring truth and transparency to government. That bright line rule that should mandate that where the Legislature, by statute, requires funds to be held in irrevocable trust, to be used for the benefit of identified beneficiaries, and prohibits any other use, the statute must be followed and the funds may not be taken. This bright line rule makes clear that the Raid by the Legislature and the Governor is illegal.

The application of this bright line rule will result in numerous benefits. First, it is unlikely that the Governor and the Legislature will be able to pursue future raids. Second, it will restore transparency and public confidence to government. Third, it will increase efficiency in government, as less time will be spent contriving ways to circumvent clear statutory provisions. Fourth, it will allow the Court to avoid the unenviable and hopeless task of engaging in hyper-technical arguments attempting to distinguish trust cases. Instead, the

Court will be able to make decisions based on the inviolability of trust funds.

The need for this bright line rule is demonstrated by a previous Attorney General opinion issued by Governor Doyle when he was Wisconsin's Attorney General. As Attorney General, Governor Doyle recognized the difference between funds to be held "in trust," and funds collected for general purpose revenue: "There is a longstanding view in Wisconsin law that trust funds are to be treated differently than general revenue." Opinion of Wis. Atty. Gen. to Honorable Michael G. Ellis, chairperson, OAG 1-95, 1995 WL 64369 at *2 (Feb. 14, 1995). After describing two cases interpreting statutes holding monies in trust, Attorney General Doyle stated:

> These precedents mandate the conclusion that ***trust funds are different from general state funds. . .***Once appropriated to fulfil [sic] the state's obligations under the public employe [sic] trust fund, the state monies lose their character as state funds and ***the Legislature loses its ability to direct their use solely by means of the regulation of general purpose funds.***

Id. at *4 (emphasis supplied).

Similarly, the Fund, held in "irrevocable trust," created and established for the benefit of health care providers and patients, and which "may not be used for any other purpose of

the state," are not state funds. Any other interpretation of Wis. Stat. § 665.27 is unsupportable in law and logic. Governor Doyle has a constitutional obligation to "take care that the laws be faithfully executed." WIS. CONST. ART. V, § 4. For the Governor to allow the use of the Fund for any purpose other than that for which it was intended is to violate his constitutional responsibilities. The Governor cannot do what he recognized as being inappropriate only a few years ago simply because it is now politically convenient. The statutory language unambiguously prohibits the use of the Fund for any other purpose of the state. The inquiry should end there.

The level of cynicism the public harbors towards Wisconsin's government was encapsulated in an April 29, 2009 article suggesting that lawmakers amend the constitution to guarantee that gas tax revenue is used for transportation projects, because they cannot trust that statutory language is sufficient to accomplish that end. *Demand a Guarantee for Gas Tax Hike*, Wisconsin State Journal (Apr. 29, 2009), *available at* http://www.madison.com/wsj/home/opinion/449135. Imagine the consequences: each time legislators want to be certain that a statute will be enforced, the constitution would be amended. If the law was not meant to be enforced, but for a constitutional

amendment, there would be no purpose behind the law; it would be superfluous. This Court must apply the law here as it was written, and as it was intended.

CONCLUSION

If the Court allows the Fund to be used for other than statutorily permitted purposes, and accepts the view that the Legislature has ready access to the Fund as a petty cash drawer, then the integrity of the Fund, as statutorily defined and protected in Wis. Stat. § 655.27(6), will be destroyed. Wisconsin will not be viewed as a "physician-friendly" atmosphere to practice medicine, and physician recruitment will suffer. Statutory language that funds are to be held "in irrevocable trust," will be disregarded and for all practical purposes, it will be open season on statutory trusts.

This Court must act as the State and Federal constitution intended and check the illegal gambit by the Legislature and the Governor in raiding the Fund.

Dated this 26th day of June, 2009.

Attorneys for the Wisconsin Academy of Family Physicians, the American Academy of Family Physicians, the Wisconsin Chapter of the American College of Physicians, the Milwaukee District Association of Osteopathic Physicians and Surgeons and the American Medical Association

Peter L. Gardon
WI State Bar ID No. 1013329
pgardon@reinhartlaw.com
Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703
Telephone: 608-229-2200
Facsimile: 608-229-2100

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,962 words.

Peter L. Gardon
WI State Bar ID No. 1013329
pgardon@reinhartlaw.com
Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703
Telephone: 608-229-2200
Facsimile: 608-229-2100