[J-75A&B-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THE HOSPITAL & HEALTHSYSTEM ASSOCIATION OF PENNSYLVANIA, GEISINGER HEALTH SYSTEM, ST. VINCENT HEALTH CENTER AND ABINGTON MEMORIAL HOSPITAL	:	No. 20 MAP 2010
	:	Appeal from the Order of the Commonwealth Court at No. 522 MD 2009 dated April 15, 2010
v.	:	997 A.2d 392
THE COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE, THE TREASURY DEPARTMENT, AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	
APPEAL OF: COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: September 14, 2011
THE PENNSYLVANIA MEDICAL SOCIETY, ON BEHALF OF ITSELF AND ALL OF ITS MEMBERS	:	No. 21 MAP 2010
	:	Appeal from the Order of the Commonwealth Court at No. 523 MD 2009 dated April 15, 2010
v.	:	997 A.2d 392
THE COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE, THE TREASURY DEPARTMENT, AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	
APPEAL OF: COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: September 14, 2011

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: September 26, 2013**

The Pennsylvania Medical Society and Hospital & Healthsystem Association of Pennsylvania ("Appellees") began this action against the Department of Insurance and the Office of the Budget (collectively, "Commonwealth Parties") by filing petitions for review under the Medical Care Availability and Reduction of Error Act ("MCARE Act" or the "Act"), 40 P.S. § 1303.101 *et seq*., seeking a declaration that the transfer of $100 million from the Medical Care Availability and Reduction of Error Fund ("MCARE Fund" or the "Fund") to the Commonwealth's General Fund impaired Appellees' vested right in having existing MCARE Fund monies used exclusively for MCARE purposes, such that their right could not be infringed by the legislation directing the transfer. Appellees grounded their assertion of vested rights on the Due Process and Remedies Clauses. See U.S. CONST. amend. XIV; PA. CONST. art I, §§ 1, 9; and PA. CONST. art. I, § 11. The Majority appears to credit Appellees' argument that the nature of the MCARE Act created a vested entitlement to have the money in the Fund utilized in the manner directed by statute. The Majority also, however, holds that Appellees' vested rights are immaterial if the money transferred from the Fund represented a surplus, deems the existence of a surplus to be a material fact in dispute, and remands for factual development in this regard. Because I believe that Appellees have demonstrated that they have a constitutionally protected vested right to the monies in the MCARE Fund irrespective of whether there was a surplus, I would conclude that under the Remedies

Clause, the transfer of monies out of the Fund unconstitutionally impaired that vested right. Accordingly, I dissent from the Majority's remand.

Preliminarily, I note my agreement with Sections I and II of the Majority opinion. My disagreement is solely with Section III(A), addressing the merits of Appellees' vested rights argument, and Section IV, remanding on the basis of the Majority's analysis of this argument. Consequently, I would not reach Appellees' tax uniformity argument, which the Majority addresses in Section III(B).

As the Majority correctly observes, the MCARE Act created the MCARE Fund as a "special fund" in the Commonwealth's Treasury, which is administered by the Pennsylvania Department of Insurance and which pays damages awarded in medical professional actions in excess of the primary professional liability insurance MCARE requires that health care providers maintain. 40 P.S. §§ 1303.713(a), 1303.712(a). To be licensed to practice medicine in Pennsylvania, providers must maintain both private professional liability insurance and contribute to the MCARE Fund via annual assessments. Id. § 1303.712(d). When the Insurance Commissioner determines the private insurance market has the capacity to handle the professional liability requirements of health care providers, the MCARE Fund will, within a specified period from that determination, cease providing coverage and terminate. Id. §§ 1303.711(d)(3)-(4), 1303.712(c)(2). At that time, once all of the Fund's liabilities are satisfied, any money remaining in the Fund will be distributed to those health care providers who contributed to the Fund in the year preceding the distribution. Id. § 1303.712(k) ("Any balance remaining in the fund upon such termination shall be

returned by the department to the participating health care providers who participated in the fund in proportion to their assessments in the preceding calendar year.").

Appellees' vested rights argument, which the Majority rejects, is that these provisions of the MCARE Act created a vested right in physicians and hospitals in the MCARE Fund. They argue that Section 712 demonstrates that the creation of the MCARE Fund was the result of a legislative bargain that requires all money in the Fund to be used for MCARE purposes, 40 P.S. § 1303.712(a), requires participating health care providers to pay assessments into the MCARE Fund in order to be licensed, id. § 1303.712(d), and mandates the return of the balance of the Fund to participating health care providers who paid assessments the year prior to termination, id. § 1303.712(k).

The legal foundation for Appellees' vested rights argument is twofold: the Remedies Clause of the Pennsylvania Constitution, see PA. CONST. art. 1, § 11, and the Due Process Clauses of the Federal and Pennsylvania and Constitutions, see U.S. CONST. amend. XIV, PA. CONST. art. I, §§ 1, 9. As the Majority notes, these concepts are intertwined. The Majority chooses to address Appellees' argument in terms of due process rather than the Remedies Clause because we have often considered the Remedies Clause as being directed to protecting accrued causes of action and defenses, and Appellees do not contend that they have a cause of action that has been undermined by legislative action. Although the Majority is correct that we have considered the Remedies Clause as protecting accrued causes of action and defenses, I am persuaded by Appellees' argument that under these circumstances, a statutory guarantee can similarly be protected as a vested right.

The Remedies Clause guards and protects vested rights. See PA. CONST. art. 1, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."). Consequently, the law cannot retroactively impinge vested rights. See Konidaris v. Portnoff Law Assoc., 953 A.2d 1231, 1241 (Pa. 2008); Menges v. Dentler, 33 Pa. 495, 1859 WL 8742, at *4 (Pa. 1859) ("The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated."). See also Krenzelak v. Krenzelak, 469 A.2d 987, 991 (Pa. 1983) ("Traditionally, retrospective laws which have been deemed reasonable are those which 'impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and when prosecuted.'"); Gibson v. Commonwealth, 415 A.2d 80 (Pa. 1980) (holding that the reinstatement of sovereign immunity cannot be applied to accrued causes of action); Lewis v. Pennsylvania R.R. Co., 69 A. 821 (Pa. 1908) (refusing to apply retroactive legislation that reduced a defendant's defenses or exemptions from demands based on the concept of a vested right); Kay v. The Pennsylvania R.R. Co., 65 Pa. 269, 1870 WL 8539 (Pa. 1870) (refusing to apply a statutory limit on tort recovery retroactively to a cause of action that accrued prior to the passage of the statute).

Based on this concept of vested rights, I agree with the Commonwealth Court and Appellees that the statutory guarantee created by the MCARE Act accrued in Appellees a vested right to have monies in the MCARE Fund used for MCARE purposes. The passage of the MCARE Act reflected a legislative compromise resulting from concern for health care providers and victims of medical malpractice in the Commonwealth. In exchange for health care providers funding the MCARE Fund through their assessments, 40 P.S. § 1303.712(d), Pennsylvania assured access to affordable and reasonable professional liability coverage, see 40 P.S. § 1303.102, and, in furtherance of this objective, the MCARE Fund would be used exclusively to pay covered claims against participating health care providers, 40 P.S. § 1303.712(a); would be augmented by public money, 40 P.S. § 1303.712(m); and any excess funds would be returned to the health care providers who paid assessments the preceding year upon the termination of the Fund, 40 P.S. §1303.712(k).

Specifically, under Section 711(d), health care providers are, with certain exceptions, required to maintain minimum medical professional liability coverage and, under Section 712(d), to pay assessments into the MCARE Fund based upon the prevailing primary premium for each participating health care provider. Because providers have paid the required assessments into the MCARE Fund, the Fund has been able not only to pay all covered claims and otherwise meet its obligations, but also accumulated the $100 million surplus. This balance is comprised primarily of assessments from the health care providers in accord with the statutory funding formula in Section 712(d)(1), and accumulated under the legal compulsion that, absent formal participation, health care providers could not practice medicine in Pennsylvania. When

the providers made contributions to the Fund via assessments pursuant to Section 712(d), the law afforded them the right to have the monies in the Fund used for specific purposes or returned to them upon termination. The balance in the Fund that was depleted by the 2009 budget legislation was the accumulation of these assessments. Indeed, between 2002 and 2008, health care providers paid nearly $1.5 billion in assessments to the MCARE Fund for its administration and for the medical professional liability coverage this special fund was created to provide.

Additionally, the statutory language of Section 712(a) defining the purpose of the MCARE Fund is phrased in mandatory terms: "Money in the fund *shall be used* to pay claims against participating health care providers for losses or damages awarded in medical professional liability actions" within the Fund's coverage, to pay liabilities assumed from its predecessor, and for the administration of the Fund. 40 P.S. § 1303.712(a) (emphasis added). The Fund was created for this sole and exclusive purpose; it was never intended to be a source of general funding for the Commonwealth to deplete or use at will. At the time health care providers paid the assessments that resulted in the Fund's balance, the law granted them the right to have those assessments used exclusively for the benefit of the Fund, not as the Commonwealth might otherwise provide in the future.[1] The Commonwealth had the concomitant

[1] In this regard I observe, as the Majority Opinion and the Dissenting Opinion by Madame Justice Todd have done, that the Commonwealth Court has recently decided that the statutory assessment formula, 40 P.S. § 1303.712(d)(1), implicitly accounts for any surplus in the fund, and that any assessment calculation must, therefore, include any unspent balances from the prior year. See Hosp. & Healthsystem Ass'n v. Ins. Comm'r of Pa., 2013 WL 4033850. While I take no position on the propriety of this decision as review has been sought in the case, I view it as supportive of my position that any balance or surplus remaining in the Fund must be used for the benefit of the (…continued)

obligation to utilize the monies in the Fund in accord with the statutory purpose, which arose simultaneously with the inverse protection that the General Fund would not be subject to the MCARE Fund liabilities. 40 P.S. § 1303.712(l).

Moreover, any money remaining in the Fund upon termination is the property of certain health care providers. Section 712(k), also part of the MCARE Act since its inception, gave participating health care providers a vested right in the balance of the fund by mandating its return upon the Fund's termination to those providers who paid assessments the preceding year. 40 P.S. § 1303.712(k). This right is more than a mere expectation contingent on a future event; it is directly set forth in the statute. By stating unequivocally that health care providers are entitled to any remaining balance in the MCARE Fund upon termination, the MCARE Act granted a vested right in the balance of the Fund.

The language of the Act, particularly Section 712(a), (d), and (k), guaranteed that, for the life of the Fund, money therein was to be used solely for statutory purposes or returned to contributing providers thereafter without any statutory provision providing for the diversion of assessment funds to the Commonwealth's General Fund. All of these provisions created in the Commonwealth the obligation to preserve the Fund for MCARE purposes and to use it in accord with the narrow provisions of the Act. Appellees' right to have the assessment balance in the Fund used for MCARE purposes is vested. It is more than a mere expectation, and rises to the level of an accrued cause

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(continued…)
Fund and the health care providers, by reducing the assessments they are required to pay into the Fund and being returned to them upon dissolution of the Fund, rather than as a source of general budgetary revenue.

of action which cannot be infringed by the 2009 budget legislation. See Konidaris, 953 A.2d at 1242 (describing vested rights as follows: "It must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another.").

The Commonwealth's power to alter the entitlements that attach to completed transactions is limited by the constitutional protection afforded to vested rights. Ieropoli v. AC&S Corp., 842 A.2d 919, 930 (Pa. 2004); Menges, 33 Pa. 495, 1859 WL 8742, at *4. "This doctrine reflects the deeply rooted principles that persons should be able to rely on the law as it exists and plan their conduct accordingly and that the legal rights and obligations that attach to completed transactions should not be disturbed." Alliance of American Insurers v. Chu, 571 N.E.2d 672, 678 (N.Y. 1991) (citation omitted). The payment of assessments into the Fund under the statutory framework of the MCARE Act and the resulting accumulation of a positive balance represent a completed transaction; the legal rights and obligations that attach to the treatment of the surplus must align with the law as it existed when the balance accrued. The nature of the obligations explicitly undertaken by the Department of Insurance with respect to the Fund and the reasonable expectations of the participating health care providers created by the statutory scheme pursuant to which they made their contributions did not contemplate the diversion of funds for general revenue purposes. While the legislature may be able to amend the MCARE Act prospectively, it cannot retrospectively seize money already in the MCARE Fund at the time of the 2009 budget legislation.

I would therefore conclude that the participating health care providers' vested right to the use of MCARE Funds for MCARE purposes and to the balance of the MCARE Fund that accumulated under the law granting those rights may not be extinguished by subsequent legislation, and that by diverting the $100 million from the MCARE Fund pursuant to the 2009 budget legislation, the Commonwealth impinged the health care providers' right to have money in the Fund used for Fund purposes or returned to them upon termination. The 2009 budget legislation retroactively changed the conditions affecting assessments already paid and presently eliminated the health care providers' vested right in the accumulated surplus. Thus, I would hold that the 2009 budget legislation, with respect to the $100 million transfer, is invalid.[2]

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[2] Although not binding, I find the reasoning of the following cases supportive of Appellees' position: Wisconsin Med. Soc'y, Inc. v. Morgan, 787 N.W.2d 22 (Wis. 2010); Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Ass'n, 992 A.2d 624 (N.H. 2010); Alliance of Am. Insurers v. Chu, 571 N.E.2d 672 (N.Y. 1991). Although each of these cases presents factual and legal distinctions, they represent the reasoned opinions of their respective state's highest court holding that the legislature cannot grant rights and then, once those rights have accrued, take them away retroactively. See Morgan, 787 N.W.2d 22 (holding that where the Injured Patients and Families Compensation Fund was funded by annual assessments on physicians in exchange for excess medical liability coverage, the physicians had a vested right in the fund's surplus because it would either be returned to them in the form of lower assessments or reinvested for the fund's future security); Tuttle, 992 A.2d 624 (holding that where policyholders funded the Medical Malpractice Joint Underwriting Association with premium payments to provide coverage to all health care providers and accumulated a surplus which was statutorily required to be used to reduce payments or be distributed to policyholders, the transfer of that surplus from its intended purpose violated the policyholders' contractual rights), Chu, 571 N.E.2d 672 (holding that where insurers made contributions to the Property/Casualty Guaranty Fund when the law granted them the right to the income earned on those contributions and provided assurances that the contributions would be used only for the benefit of the fund, including the promise to keep the fund separate from other state monies, the contributions did not become state money to do with as the state wished but created in the state obligations to preserve the fund and to use its assets and earnings only for the narrow purposes set forth).

The Majority recognizes that the transfer of monies from the MCARE Fund to the General Fund is retrospective in nature because it attaches new legal consequences to assessments providers paid into the Fund in reliance on the MCARE Act, therefore raising due process concerns regarding the infringement of vested rights, and that providers retained a vested entitlement to have money in the Fund utilized in a manner directed by the Act. Maj. Slip Op. at 22, 24. The Majority holds, however, that whether the contested $100 million represented a surplus in the Fund is a fact that is material to the outcome of Appellees' due process/vested rights argument. Maj. Slip Op. at 25 (citing Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia, 44 A.3d 299, 305 (D.C. 2012); 81A C.J.S. States § 387 (2012); Daugherty v. Riley, 34 P.2d 1005 (Cal. 1934)). I am not persuaded by the Majority's legal analysis in this regard.

Respectfully, I find no support for the Majority's holding that the legislature retains authority to transfer any surplus of monies protected by vested entitlements. The Majority cites Washington, D.C. Ass'n of Realtors, 44 A.3d 299, Daugherty, 34 P.2d 1005, and 81A C.J.S. States § 387 (2012) (relying on Flynn v. Department of Admin., 576 N.W.2d 245 (Wisc. 1998)) in support of its argument. In my view, none are materially helpful. In Washington, D.C. Ass'n of Realtors, 44 A.3d at 303, although the court recognized that the legislature's authority to direct the transfer of monies from the disputed special fund to the general fund could be answered by determining whether the transfer would "contravene a specific constitutional provision controlling the fund or breach a contractual obligation," id., 44 A.3d at 305, the argument did not concern the assertion of constitutionally protected rights and was instead premised on an alleged violation of the Home Rule Act, D.C.Code §§ 1–201.01–1–207.71 (2001). In contrast,

Appellees' argument herein is premised on their constitutionally protected vested right to monies in the MCARE Fund.

Similarly, in Flynn v. Department of Admin., 576 N.W.2d 245 (Wisc. 1998), which is the primary source from which the Majority's authority is derived, see Maj. Slip Op. at 25 (citing 81A C.J.S. States § 387 (2012)), the disputed money was paid by court users as filing fees into the general fund with a portion credited to a court automation program. At the statutorily established termination of the program, the court automation appropriation carried a positive balance, and the legislature sought to utilize the balance for another purpose. The court validated the legislature's decision and rejected an argument that the legislative action violated public policy. Notably, there was no vested rights argument by a group of individuals who paid into the fund based on an express guarantee that they would receive the benefit of the fund and its surplus. Nor did the statute at issue contain any provision addressing a surplus, as the MCARE Act does at Section 1303.712(k).

Finally, in Daugherty, the California Supreme Court stated that although the legislature may utilize a surplus that exists in a special fund, if it transfers money from such a fund to the general fund, it is a loan that the legislature is required to repay to the special fund:

> What has been said is not to deny power upon the part of the Legislature to transfer a special fund reserve temporarily from one purpose to another under the authority of . . . the Political Code or other authority to like effect. But when these diversions are made the transfers are under the section deemed a loan from the special fund to be returned to that fund as soon as funds are available. This right of transfer established by [the Political Code] is specifically declared not to warrant the transfer of any money from any fund so as to interfere in any manner with the objects for which such fund was created.

34 P.2d at 1010. The court therefore held that the legislature could not establish a fund for one purpose, assess fees for that purpose, then permanently divert that money for a foreign purpose. Id. at 1011.

I am therefore unable to agree with the Majority that it is relevant whether the transferred funds represented a surplus, particularly considering that the distribution of the reserves upon the Fund's termination in accord with Section 712(k) precludes the possibility of such reserves being characterized as a surplus. I would instead accept Appellees' vested rights argument and affirm the Commonwealth Court. Therefore, I respectfully dissent.