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Injured Patients and Families Compensation Fund (Insurance and Health and Family Services)

[LFB 2005-07 Budget Summary: Page 311, #2]

CURRENT LAW

The injured patients and families compensation fund (IPFCF), created in 1975 as the patients compensation fund, provides excess medical malpractice coverage for health care providers. Under current law, health care providers must obtain primary medical malpractice insurance from private insurance companies in the amount of $1 million per occurrence and $3 million per policy year in the aggregate. The IPFCF provides compensation for claimants whose economic damages exceed the negligent health care provider's liability insurance. IPFCF coverage for economic damages is unlimited. Participation in the IPFCF is mandatory, unless the provider qualifies for an exemption. Exemptions include: (a) providers who do not practice in Wisconsin for more than 240 hours in a fiscal year; (b) providers employed by the state, a county, or a municipality who do not expect to practice outside of that employment for more than 240 hours during a fiscal year; (c) providers whose principal place of practice is not in Wisconsin (50 percent of the income from the practice is derived from outside Wisconsin, or more than 50 percent of patients will be attended to outside Wisconsin during the year); (d) federal employees covered under the Federal Tort Claims Act who do not expect to practice outside that employment for more than 240 hours during a fiscal year; (e) retired providers; (f) providers who have never practiced in Wisconsin to date; and (g) corporations and partnerships that cease providing medical services in Wisconsin.

The IPFCF provides coverage on an occurrence basis. Payment of the premium for a given year of practice entitles the provider to coverage for claims filed for any acts of malpractice that occur during that year, including claims that are filed subsequent to the IPFCF coverage cancellation date. If a claim is based on an occurrence during a covered year, the IPFCF is responsible for coverage, regardless of when the claim is filed. Under current law,

claims are paid in the order received within 90 days, unless appealed, and if there are insufficient funds, the claims are immediately payable in the following year in the order in which they were received.

The IPFCF is funded through annual assessments paid by providers and through investment income. There are four fund classes based on provider specialty as identified by applicable insurance services office (ISO) codes. Physicians whose loss exposure is similar are grouped together in one of the four classes. Class 1 includes specialties with the lowest risk and therefore these providers pay the lowest rate. Class 4 represents the highest risk and therefore these providers pay the highest rate. The primary factors influencing annual assessments include an actuarial assessment of expected loss exposure based on prior years' experience and the overall financial position of the fund. Annually, an actuarial consultant analyzes the IPFCF loss experience and financial position and submits assessment fee recommendations to the IPFCF's actuarial and underwriting committee. The committee reviews the recommendations and, in turn, recommends assessment fee levels to the IPFCF Board of Governors. The Board of Governors then submits a fund fee administrative rule to the Legislature for approval.

Under current law, the Wisconsin State Investment Board invests moneys held in the fund in investments with maturities and liquidity that are appropriate for the needs of the fund as reported by the IPFCF Board of Governors. Based on data through September 30, 2004, the IPFCF actuary has estimated IPFCF's balance sheet as of the end of fiscal year 2003-04 to show total investment assets of $741,283,000 total liabilities of $670,773,000, and the fund equity of $70,510,000.

GOVERNOR

Transfer $169,703,400 in 2005-06 and $9,714,000 in 2006-07 from the IPFCF to a new segregated fund, the health care quality improvement fund (HCQIF).

Purpose of the Injured Patients and Families Compensation Fund. Expand the purposes of the IPFCF to include: (a) ensuring the availability of health care providers in the state; (b) enabling the deployment of health care information systems technology for health care quality, safety and efficiency, as referenced in the sections of the bill that would authorize the new Health Care Quality and Patient Safety Board to make grants and loans; and (c) the deployment of health care information systems technology for health care quality, safety and efficiency by the Board.

DISCUSSION POINTS

1. This item would fund a portion of the state's 2005-06 medical assistance (MA) benefits, MA supplemental payments to hospitals, and health care quality grants and loans in 2005-06 and 2006-07 by using assets that have accumulated in the IPFCF. This funding from the IPFCF to support MA benefits and supplemental payments to hospitals would be provided on a one-time

basis, and consequently would not be part of the MA base for the 2007-09 biennium.

Patients Compensation Funds

2. At least eight states other than Wisconsin have patients compensation funds -- South Carolina, Indiana, Kansas, Louisiana, Nebraska, New Mexico, Pennsylvania, and Florida. Other states in the process of establishing a fund include: Ohio, Iowa, Washington, Wyoming, Montana, Colorado, and Nevada. Each state that has a patients compensation fund operates the fund with different requirements. Participation in at least three of the states -- Kansas, Pennsylvania, and Wisconsin -- is mandatory. Coverage in at least two of the states, South Carolina and Wisconsin, is unlimited. Primary insurance coverage that is required for providers varies from state to state. Wisconsin has the highest primary insurance coverage requirement of $1 million per incident and $3 million per policy year. Wisconsin's fund is unique in that it is the only fund to combine mandatory participation with unlimited economic loss coverage.

3. When Wisconsin's patients compensation fund was established in 1975, it operated on a cash basis for the first five years. That is, providers were assessed based on actual payout amounts for claims in a given year. During the 1980s, the fund switched from cash accounting to accrual accounting to improve the integrity of the fund. Under the accrual method, providers are assessed based on estimates of what all claims would total over time for incidents that occurred in any given year, rather than on what the payout amount was for that year. Accrual accounting attempts to ensure that the fund has sufficient assets to pay any outstanding liabilities, including claims incurred but not reported, if the fund were discontinued. The estimates of what claims would total over time are actuarially determined. Wisconsin requires insurers to be financially solvent such that their assets are sufficient to cover any outstanding liabilities. Therefore if an insurer stopped doing business, all outstanding claims would be paid. OCI seeks to administer the IPFCF in a similar manner.

4. During the 1990s, the fund's Board of Governors began to increase reserves to cover any outstanding claims if the fund were eliminated. The amount of the reserves, the assessments and investment income, total the IPFCF's total assets. Any outstanding claims since the inception of the fund, including claims incurred but not reported, compose the fund's outstanding liabilities. The difference between the total assets and the total outstanding liabilities is the fund equity. The IPFCF uses estimated future investment income earnings to discount its total outstanding liabilities.

5. To determine provider assessments for the IPFCF, actuaries attempt to predict how many claims will occur in a given year and how much those claims will cost. By the actuaries' own statements, the process is highly uncertain in an area such as medical malpractice with extended reporting and settlement patterns, and given that the IPFCF provides unlimited excess liability protection over primary insurance. The actuaries indicate that their estimates have been tracking the industry nationally as a whole. However, some have expressed concern that the estimates may be too conservative for Wisconsin.

6. The 13-member IPFCF Board uses the actuarial information to set annual

assessment rates for providers, which are then established by rule. Attachment 1 shows annual provider assessments for each provider classification from fiscal years 2000-01 through 2004-05. The Board has usually set rates that differ from the actuaries' recommendations. The Board attributes the difference to the fact that Wisconsin's medical malpractice environment is much more stable than the rest of the nation and to the fact that, because assessments are mandatory, the IPFCF has a "captured pool" to require additional assessments to make up for any underestimation in assessments from a previous year. Table 1 compares the actuaries' recommended percentage changes to assessments with the percentage changes approved by the Board in each year from 1994-95 through 2005-06.

TABLE 1

Annual Percentage Changes to Assessment Fees
Policy Years 1994-95 through 2002-03

Policy Year	Actuary Recommendation	Board Approved
1994-95	10.8%	7.1%
1995-96	4.9	-11.2
1996-97	17.3	10.0
1997-98	-17.7	-17.7
1998-99	5.9	0.0
1999-00	2.7	-7.0
2000-01	3.7	-25.0
2001-02	-28.6 to 28.2	-20.0
2002-03	N.A.[1]	-5.0
2003-04	N.A.[1]	5.0
2004-05	N.A.[1]	-20.0
2005-06	N.A.[1]	-30.0

[1] Beginning in 2002-03, rather than recommending a specific recommendation for assessment levels, the actuary began offering guidance on a range of assessment levels based on an estimate of the "break even" point for the fund. The break even point is the point at which assessments collected equal all expected claim payments for claims occurring in that particular year, regardless of when the claim is reported or paid.

7. Table 2 lists the number of providers assessed for each of fiscal years 2000-01 through 2004-05 and the assessment revenue for each of those years.

TABLE 2

Number of Providers Assessed and Assessment Revenue
Policy Years 2000-01 through 2004-05

Policy Year	No. of Providers Assessed	Assessment Total
2000-01	11,236	$47,879,300
2001-02	11,253	36,795,100
2002-03	11,552	29,463,700
2003-04	11,902	32,900,629
2004-05	12,093	26,317,000[1]

[1]Estimated.

8. Historically, actual expenditures have been lower than projected expenditures. However, because it is difficult to predict when claims for any specific incident will be paid, expenditures could greatly increase in the future if losses incurred in previous years are finally paid. Through March, 2005, the IPFCF had paid claims totaling approximately $586.3 million, since its inception and 32 claims were outstanding.

9. IPFCF reserves are used to pay claims for incidents that occurred in prior years. For example, a claim may be submitted to the IPFCF for payment several years after the incident occurred. Assessments collected from the year of the incident would have been set-aside in reserves to pay for any claims resulting from that year. Some claims could take up to 20 years after the incident date before they are paid. Although the statute of limitations for filing a medical malpractice claim is, in most cases, three years from the incident date or one year from the discovery date, there is no limit on how long the litigation process will take. Attachment 2 shows for each fiscal year from 1975-76 through 2003-04 assessments collected during that year, claims paid out through September 30th of that year, paid indemnity for incidents that occurred in that year, the number of claims paid for incidents that occurred in that year, and the number of outstanding claims associated with each year. For example, in policy year 1990-91, the fund collected $43,800,000 in assessments and paid claims totaling $41,631,000. However, since 1990-91, the fund has paid a total of $29,455,000 in claims for incidents that occurred during 1990-91. The fund has paid 20 claims since 1990-91 for incidents that occurred during 1990-91, and there remain two claims outstanding.

10. In addition to premiums, the IPFCF invests its reserves, which earn interest. According to a Wisconsin Investment Board annual report, as of June 30, 2004, the fund had total investment assets of $740.7 million. Investment income has accounted for 33 percent of the total IPFCF revenue since 1975. Investment income reduces the provider assessments that fund current and future claim payments. The investments are long-term. These funds are not cash on hand and would have to be liquidated to receive a cash amount. The fund may realize a loss or gain as a result of liquidating assets and the remaining balance would earn less in the future. Table 3 shows

assessments collected, total assets, total liabilities, and the fund equity for fiscal years 1994-95 through 2002-03 as listed in Legislative Audit Bureau reports. Total liability and fund equity estimates for 2003-04 have been revised by the IPFCF actuary based on data through September 30, 2004.

TABLE 3

IPFCF Balances
Fiscal Years 1994-95 through 2003-04

Fiscal Year	Assessments	Total Assets	Total Liabilities	Fund Equity
1994-95	$55,505,700	$310,015,300	$367,738,100	-$57,722,800
1995-96	51,048,900	336,223,000	378,018,500	-41,795,500
1996-97	58,259,200	376,830,700	420,924,900	-44,094,200
1997-98	49,884,800	462,227,500	484,394,300	-22,166,700
1998-99	50,621,700	501,134,200	492,554,400	8,579,800
1999-00	47,879,300	542,613,000	515,383,300	27,229,700
2000-01	36,795,100	576,709,100	548,260,500	28,448,700
2001-02	29,556,000	588,823,400	582,219,300	6,604,100
2002-03	29,463,700	667,448,500	659,513,500	7,935,000
2003-04[1]	31,603,000	741,283,000	670,773,600	70,510,000

[1]Reestimated by the IPFCF actuary based on data through 9/30/04.

11. As shown in Table 3, OCI estimates that, based on data through September 30, 2004, IPFCF's fund equity was approximately $70.5 million.

Legal Issues

12. In 2003 Wisconsin Act 111, subsequent to the 2003-05 budget deliberations, the Legislature: (a) renamed the patients compensation fund the injured patients and families compensation fund; (b) specified that the IPFCF 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; (c) specified that 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; and (d) specified that moneys in the fund may not be used for any other purpose of the state.

13. In an April, 2005, memorandum, the Wisconsin Legislative Council addressed potential legal issues related to the Governor's proposal to transfer $179.4 million from the IPFCF to the HCQIF created in the bill. In addition to addressing the AB 100 proposal affecting the IPFCF, the attached Legislative Council memorandum provides information on a somewhat similar proposal contained in the Governor's 2003-05 biennial budget bill and 2003 Act 111. The

memorandum summarizes possible legal arguments that could be raised with respect to the Governor's proposal to create additional purposes for the fund and reallocate moneys from the fund for the new purposes. The legal issues include whether the proposed IPFCF transfer represents an unconstitutional taking of property without due process of law, and whether the transfer represents an unconstitutional impairment of contract. While it articulates arguments both for and against the legality of the transfer, the memorandum states that the "taking" claim "is somewhat strengthened" by the fact that AB 100 does not include a sum sufficient appropriation to ensure payment of claims the IPFCF is unable to pay because of insufficient funds. Further, with respect to the impact of Act 111 on a claim of impairment of contract, the memorandum states, " ... it could be questioned whether reserves that were established under current law, especially those that have accrued since the law was changed under 2003 Act 111, may be bound by the new purposes proposed in Assembly Bill 100."

14. The IPFCF Board of Governors indicates that it has a fiduciary responsibility to protect the integrity of the fund and has passed a resolution that indicates that as trustee, the Board opposes any attempt to withdraw funds from the IPFCF that goes beyond the original intent that the fund be held in trust solely for liability claims. In addition, the Board has directed legal counsel for the fund to review the issue.

Medical Malpractice Issues

15. According to various publications such as *Health Affairs* and the *Health Policy Monitor* published by the Council of State Governments, the country is in the midst of a medical malpractice crisis, the third such crisis following the malpractice crises of the 1970s and 1980s. Nationally, over the last several years, malpractice insurance premiums have increased by between 15 and 30 percent, although rate increases in some individual states were much higher. Analysts have attributed the increases to a combination of factors, including the withdrawal of some major malpractice insurers from the market, slow economic growth affecting insurers' investment income, and the severity of malpractice claims.

16. According to a July, 2004, study commissioned by the National Association of Insurance Commissioners (NAIC), the extent of a medical liability insurance crisis varies among the states. Twenty-eight jurisdictions out of 51 surveyed in the NAIC study reported loss ratios in 2002 above 100 percent (that is, for each premium dollar received, more than one dollar is expected to be paid); yet, there were seven jurisdictions with loss ratios below 70 percent, which would be considered relatively favorable. Wisconsin reported the lowest ratio, 61.71 percent, of all reporting jurisdictions. Additionally, medical liability rates are, on average, lower in Wisconsin than in most surrounding states. The NAIC study indicates that underwriting losses have been the primary, although not exclusive, driving factor in rate increases experienced by physicians and other health care providers. Others dispute whether rising insurance premiums have been caused by rising malpractice claims or payouts. The NAIC study also found that much of the medical malpractice data reviewed for the report was "inconsistent, incomplete, difficult to obtain and even more difficult to interpret." The authors of the NAIC study agree with the conclusion in a 2003 GAO study that "a lack of necessary data has hindered and continues to hinder the efforts of Congress,

state regulators, and others to carefully analyze the problem and the effectiveness of the solutions that have been tried."

17. More than two-thirds of medical liability insurers nationwide reported that malpractice premiums seem to be leveling off in 2004, according to survey results from the *Medical Liability Monitor* a publication that has been publishing news about malpractice issues for 30 years. According to the 2004 *Medical Liability Monitor* survey, 15 percent of firms responding to the 2004 rate survey said they expect rates to increase significantly in the next year; whereas in 2003, 83 percent of survey respondents forecast significant increases.

18. However, malpractice rates are not leveling off everywhere, and the *Medical Liability Monitor* survey notes that some carriers are still reporting triple-digit increases. Moreover, some physicians who are experiencing smaller increases are still paying extremely high rates. In states where physicians face sharp increases in their medical liability premiums, some medical facilities have shut down, some physicians are reluctant to perform high-risk procedures, and early physician retirements are on the rise. According to the *Medical Liability Monitor* survey, for the most part, doctors in states with tort reforms tended to fare better with respect to malpractice premium increases than those in states without reforms.

19. Wisconsin has implemented a number of tort reform measures to stabilize the medical malpractice environment, including: (a) a statute of limitations, in most cases, of three years from the incident date or one year from the discovery date; (b) a cap on noneconomic damages of $350,000 plus a cost-of-living increase, currently approximately $432,500; (c) limits on attorney contingency fees; (d) mandatory professional primary liability insurance of $1 million per incident and $3 million per policy year; (e) periodic payment of damages; (f) a mediation system to resolve disputes without litigation; (g) a contributory negligence provision, which allows damages awarded to be diminished in proportion to the amount of negligence attributed to the person recovering; (h) abolition of the collateral source rule, which results in the admission of evidence, in an action to recover damages for medical malpractice, of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury; and (i) the provision of unlimited excess liability coverage through the IPFCF. The other five states that show no problem signs have also implemented a variety of tort reforms.

20. A number of cases have been filed in Wisconsin courts challenging the constitutionality of the cap on noneconomic damages. In 2004, the Wisconsin Supreme Court upheld the cap in a medical malpractice wrongful death case. In early 2005, the Wisconsin Supreme Court agreed to hear another case challenging the cap, this time involving an appeal from a jury verdict that found a physician was negligent in delivering a baby, causing deformities and some paralysis to the boy's arm. The IPFCF actuary has estimated that, if Wisconsin's cap on noneconomic damages were to be declared unconstitutional, the potential fund liabilities may be increased by an estimated $150 million to $200 million.

21. The American Medical Association has listed Wisconsin as one of six states whose medical liability systems are not in crisis or showing problem signs (the other five being California,

Colorado, Indiana, Louisiana, and New Mexico).

22. As noted in an October, 2004, Wisconsin Legislative Audit Bureau (LAB) report, the IPFCF is often cited as an important factor in Wisconsin's relatively stable environment for health care providers, and the fund's solid financial position provides flexibility to readily respond to changes that may occur in the medical malpractice environment in the future. Although the IPFCF contributes to the stable and predictable medical malpractice environment, the extent to which transferring money from the fund on a one-time basis may affect Wisconsin's stable medical malpractice environment is difficult to estimate. The medical malpractice environment would still be predictable because the amount of the transfer is known, and the transfer is on a one-time basis, so the fiscal effects could be calculated. However, if malpractice premiums significantly increase in response, it could contribute to a destabilization of the medical malpractice market in the state.

Fund Integrity and Actuarial Reviews

23. Another issue regarding the proposed transfer of $179.4 million from the fund involves taking a fiscally sound fund and making it less so in order to promote other public policy considerations. The Governor's bill proposes to use $179.4 million from the IPFCF to substitute for GPR funding that would otherwise be needed to support MA-eligible health care costs, and for grants and loans for a variety of health care information technology purposes.

24. According to the actuarial analysis submitted to the IPFCF actuarial committee by Milliman, Inc., as actuary for the fund, transferring $179.4 million would create a substantial fund equity deficit. Additionally, if IPFCF moneys were transferred from the fund, the amount of future investment income earnings available to offset the IPFCF's total estimated outstanding liabilities would have to be reestimated downward. OCI has received an estimate that, when decreased investment earnings are factored in, a transfer of $179.4 million from the fund would equate to an impact on the fund of more than $227 million.

25. Another issue involves the accuracy of actuarial estimates of total outstanding loss liabilities for the IPFCF. The LAB October, 2004, audit of the IPFCF reiterated a suggestion that OCI contract for an independent review of Milliman's methods and assumptions in estimating the IPFCF's loss liabilities. LAB noted that an actuarial audit may be especially useful to the IPFCF because of the long-term nature of medical malpractice claims, increased unpredictability resulting from the fund's coverage, and the significant effect actuarial analyses have on the fund's financial decisions and operations. Additionally, LAB noted that some parties have been critical of the IPFCF actuary for what those parties view as overly conservative estimates of IPFCF loss liabilities. In late February, 2005, OCI contracted with the firm of Tillinghast-Towers Perrin, a consulting actuary with extensive experience in performing actuarial services related to medical malpractice. Tillinghast-Towers Perrin will review the assumptions and methodologies used by Milliman, Inc., in estimating IPFCF loss liabilities. OCI expected to receive a written report from Tillinghast-Towers Perrin by the end of April, 2005, but has yet to receive the report.

26. In the meantime, the administration retained Aon Risk Consultants (Aon) to provide

an independent actuarial opinion of the IPFCF. In a report dated April 4, 2005, Aon recommended a net unpaid loss and loss adjustment expense calculation for the IPFCF from the fund's inception through September 30, 2004 of $387,987,000. Aon compares this with a Milliman recommendation for a net unpaid loss and loss adjustment expense provision through June 30, 2004 of $666,497,000. (Milliman has since revised this estimate downward to $620,603,000, based on data through September, 2004.) Additionally, Aon recommended projected losses and loss adjustment expenses for the 2004-05 fund year of $64,796,000 for the IPFCF, which Aon compares to the Milliman recommendation of $80,111,000. (Milliman has since revised this estimate downward to $72,966,000 based on data through September, 2004).

The net unpaid losses and loss adjustment expenses are part of the total liabilities for the IPFCF. The loss liabilities are the amounts expected to be paid in the future for incidents of malpractice that have already occurred. Loss liabilities increase each year, as another year of activity is added to the ultimate potential losses paid. Estimates of undiscounted losses and loss adjustment expenses are offset by estimates of investment income to arrive at net unpaid losses and loss adjustment expenses. The total liabilities are subtracted from the total assets to arrive at the fund surplus. For example, to reflect the fund balance as of the end of fiscal year 2003-04, based on data through September, 2004, Milliman estimated total IPFCF assets of $741,283,000, reestimated total IPFCF liabilities of $670,773,000, and calculated a fund surplus of $70,510,000. Under Aon's recommendation for estimating net unpaid loss and loss adjustment expenses as of September 30, 2004 of $387,987,000, the fund surplus at the end of fiscal year 2003-04 would be estimated to exceed $303 million.

In arriving at a recommendation estimating net unpaid losses and loss adjustment expenses at a level $232,617,000 below that recommended by Milliman (as revised for data through September, 2004), Aon used an 85 percent confidence percentile. According to the Aon report, this can be interpreted to mean that there is an 85 percent probability that actual liabilities will be below the estimate, and a 15 percent probability that the actual liabilities will ultimately exceed the estimate. Aon estimates that the Milliman recommendation equates to a confidence percentile slightly below 99 percent for its recommendation for net unpaid losses and loss adjustment expenses of $666,496,494 as of June 30, 2004, which would mean that there exists a 99 percent probability that actual liabilities will be below the estimate.

The Aon report states that there are situations where it is appropriate to maintain net unpaid losses and loss adjustment expenses at confidence levels in excess of 90 percent, including: (a) when there is a limited or unreliable loss history; (b) when there is a likelihood of receiving several "mega-million" dollar claims; and (c) where there is an inability to assess for shortfalls. After acknowledging that one or more of these situations may have applied in the early years of the IPFCF's existence, Aon asserts that, given the IPFCF's 30-year loss history, the statutory limit on non-economic damages, and comparatively high mandatory malpractice coverage levels ($1 million per occurrence, $3 million per policy year), it would be reasonable and appropriate to maintain liabilities at a 75 to 85 percent confidence level. Further, Aon notes that "in the unlikely event that actual liability payments exceeded the 75% to 85% percentile, the Fund has the ability to make up any shortfall through the annual assessment determination."

It is presumably on the basis of the Aon report that the administration asserted in documentation accompanying its budget that "independent analysis of the fund reserves indicate that the liabilities have been overestimated and that revenues can be transferred without affecting the financial stability and long-term viability of the fund." Table 4 represents a balance sheet through 2003-04 comparing the IPFCF surplus projected by Milliman in its published report to the IPFCF actuarial committee with its recalculated surplus based on data through September 30, 2004, and the surplus projected by Aon based on data through September 30, 2004.

TABLE 5

IPFCF
Balance Sheet Through Fiscal Year 2003-04

	Fund Financial Statement As Published	Hindsight Restatement Based on Actuarial Studies @ 9/30/04 Milliman	Aon
(1) Total Fund Assets	$741,283,000	$741,283,000	$741,283,000
(2) Fund Undiscounted Unpaid Claim Liabilities	880,445,000	786,030,000	493,625,000*
(3) Offset for Investment Income	-213,948,000	-165,427,000	-105,638,000
(4) Fund Discounted Unpaid Claim Liabilities [(2) + (3)]	666,497,000	620,603,000	387,987,000
(5) Total Fund Liabilities	716,667,000	670,773,000	438,157,000
(6) Fund Surplus [(1) - (5)]	24,616,000	70,510,000	303,126,000

*Unpaid claim liabilities as of 9/30/04 represent estimates at an 85% confidence percentile.

27. Milliman, Inc., an international consulting actuarial firm, has been the IPFCF actuary since the fund's inception. Milliman is one of the two largest actuarial firms in the country in terms of its medical malpractice specialty area.

Milliman has noted factors that make providing actuarial estimates for the IPFCF uniquely challenging, including the fact that: (a) the fund provides coverage on an occurrence basis, entitling a provider to coverage for claims filed for any acts of malpractice that occur during a year in which the provider was assessed a fee, including claims that are filed subsequent to the IPFCF coverage cancellation date; (b) the state capped noneconomic damages in 1995 at $350,000, indexed for inflation; (c) the fund participates in relatively few malpractice cases due to the $1 million primary insurance threshold imposed in 1997, giving the actuary a small statistical sample with which to work; and (d) the fund provides unlimited coverage for economic damages. The statutory cap on noneconomic damages and the $1 million primary insurance threshold each has the effect of reducing the fund's exposure; however, those two changes occurred 20 and 22 years into the fund's history, respectively. Consequently, the current liability parameters have existed for fewer than 10 years, giving an actuary a relatively brief period on which to base estimates of the individual and combined effects of those changes. Milliman acknowledges that, in hindsight, its estimates appear

conservative in the wake of those changes, evidenced by its recommendations each year since 1997 to reduce the recommended reserves based on another year of the fund's development. However, Milliman contends that a conservative approach is warranted, given the relatively brief period in which the current system has existed. Arguably, Milliman's annual suggested changes to its earlier recommendations for the fund's reserves, based on another year's history, correct to some extent any overly conservative prior estimates.

Although Milliman has not issued an official written response to the Aon report, Milliman actuaries have discussed potential reasons for the significant differences in the firms' estimates of the IPFCF surplus as of June 30, 2004. For example, Milliman notes that its projections differ from Aon's related to the number of malpractice claims incurred but not yet reported, the length of time during which those claims may still be reported for any given year, and the average payment per claim. In short, Milliman projects a higher number of claims overall, predicts that claims may be reported for a longer period relating to any particular year, and predicts that the fund will pay more per claim. The firms' estimates for potential future loss and defense costs differ throughout all years of the fund's existence, but differ most significantly for the years 1990-91 through 2001-02, the period during which the noneconomic damages cap was reinstated and the primary insurance threshold was raised to $1 million per occurrence. Milliman projects unpaid claim liabilities of $564,489,000 for those years, but Aon projects unpaid claim liabilities of $312,866,000, accounting for a difference of over $251 million. Although the firms' estimates of total potential loss and defense costs differ significantly for the 12-year period from 1990-91 through 2001-02, their estimates of the number of claims incurred but not reported for any given year do not differ significantly. The significant difference in the total amount of unpaid claim liabilities projected by the firms seems to stem from the fact that Milliman predicts that claims attributable to any given year may be reported for a longer time after that year, and would result in higher payments from the fund.

Additionally, Aon states that the scope of its study did not include an independent analysis of appropriate assessment levels for the 2004-05 fund year. Milliman cautions that reliable assessment revenue estimates are available for 2004-05, in the amount of $26.3 million. In its report, Aon has recommended a projection for losses and loss adjustment expenses for 2004-05 in the amount of nearly $64.8 million (compared to Milliman's estimate of $72,966,000.) Thus, although not necessary for Aon's projection of fund equity as of September 30, 2004, data were available to Aon indicating that fund equity in 2004-05 would be reduced by approximately $38.5 million, or the difference between Aon's projection for losses and the projected assessment revenues. Moreover, in February, 2005, the IPFCF board approved fees at a level estimated to generate $18,400,000 in 2005-06, or 30 percent less than in 2004-05. Thus, by Milliman estimates, when projected assessment revenue is balanced against projected liabilities for fiscal years 2004-05 and 2005-06, the fund balance statement as of June 30, 2006 may show a $30 million deficit.

In the "Conditions and Limitations" section of its report, Aon states that its projections "make no provision for the extraordinary future emergence of losses or types of losses not sufficiently represented in the historical data, or which are not yet quantifiable." Aon has based its estimates and recommendation exclusively on empirical data regarding payments throughout the

fund's history. The largest single award in the fund's payment history has been approximately $18 million. By not providing for the possibility of an extraordinary future loss, Aon may have underrepresented potential fund payments. Milliman, as the actuary hired to advise the IPFCF Board, must attempt to account for extraordinary future emergence of losses in its recommendations. In its November 24, 2004 report to the IPFCF actuarial committee, Milliman notes that a coverage such as medical malpractice, with its extended reporting and settlement patterns is especially difficult to estimate and that fact is "compounded even further for the Fund, given the nature of its coverage -- unlimited excess liability protection over the primary carriers." The fact that catastrophic claims for economic damages have not yet occurred provides no assurance that they will not, given the fund's limitless coverage of economic losses. Additionally, Milliman states that these same factors that make IPFCF coverage difficult to estimate also prevent Milliman from presenting its recommendations to the IPFCF Board in terms of "confidence percentiles" as Aon does in its report. Rather than present a variety of projections at various confidence percentiles, a practice it considers incongruous and inappropriate given the nature of the fund's coverage, Milliman presents its best estimate of liabilities to the IPFCF Board.

Transfer of Funds

28. As noted above, based on the analysis in the attached Legislative Council memorandum, the absence of such a GPR sum sufficient appropriation may make the administration's proposal more vulnerable to a successful legal challenge. If the Committee adopts the Governor's recommendation to transfer funds from the IPFCF to the general fund, it could create a GPR sum sufficient appropriation to pay any portion of a claim for damages arising out of the rendering of health care services that the IPFCF is required to pay but is unable to pay because of insufficient moneys.

29. Also, the majority of the funds in the IPFCF are not cash on hand and would have to be liquidated to receive a cash amount. The fund may realize a loss or gain on the liquidation. The Committee could modify the Governor's proposal by including a provision that would require the state to repay in the 2007-09 biennium, or over a longer period, any amount of funding transferred from the IPFCF in 2005-07, including interest foregone and including losses resulting from liquidation.

30. Finally, the Committee could delete the provision from the bill in order to avoid a potential legal challenge, to avoid any potential adverse effects to the medical malpractice environment in Wisconsin, and to maintain the integrity of IPFCF's fund equity balance.

ALTERNATIVES

1. Adopt the Governor's recommendation to transfer $169,703,400 in 2005-06 and $9,714,000 in 2006-07 from the IPFCF to the health care quality improvement fund.

2. Modify the Governor's recommendation by creating a sum sufficient GPR appropriation to pay any portion of a claim for damages arising out of the rendering of health care

services that the IPFCF is required to pay but is unable to pay because of insufficient moneys.

3. Modify the Governor's recommendation to require that the state repay, from a GPR sum sufficient appropriation, the amount transferred from the IPFCF, including interest foregone and losses resulting from liquidating IPFCF assets, at an interest rate determined by the Wisconsin State Investment Board, over the following number of years:

a. 2 years from the end of the 2005-07 biennium.

b. 4 years from the end of the 2005-07 biennium.

c. 6 years from the end of the 2005-07 biennium.

4. Delete the provision.

Prepared by: Eric Ebersberger
Attachments

ATTACHMENT 1

Annual Provider Assessments[1]

Provider Types	2000-01	2001-02	2002-03	2003-04	2004-05
Physician Class 1[2]	$1,898	$1,538	1,461	1,534	1,227
Physician Class 2[3]	3,606	2,769	2,630	2,276	2,209
Physician Class 3[4]	7,877	6,385	6,063	6,366	5,093
Physician Class 4[5]	11,388	9,231	8,766	9,204	7,363
Nurse Anesthetist	475	378	359	377	302
Hospital -- per Occupied Bed	116	93	88	92	74
Nursing Home -- per Occupied Bed	22	17	16	17	13
Employees of a Partnership or Corporation					
Nurse Practitioner	475	385	365	384	307
Advanced Nurse Practitioner	664	538	511	537	430
Nurse Midwife	4,176	3,385	3,214	3,375	2,700
Advanced Nurse Midwife	4,365	3,538	3,360	3,528	2,822
Advanced Practice Nurse Prescriber	664	538	511	537	430
Chiropractor	759	615	584	614	491
Dentist	380	308	292	307	256
Oral Surgeon	2,847	2,308	2,192	2,301	1,841
Podiatrists -- Surgical	8,067	6,538	6,209	6,520	5,216
Optometrist	380	308	292	307	256
Physician Assistant	380	308	292	307	256

[1] These rates apply to providers having Wisconsin as their primary place of practice. Other rates apply to providers for whom Wisconsin is not their primary place of practice.

[2] Includes family or general practice physicians not performing surgery, and nutritionists.

[3] Includes family or general practice physicians performing minor surgery, and ophthalmologists performing surgery.

[4] Includes most types of surgeons, such as plastic, hand, general, and orthopedic.

[5] Includes obstetric and neurological surgeons.

Note: The listed assessments represent IPFCF assessments only and do not include malpractice insurance rates for coverage with limits of $1 million/$3 million. For example, in 2002 the average malpractice insurance premium for general surgeons in Wisconsin was $17,433.

ATTACHMENT 2

Wisconsin Injured Patients and Families Compensation Fund
Policy Years 1975-76 through 2004-05
as of September 30, 2004

Year	Fund Year* Assessments	Paid Indemnity in Calendar Period	Paid Indemnity Incidents that Occurred in in Fund Year as of 9/30/04	Number of Claims Paid for Incidents that Occurred in the Fund Year as of 9/30/04	Number of Outstanding Claims by Fund Year as of 9/30/04
1975-76	$3,037,000	$0	$5,713,000	16	0
1976-77	3,056,000	0	4,977,000	21	0
1977-78	1,351,000	360,000	9,160,000	24	0
1978-79	1,419,000	2,219,000	11,179,000	23	0
1979-80	2,396,000	1,832,000	21,652,000	37	0
1980-81	4,413,000	3,966,000	16,279,000	34	2
1981-82	4,671,000	3,740,000	22,976,000	45	1
1982-83	7,351,000	8,472,000	19,320,000	32	0
1983-84	10,272,000	13,227,000	19,574,000	34	0
1984-85	17,401,000	12,894,000	11,772,000	26	0
1985-86	32,705,000	7,959,000	54,440,000	42	0
1986-87	30,809,000	18,930,000	23,798,000	37	0
1987-88	33,280,000	25,184,000	41,884,000	23	0
1988-89	37,985,000	18,222,000	23,540,000	18	0
1989-90	43,279,000	22,366,000	25,796,000	24	0
1990-91	43,800,000	41,631,000	29,455,000	20	2
1991-92	42,199,000	26,056,000	38,402,000	19	1
1992-93	46,188,000	44,961,000	30,394,000	21	0
1993-94	51,200,000	18,537,000	51,121,000	21	1
1994-95	55,542,000	48,066,000	31,718,000	32	1
1995-96	50,535,000	40,045,000	15,450,000	13	3
1996-97	58,703,000	23,680,000	16,233,000	14	3
1997-98	50,363,000	25,625,000	8,671,000	5	1
1998-99	50,620,000	16,386,000	22,730,000	6	3
1999-00	47,640,000	48,672,000	10,600,000	4	3
2000-01	36,573,000	30,018,000	519,000	0	6
2001-02	29,750,000	30,361,000	1,250,000	1	4
2002-03	29,319,000	16,315,000	0	0	1
2003-04	31,603,000	18,882,000	0	0	0
2004-05	26,317,000	0	0	0	0
	$883,777,000	$568,606,000	$568,603,000	592	32

* Fund Year is the policy period beginning July 1 and Ending the following June 30

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: BOB LANG, DIRECTOR, LEGISLATIVE FISCAL BUREAU

FROM: Laura Rose, Deputy Director

RE: Injured Patients and Families Compensation Fund Issues

DATE: April 26, 2005

This memorandum discusses the following:

- The Governor's budget proposal from the 2003-05 Legislative Session on the Patient Compensation Fund (PCF).
- 2003 Wisconsin Act 111, which relates to the purpose and integrity of the PCF, and changed the name of the PCF to the "Injured Patients and Families Compensation Fund" (IPFCF).
- The Governor's current budget proposal on the IPFCF.
- Issues relating to the Governor's proposal.

2003-05 Budget Proposal on the Patient Compensation Fund

2003 Senate Bill 44, introduced by Governor Doyle on February 20, 2003, proposed the following changes to the PCF:

- Created subch. VIII of ch. 655, the health care provider availability and cost control fund. The purposes of the fund were to assist in the education and training of health care providers; ensure that Medical Assistance (MA) health care providers and providers for other health care programs established by this state receive sufficient reimbursement rates to retain their participation in the programs; and defray the cost of other health-related programs that the Secretary of the Department of Health and Family Services (DHFS) determines are effective in ensuring the availability of health care providers in this state, and controlling the cost of health care services.

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- Funded the health care availability and cost control fund with the transfer of $200,000,000 in fiscal year 2003-04 from the PCF to the health care provider availability and cost control fund.

- Established a sum-sufficient appropriation for the payment of any portion of a claim for damages arising out of the rendering of health care services that the PCF is required to pay under ch. 655 but that the PCF is unable to pay because of insufficient moneys.

- Provided for the administration of the health care availability and cost control fund by the State Investment Board.

The Joint Committee on Finance removed the proposal from the budget bill.

2003-05 Legislation Relating to the Patient Compensation Fund

In the 2003-05 Legislative Session, the Legislature passed Assembly Bill 487, which became 2003 Wisconsin Act 111.

2003 Wisconsin Act 111 does the following:

1. Changed the name of the PCF to the "Injured Patients and Families Compensation Fund (IPFCF)."

2. Specified that the IPFCF 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.

3. Specified that the IPFCF, including any net worth of the IPFCF, is held in "irrevocable trust" for the sole benefit of health care providers "participating in the fund" and proper claimants. The Act specified that any moneys in the IPFCF may not be used for any other purpose of the state.

Act 111 took effect on January 8, 2004.

2005-07 Budget Proposal on the Injured Patients and Families Compensation Fund

In the 2005-07 Budget Bill (2005 Assembly Bill 100), Governor Doyle proposes to transfer $169,703,400 in 2005-06 and $9,714,000 in 2006-07 from the IPFCF to the health care quality improvement fund (HCQIF), which would be created in the bill. The HCQIF would be a separate, nonlapsible trust fund, that would consist of these transferred funds, as well as $130,000,000 from the net proceeds of revenue obligation bonds backed by the state's excise taxes on alcoholic beverage, cigarette, and tobacco products; $250,000 annually from program revenues DHFS collects from health care providers; repayment of loans provided by the Health Care Quality and Patient Safety Board; and unanticipated general fund revenues received in the 2005-07 biennium, in an amount determined by the Department of Administration Secretary, that would otherwise be transferred to the budget stabilization fund.

The Governor's budget also proposes to create three segregated (SEG) revenue appropriations from the HCQIF to support MA benefit costs, as follows:

- Create a continuing appropriation, budgeted with $150,000,000 SEG in 2005-06 and $130,000,000 SEG in 2006-07 to support MA benefit costs.

- Create a sum sufficient appropriation, to which unanticipated general fund revenues received in the 2005-06 biennium, as described above, would be credited.

- Create an annual appropriation, budgeted with $9,703,400 in 2005-06 and $9,714,000 in 2006-07, to provide payments for direct graduate medical education, a major managed care supplement, a pediatric services supplement, rural hospital supplements, and an essential access city hospital supplement.

The bill repeals the sum sufficient appropriation and all of the statutory references to this appropriation on June 30, 2007.

The current purpose of the IPFCF is 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 IPFCF provides excess medical malpractice coverage for medical malpractice claims that exceed the provider liability limits of $1,000,000 per claim and $3,000,000 per policy year in the aggregate. Health care providers must obtain primary medical malpractice insurance up to the liability limits. The IPFCF is funded through annual assessments paid by providers and through investment income. Annual assessments are determined based on actuarial estimates of the IPFCF's loss liabilities. The State of Wisconsin Investment Board makes long-term investments for the IPFCF. As of June 30, 2004, the Investment Board reported net assets of the fund to be approximately $695,600,000.

The Governor's budget bill expands the purpose of the IPFCF to include all of the following new purposes:

- Ensuring the availability of health care providers in the state.

- Enabling the deployment of health care information systems technology for health care quality, safety, and efficiency, as referenced in the sections of the bill that would authorize the new Health Care Quality and Patient Safety Board to make grants and loans.

- Deploying health care information systems technology for health care quality, safety, and efficiency by the Board.

Issues Relating to Proposal

The following summarizes some possible issues that could be raised with respect to the Governor's proposal to rename the IPFCF, create additional purposes for the fund, and reallocate moneys from the fund for these new purposes.

1. *Taking of Property Without Due Process of Law.* Because 2003 Wisconsin Act 111 states that the IPFCF, including any net worth of the IPFCF, is held in "irrevocable trust" for the sole benefit of health care providers participating in the fund and proper claimants, and the moneys may not be used for any other purpose of the state, it is possible that the proposal to reallocate moneys from the IPFCF to

the HCQIF created in the Governor's budget bill may be considered to be a taking of property without due process of law.

The U.S. Constitution, Amendment Five, provides in part: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor."

In *Wisconsin Professional Police Association, Inc. v. Lightbourn*, 243 Wis. 2d 512, 627 N.W.2d 807 (S. Ct. Wis. 2001), Justice Prosser set forth the initial steps in analyzing a taking claim: whether a private property interest exists, and whether the private property has been taken. If private property is shown to have been taken, the next steps are to determine whether the property is taken for a valid public use, and whether just compensation is provided therefore. *Wisconsin Retired Teachers Assn. v. Employee Trust Funds Board*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997).

An accrued claim for medical malpractice is a property interest. *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, at 143 (S. Ct. 2000). An individual who receives a malpractice award has a property right in having the claim paid by the IPFCF if it exceeds the limits for which the liable health care provider is insured. If the Assembly Bill 100 proposal were to result in jeopardizing the payment of a claimant's award by the IPFCF, it could be seen as a taking of property without due process of law. The "taking" claim is somewhat strengthened by the fact that the sum sufficient appropriation that was included in the 2003-05 budget proposal to ensure payment of claims is not included in Assembly Bill 100.

It might also be possible to assert that participating IPFCF providers, if required to pay higher fees as a result of the Assembly Bill 100 proposal, had their property taken because they did not agree to fund the HCQIF, as created in Assembly Bill 100, with their IPFCF fees.

On the other hand, it could be argued that the cash reserves in the IPFCF are ***not*** private property. In *Great Lakes Higher Education Corporation v. U.S. Department of Education*, 911 F. 2d 10 (7th Cir. 1990), the cash reserves of the Great Lakes Higher Education Corporation (GLHEC), a private, nonprofit, corporation providing student loan guarantees, were found not to be "private property" for the purposes of the Fifth Amendment to the U.S. Constitution. 911 F. 2d 10 at 14. In that case, the U.S. Department of Education (DOE), after amendments to the statutes governing the agreements between student loan guarantee agencies such as GLHEC and DOE, recouped cash reserves from these agencies that it determined were excessive. The court said this recoupment of reserves was not a taking:

> The purpose and legal structure of Great Lakes places it in that borderline between the wholly public and wholly private instrumentality. The extensive federal regulation of the agency suggests its highly public nature .... In essence, Great Lakes is an intermediary between the United States and the lender of the student loan. The United States is the loan guarantor of last resort. Great Lakes assists the United States in performing that function. It cannot be compelled to perform that function, nor can it insist that its compensation for that service be irrevocably fixed. We, therefore, conclude that the reserve fund excess is not "private property" for purposes of the Fifth Amendment. 911 F. 2d 10, at 13-14.

If a court were to determine that private property interests exist in the IPFCF for claimants or payors, the next question is whether: (1) the proposal in Assembly Bill 100 to create a new fund in ch. 655 and transfer approximately $180,000,000 from the IPFCF reserves jeopardizes the payment of any accrued claims under the IPFCF; or (2) the proposal will result in an increase in IPFCF provider fees, and those fees are taken for a use not contemplated by ch. 655.

Several Wisconsin Supreme Court cases examined transfer of funds from state trust funds to other funds. A recent case, *Wisconsin Professional Police Association, supra*, held that legislation which authorized the transfer of funds from the one account in the Wisconsin Retirement System (the transaction amortization account or TAA) to the reserves and accounts in the fixed trust, which resulted in more benefits to some classes of fund participants over others, did not constitute a taking.

Another transfer at issue in *Wisconsin Professional Police Association* involved a distribution of $200,000,000 from the employer reserve to employers as a credit for employers against unfunded liabilities. The court stated that this was not an unconstitutional taking of property, nor was it an unconstitutional impairment of contract:

> The size of the employer reserve balance does not increase or in any way determine the contractual benefit to be received by participants. At best, the balance in the employer reserve may heighten the possibility of an increase in the formula multiplier or the benefit caps in a future vote by the state legislature.... No one in this litigation suggests that Act 11 abrogates the statutory and constitutional obligation of employers to fulfill benefit commitments to participants. These "benefits accrued" for "service rendered" are the essence of the property right enjoyed by participants. There is no taking of property or impairment of contract when everyone concedes that accrued benefits must be paid.... 243 Wis. 2d 512, at 602-603.

Other cases have found an unconstitutional taking upon a transfer from vested retirement funds. In *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549 (S. Ct. Wis. 1996), the court determined that it was an unconstitutional taking to give retirement service credits to district attorneys transferred from the Milwaukee County system to the state system and fund the transferred credits by transferring moneys out of the county pension fund, instead of paying for the credits with state moneys.

An unconstitutional taking was also found in *Wisconsin Retired Teachers Association, Inc. v. ETF Board*, 207 Wis. 2d 1 (S. Ct. Wis. 1997). In that case, a transfer from the retirement fund was authorized by the passage of a law that superseded the role of the ETF in making such transfers. In that case, 25% of annuitants received a special investment performance dividend as part of a $230 million distribution from the TAA, while 75% of annuitants received no dividend. This distribution violated many of the statutory provisions in ch. 40, and superseded the statutory role of the Employee Trust Fund in making these distributions.

2. *Impairment of Contract.* The proposal to reallocate moneys from the IPFCF to the HCQIF created in the Governor's budget bill may be considered to constitute an impairment of contract. If the IPFCF is contractually limited to paying part of health care provider liability for medical malpractice

claims to further the purpose of curbing the rising costs of health care by financing part of the liability, then using the funds for unrelated purposes could be deemed an impairment of contract.

Article I, Section 10 of the U.S. Constitution provides, in part, as follows: "No state shall...pass any...law impairing the obligations of contracts...." Article I, Section 12 of the Wisconsin Constitution, provides, in part, as follows: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed...."

The Wisconsin Supreme Court, in *Wisconsin Professional Police Association, supra*, stated that it usually follows a three-step methodology developed by the U.S. Supreme Court in analyzing impairment of contract claims: first, to inquire whether the challenged statute has operated as a substantial impairment of a contractual relationship; second, if the legislation is found to substantially impair a contractual relationship, whether there exists a significant and legitimate public purpose behind the legislation; and third, if such a public purpose exists, whether the challenged legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Wisconsin Professional Police Association*, 234 Wis. 2d 512, at 593-594.

In this case, health care providers required to participate in the IPFCF could possibly claim a contractual relationship with the state through the IPFCF: in return for payment of the mandated fees, the participating providers receive malpractice coverage for claims which exceed the amounts covered by their private malpractice insurance policies. If the Governor and the Legislature created a new purpose for ch. 655 after the establishment of the initial contractual relationship, these providers could assert that they did not agree to have their fees used for this broader statutory purpose.

If this proposal were to be enacted into law and subsequently challenged in court, the court would first analyze whether this change in the purpose of ch. 655 operated as a significant impairment of contract. In *Great Lakes Higher Education Corporation v. U.S. Department of Education, supra*, the court found no impairment of contract when the agreement between GLHEC and the U.S. DOE was altered by statutory amendments to permit the recoupment of cash reserves. However, in that case, the original enabling legislation specifically stated that GLHEC agreed to conform both to the existing federal statutes and regulations and to new obligations that Congress or the Secretary of Education might impose in the future. GLHEC consented to these terms in the insurance program agreement. 911 F. 2d 10, at 12.

In this case, the statutes governing the IPFCF do not mention that the health care providers participating in the IPFCF agree to be bound by new obligations that the Legislature might impose on the fund in the future. Of course, the Legislature is free to amend the purpose of the IPFCF at any time. However, it could be questioned whether reserves that were established under current law, especially those that have accrued since the law was changed under 2003 Act 111, may be bound by the new purposes proposed in Assembly Bill 100.

If a court found an impairment of contract, a court would then examine whether there is a significant and legitimate public purpose behind the legislation that allegedly gave rise to the impairment. The proponents would likely assert that using IPFCF reserves to supplement Medical Assistance costs essential to maintaining the participation of health care providers in the Medical Assistance program and to ensuring the availability of health care providers to serve low-income persons in this state. Alternatively, if the transfer of funds were to somehow result in an unacceptable fee

increase for participating providers that resulted in lessening the supply of providers, it could be argued that the proposal does not serve a significant and legitimate public purpose. However, it is beyond the scope of this memorandum to speculate on the effect of the proposal on IPFCF fees.

Finally, if an impairment of contract was found, but was justified by a legitimate public purpose, a court would examine whether the legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. It might also examine whether it is reasonable and appropriate to require mandatory IPFCF participants to supplement Medical Assistance costs with their fees, as well as funding the other purposes established under the HCQIP.

If you have any questions on the issues raised in this memorandum, please contact me directly at the Legislative Council staff offices. My telephone number is 266-9791.

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