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# Budget Briefs

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Budget Brief 07-2

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## TRANSFER FROM THE MEDICAL MALPRACTICE FUND

The biennial budget act, 2007 Wisconsin Act 20, authorizes the transfer of \$200 million dollars from the Injured Patients and Families Compensation Fund to the Medical Assistance Trust Fund. The legality of this transfer is currently being challenged in circuit court by one of the state's largest associations of medical professionals.

### BACKGROUND

The Injured Patients and Families Compensation Fund (IPFCF) was created by Chapter 37, Laws of 1975, to counter the increasing cost of medical malpractice insurance. The fund covers malpractice claims that exceed the primary level of insurance coverage that health care providers are required to carry. (Statutes require coverage of \$1 million per incident and \$3 million per policy year.) It is credited with keeping insurance costs low and creating an inviting atmosphere for medical professionals in Wisconsin. The fund is made up of assessments on certain health care providers, with exemptions for those providers who are government employees.

The fund is overseen by a 13-member Board of Governors, which in turn is overseen by the Office of the Commissioner of Insurance.

Section 655.27 (1), Wisconsin Statutes, directs the IPFCF to pay portions of claims that are in excess of the state-required financial liability of the health care provider. Section 655.27 (6) defines the purpose and integrity of the fund:

“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.”

This language was created by 2003 Act 111 and signed by Governor Doyle. The original bill appears to have been introduced in response to a proposed transfer of fund money during the 2003 legislative session. At that time, the governor had proposed transferring \$200 million from the IPFCF to help ease the budget deficit.

### BUDGET PROVISION HISTORY

Section 9225 (2) of 2007 Act 20 provides:

“Notwithstanding section 655.27 (6) of the statutes, there is transferred from the injured patients and families compensation fund to the Medical Assistance trust fund \$71,500,000 in fiscal year 2007-08 and \$128,500,000 in fiscal year 2008-09.”

This language is part of the budget's nonstatutory provisions. The provision grew out of several other proposals in the budget process.

**Governor's Proposal.** In the original budget bill, 2007 Senate Bill 40, section 9225 provides for a transfer of \$175 million from the IPFCF to the “Health Care Quality Fund.” The Health Care Quality Fund was proposed by the governor to support programs in the Department of Health and Family Services and other health-related Wisconsin agencies. According to the drafting file for section 9225, a cigarette tax increase was to be the original source of funding for the Health Care Quality Fund, and the IPFCF transfer was later added as an additional revenue source.

**Joint Committee on Finance.** Senate Substitute Amendment 1, introduced by the Joint Committee on Finance, did not amend section 9225 of the governor's proposal.

**Assembly Proposal.** An amendment to the state assembly version of the budget (Assembly Amendment 1 to Assembly Substitute Amend-

ment 1) removed the transfer provision completely. It also proposed specific language to section 655.27 that would prohibit the governor from introducing a budget bill using the IPFCF for any purpose that is not specifically authorized in the statute. According to the drafting file, the changes were requested by the assembly republican caucus. They were not incorporated into the final budget.

**Conference Amendment.** During the conference amendment process, section 9225 of the budget was rewritten to provide that \$200 million (\$71.5 million in FY 2007-08 and \$128.5 million in FY 2008-09) would be transferred from the IPFCF to the Medical Assistance Trust Fund. This is the language that became law with the signing of 2007 Wisconsin Act 20.

#### **AGENCY ASSESSMENTS**

Prior to budget passage, three legislative agencies assessed the impact of the fund transfer as proposed in the original budget bill (\$175 million to the Health Care Quality Fund).

**Audit Bureau.** In March 2007, the Legislative Audit Bureau released a state-required audit of the IPFCF. In its cover letter to the Joint Legislative Audit Committee, it reported that the fund was in a sound financial position, with net assets of \$59.8 million as of June 30, 2006. The fund had accumulated \$737.4 million in cash and investments, to pay estimated loss liabilities of \$685 million. (These amounts vary from the unaudited amounts in the IPFCF 2006 annual report.) Because of this loss liability factor, the Audit Bureau warned that the governor's proposed transfer would place the fund in a deficit accounting position. The report also noted that the transfer could result in increased assessment rates on health care providers.

**Legislative Council.** Also in March, the Legislative Council sent a memorandum to the Legislative Fiscal Bureau addressing four legal

questions related to the proposed transfer in the original bill. The memo concluded that legal arguments existed for and against the transfer. For example, the memo concluded that the proposed transfer was probably not consistent with section 655.27 (6); however, it could still be permissible if justified by a public purpose.

**Fiscal Bureau.** In June, the Legislative Fiscal Bureau released Budget Paper #377 related to the fund transfer as proposed in the original bill. This paper was created for the Joint Committee on Finance deliberations. It reported that the IPFCF's accounting firm estimated that the proposed transfer would reduce the fund's surplus by \$235.1 million, which includes \$65.1 million in reduced investment income. This would have left the fund with a net deficit of \$233.1 million by the end of FY 2007-08. However, even without the transfer, accounting projections have predicted that the fund will revert to a net deficit in FY 2008-09.

#### **PENDING COURT CHALLENGE**

On October 29, 2007, the Wisconsin Medical Society filed a complaint in Dane County Circuit Court against the Commissioner of Insurance, the Secretary of the Department of Administration, the State Treasurer, and the IPFCF Board of Governors. The Wisconsin Medical Society is the largest association of medical doctors in the state, with 11,000 members. It alleges that the fund transfer is, among other things, an unconstitutional taking, a breach of contract, an invalid tax, a violation of equal protection, and a breach of fiduciary duty.

In December, the Wisconsin Medical Society removed the IPFCF Board of Governors and the Commissioner of Insurance from the lawsuit. According to reports, the fund transfer of \$71.5 million for FY 2007-08 has already occurred.