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## States Hit Roadblocks in Hauling Away Money from State Medical Liability Funds

As states across the nation attempt to close unprecedented budget deficits, some states are looking toward accessing state-created medical liability funds as a way to help close budget shortfalls. Recent companion court decisions in Pennsylvania — coming on the heels of a decision in New Hampshire earlier this year and a pending decision forthcoming in Wisconsin — may cause legislatures some pause before dipping into state liability medical and other trust funds to shore up state budgets.

### Background of Pennsylvania Cases

In Pennsylvania, under the 2002 (as amended) Medical Care Availability and Reduction of Error Act (“MCARE”) health care providers are required to maintain minimum medical professional liability coverage. MCARE also establishes a medical professional liability fund known as the MCARE Fund to pay claims against providers for losses or damages awarded in medical professional liability actions in excess of their basic insurance coverage. The MCARE Fund is funded by an “assessment” on each participating health care provider. In order to be licensed to practice in Pennsylvania, health care providers must maintain both private professional liability insurance and contribute to the MCARE Fund.

In 2003, the Pennsylvania General Assembly enacted the Health Care Provider Retention (“HCPR”) Program (“Abatement Law”) to alleviate the threat that many physicians would leave Pennsylvania if the high cost of professional liability insurance was not addressed. The Abatement Law, which expired in 2008,

provided assessment abatements to physicians and other participating MCARE providers (excluding hospitals) to reduce MCARE providers’ annual MCARE assessments. The Abatement Fund, financed primarily by cigarette taxes, was intended to recruit physicians and provide incentives for them to practice in Pennsylvania. Beginning in 2008, approximately \$600 million dollars allocated to the Abatement Fund was never transferred to the MCARE Fund to actually fund abatements. In addition, on October 9, 2009, Pennsylvania’s Governor signed into law Act No. 2009-50, which the Pennsylvania General Assembly intended to give relief in the ongoing budget crisis: (a) by authorizing the transfer of \$100 million from the MCARE Fund to Pennsylvania’s general fund; and (b) by repealing the funding for the MCARE Fund through transfers from the HCPR Account.

The Pennsylvania Medical Society (“PAMED”) and the Hospital and Healthsystem Association of Pennsylvania (“HAP”) filed separate lawsuits, both contesting that as much as \$616 million dollars had been allocated to the Abatement Fund but never transferred to the MCARE Fund to actually fund abatements. Petitioners also alleged that the Commonwealth was not permitted to transfer \$100 million from the MCARE Fund to Pennsylvania’s general fund. (See *The Hospital and Health System Association of Pennsylvania v. Commonwealth of Pennsylvania et. al.*, 2010 Westlaw 1491056 (Pa. Commonwealth April 15, 2010); *The Pennsylvania Medical Society v. The Department of Public Welfare of the Commonwealth of Pennsylvania and Office of the Budget et al.*, 2010 Westlaw 1491269 (Pa. Commonwealth April 15, 2010)).

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### Pennsylvania Court Decision

The Pennsylvania Commonwealth Court ruled in favor of PAMED and HAP in finding that the petitioners had a vested right to the funds at issue that could not be overturned by a subsequent act of the legislature. The Commonwealth argued that “budgetary appropriations do not create vested rights in any fund; rather, they are executory gifts subject to revocation before the monies are actually paid.” The court disagreed, finding that the “MCARE Act rises to the level of a guarantee that, for the life of liabilities of the MCARE Fund was to be used solely for MCARE-related purposes....”

The court also rejected the Commonwealth’s arguments that because the abatement program expired, it was no longer required to use the tax money already raised to fund the MCARE Fund. “Contrary to [the Commonwealth’s] position, the end of the HCPR Program only means that the Insurance Department will no longer grant abatements to eligible health care providers. It does not mean that [the Commonwealth] may avoid their statutory responsibilities to fund the program from the specifically-designated HCPR Account while the program was in effect.” The court determined that the abatements were “vested rights that [could] not be extinguished by the October 2009 budget legislation.”

### Pennsylvania Dissenting Opinion

Judge Dan Pellegrini was the lone dissent in both cases, stating that “the

doctors have already received all the benefits to which they claim they are entitled [and]...do not have a vested right to receive hundreds of millions of dollars from tax money in the HCPR Account.” The dissent also believed the matter before the court was “non-justiciable” and reasoned that “the case before this Court involves more than merely interpreting the laws of the Commonwealth and determining the constitutionality of legislative action. It requires us to appropriate money and dictate to the General Assembly how to budget, functions which have been constitutionally committed to the Executive and Legislative branches.”

### Reaction to Pennsylvania Decision

PAMED issued a statement that it “is deeply gratified that the Commonwealth Court agreed with our argument that the state should not have taken money from the MCARE Fund and the HCPR Account that’s intended to help compensate successful malpractice claims.”

Pennsylvania Governor Ed Rendell disagreed with the Pennsylvania court decision, believing that “the legislature has the absolute right to do whatever it wants with that money...we created the MCARE Fund and we can end it.” The Governor has indicated that the Commonwealth plans to appeal the decision.

### New Hampshire Medical Liability Insurance Fund

The Pennsylvania decisions follow on the heels of a New Hampshire Supreme Court case, decided earlier this year, that ruled in favor of a chal-

lenge by policyholders of the New Hampshire Medical Malpractice Joint Underwriting Association (“JUA”) to New Hampshire’s attempt to close its budget gap by taking money out of a state-created medical liability insurance fund. (*See Tuttle v. Medical Malpractice Joint Underwriting Association*, 159 N.H. 627, 2010 WL 313403 (N.H.) (January 28, 2010). The New Hampshire Supreme Court found unconstitutional a state law authorizing the transfer of \$110 million from the JUA to the state’s general fund. The New Hampshire Governor had approved the transfer of what lawmakers considered to be a surplus in the JUA fund. However, the court found that doctors who contracted with the JUA had a “vested right” in how any excess JUA funds could be used and that the state’s taking of the money violated those rights. The Court disagreed with New Hampshire that because the insurance pool was created by the state, the legislature could use any surplus money as they deemed necessary for other purposes. The New Hampshire Supreme Court ruled that such legislative action constituted “a change in law that impairs the contractual relationships between the policyholders and the JUA.”

### Wisconsin Injured Patients and Families Compensation Fund

The next battleground state over money allocated to state-created funds is Wisconsin, where the Wisconsin Injured Patients and Families Compensation Fund (the “Wisconsin Fund”) is \$200 million lighter after the Wisconsin legislature withdrew the funds to balance its 2007-09 budget. The Wisconsin Fund

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**States Hit Roadblocks in Hauling Away Money from State Medical Liability Funds** (cont'd.)

contains money held in trust to pay the claims of injured patients and their families in medical liability lawsuits. The Wisconsin Medical Society ("WMS") sued the state of Wisconsin in 2007, to have the transfer of funds declared unconstitutional. The WMS claimed "the state ignored that the money in the Fund is held in trust for the exclusive purpose of paying medical liability claims....[WMS] sued because the State's raid of the Fund was illegal and could harm physicians, patients and Wisconsin's medical liability environment." On December 19, 2008, Dane County Circuit Court Judge Michael Nowakowski ruled that the legal principle of sovereign immunity prevented Wisconsin from being sued in this case and that WMS does not have a property interest in the Wisconsin Fund that would prevent the state from withdrawing the \$200 million. The case was appealed to the Wisconsin Supreme Court, where a decision is pending after oral arguments were held in April 2010.

**Conclusion**

As states face some of the largest budget deficits in this nation's history, state-created medical liability and other trust funds are appealing targets for state legislatures and governors, deciding between a combination of steep spending cuts and higher taxes to balance ballooning state budget deficits. We expect such efforts by state legislatures to continue as state budget shortfalls rise to historic levels. Such efforts to tap state-created trust funds, however, raise a host of legal questions. Locke Lord Bissell & Liddell LLP will continue to follow developments in this area.

**About the Authors**

R. Dean Conlin is a partner at Locke Lord. He has more than 30 years of experience in a wide range of health care, insurance regulatory and corporate matters. Mr. Conlin has focused on managed health care since the early stages of preferred provider networks. His clients include regulated insurers and alternative risk vehicles that provide managed health care coverage. His work for these clients, including preferred provider organizations, has ranged from product development to regulatory counseling, including counseling on the impact of ERISA on managed health care. In addition, Mr. Conlin has organized insurers and reinsurers and counseled them on a full range of regulatory and corporate issues. In this connection, he leads our firm's longstanding representation of Old Republic International Corporation and American Fuji Fire and Marine Insurance Company. He also counsels Lloyd's Illinois, Inc., which is the corporate Illinois Attorney-in-Fact for Underwriters at Lloyd's, London.

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