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Providers in Three States Blaze the Trail

How safe are your public malpractice insurance funds? They may be more vulnerable than you think. Governors and state legislatures in cash-strapped states have begun looking to these appealing pools of standby funds as easy targets for a quick budgetary fix, seemingly without considering the original purpose of the funds. Recent legal efforts to prevent these forays have been hard-waged, but have resulted in some success.

In Wisconsin, for example, most physicians are required to contribute to the Injured Patients and Families Compensation Fund (the "Fund"). In 2007, the state raided the Fund, taking $200 million to balance the state budget. The Wisconsin Medical Society (the "Society") went to court to prevent the state from taking this money. It contended that Wisconsin's physicians had contributed all of the $200 million—plus interest earnings on their contributions—and therefore had a right to have the fund used for its stated purpose: to fund payments of malpractice claims without the need for traditional, expensive private insurance. When a lower court held that the state was immune from such a suit, the Society appealed. The appellate court referred the matter directly to the Wisconsin Supreme Court, where a decision is pending.

A similar scenario developed in New Hampshire, where physicians and hospitals sued the state when the governor reportedly convinced the legislature to use $110 million from the state's Joint Underwriting Association (JUA)—a quasi-public liability insurance company—to balance the current two-year budget. The JUA was formed in 1975 as a tax-exempt underwriter to give doctors, hospitals and other medical providers access to affordable medical malpractice insurance. When the providers sued the state, the New Hampshire Supreme Court agreed, in a 3–2 ruling, that the state's taking of the money violated an existing contract and the retroactive law taking the money was unconstitutional. Legal and administrative wrangling continues in New Hampshire.

In Pennsylvania, the Hospital & Healthsystem Association of Pennsylvania (HAP) and the Pennsylvania Medical Society (PMS) recently won appellate court summary judgments in their favor, which struck down the legislature's taking of several hundred million dollars from two accounts established to pay malpractice claims. The first account, created in 2002, is known as the Medical Care Availability and Reduction of Error Fund (MCARE) and is used to pay malpractice damages or settlements in excess of basic insurance coverage that all providers must obtain privately.

The second account was created in 2003 when the state legislature enacted the Health Care Provider Retention Program (HCPR) in response to the threat that many physicians would leave or not come to Pennsylvania if the high cost of malpractice insurance was not addressed. HCPR provided abatements to most physicians and other healthcare providers of their MCARE assessments during the five years the program was in effect. In order to fund the abatement program, the legislature established a special account (the "HCPR Account") from a new tax on cigarettes that was to be used to pay MCARE assessments for those providers whose assessments were abated.

Although the state legislature appropriated funds annually from the HCPR Account to pay for the abatements, the responsible administration officials failed to transfer the appropriated funds from the HCPR Account to MCARE. As a result, the HCPR Account balance grew to more than $700 million. For the cash-strapped state government, both the MCARE surplus and the HCPR Account balance were apparently too tempting to resist. The legislature balanced its 2010 budget by transferring $100 million from MCARE and the entire remaining balance of $708 million from the HCPR Account to be used for general purposes.

The recent judgments in favor of HAP and PMS declared the transfers from both MCARE and the HCPR Account invalid. The Commonwealth Court of Pennsylvania held, as a matter of statutory interpretation, that the administration officials who were sued had a duty to transfer funds from the HCPR Account to MCARE in the amounts of the abatements granted by HCPR and failed to do so. The amount in question is between $446 million and $616 million. The court also held that the money in MCARE was required to be used only for MCARE-related purposes.

What may be most significant is the court's holding that the providers' rights established in the 2002 and 2003 statutes creating the accounts were vested and could not be overturned by subsequent legislation. The court held that the legislature could change those programs going forward, but the 2010 legislature could not undo rights that had vested in the healthcare providers as a result of the prior legislative programs. These decisions are now on appeal before the Pennsylvania Supreme Court.

Providers in other states that require payments into similar malpractice insurance funds may want to consider protecting their funds from governors and legislators eager to recoup budget shortfalls without new revenue sources. The recent successes in Pennsylvania and New Hampshire can provide guidance for defending providers' rights against those aims.

If you have a question on this material or would like to discuss legal services, please contact us at **healthcare@duanemorris.com**.

Duane Morris LLP is an international full-service law firm of more than 700 lawyers, approximately 35 of whom advise a wide range of healthcare organizations on all aspects of corporate matters, mergers and acquisitions, regulatory compliance and enforcement, reimbursement, litigation, labor and employment, real estate and taxation matters.

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Mr. Loder and Mr. Lebowitz represent HAP in the Pennsylvania litigation described above.

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