

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0968

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

WILLIAM J. FABER, D.O.,

Petitioner-Respondent,

v.

JOSEPHINE W. MUSSER,
COMMISSIONER OF INSURANCE
AND BOARD OF GOVERNORS,
WISCONSIN HEALTH CARE
LIABILITY INSURANCE PLAN,

Respondents-Appellants.

APPEAL from an order of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Reversed and cause remanded with
instructions.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. The Board of Governors of the Wisconsin Health Care Liability Insurance Plan and Board Chair Josephine W. Musser (collectively, WHCLIP) appeal from an order by which the circuit court effectively reversed and remanded this ch. 227 appeal to WHCLIP. Under that order, WHCLIP has been instructed to reverse its administrative-level decision and process the application of respondent William J. Faber, D.O., for retroactive health care liability coverage and for "gap" insurance. Because we hold that WHCLIP is not obligated to provide insurance coverage of the type here at issue, we reverse.

ISSUE

This case involves the interaction of three statutory back-up insurance¹ schemes. The first, WHCLIP, exists to "provide health care liability insurance and liability coverage normally incident to health care liability for risks in this state which are equitably entitled to but otherwise unable to obtain such coverage." WIS. ADM. CODE § INS 17.25; *see* § 619.04, STATS.

The second, Wisconsin Insurance Security Fund (WISF), exists to "maintain public confidence in the promises of insurers by providing a mechanism for protecting insureds from excessive delay and loss in the event of liquidation of insurers and by assessing the cost of such protection among insurers" Section 646.01(2)(a), STATS. WISF, however, provides coverage only to a maximum of \$300,000. Section 646.31(4), STATS.

The third, Patients Compensation Fund (PCF), provides coverage for health care malpractice awards that exceed \$400,000. Section 655.27(1), STATS.

Thus, the statutory scheme may be summarized as follows: WHCLIP provides an insurance plan of last resort for those health care providers entitled to but unable to obtain liability coverage; WISF exists to fill

¹ By "back-up" insurance, we mean insurance schemes, created by statute, which are designed to operate when private market insurers fail to provide adequate coverage.

the breach left when a liability insurer goes into liquidation by providing coverage up to \$300,000; and PCF provides coverage when a medical malpractice award exceeds \$400,000. As is apparent, when WISF and PCF are harnessed in tandem, they do not provide full coverage but leave a \$100,000 "gap."

The issue in this appeal is which scheme, WHCLIP or WISF/PCF, is correctly invoked where an insurer has gone into liquidation leaving a health care practitioner without liability coverage and facing malpractice claims which may result in judgments of over \$300,000.

FACTS

For the period between January 1988 and December 1992, Faber, an osteopath and surgeon, obtained health care provider's liability insurance from Professional Medical Insurance Company of Kansas City, Missouri (Pro-Med). In October 1988, Pro-Med informed Faber that his policy would not be renewed. However, Pro-Med offered Faber extended noncancelable reporting coverage insurance (tail insurance), which Faber purchased.

In April 1994, as part of Pro-Med's subsequent bankruptcy, its deputy receiver informed Faber that his tail insurance policy was canceled. At that time, several outstanding claims were pending against Faber. Under § 646.31, STATS., defense of these cases was assumed by the Wisconsin Insurance Security Fund, to a statutory maximum of \$300,000 per claim. As noted above, under § 655.27(1), STATS., claims over \$400,000 are covered by the Patients Compensation Fund.

As a result of Pro-Med's bankruptcy, Faber requested WHCLIP to: (1) replace the canceled tail coverage policy; and (2) cover the \$100,000 "gap." Faber reasoned that his canceled Pro-Med policy would have provided both tail coverage and "gap coverage," and that because Pro-Med had gone into liquidation, he was "unable to obtain" either type of insurance. He argued that the statutory insurance scheme embodied in WHCLIP was properly invoked because he would be "unable to obtain" retroactive tail insurance, and because the \$100,000 gap left by the WISF/PCF scheme was otherwise uninsurable.

The circuit court agreed with Faber, and WHCLIP appeals. We reverse.

ANALYSIS

Faber's argument is facially attractive: WHCLIP exists to provide coverage where an eligible health care provider is otherwise "unable to obtain" coverage, and Faber is an eligible health care provider who is "unable to obtain coverage" because of Pro-Med's liquidation. As a result, according to Faber, WHCLIP should provide insurance. We reject the argument because it does violence to the overall statutory back-up insurance scheme under which WISF was created to provide coverage in situations where, as here, health care providers' liability insurers undergo liquidation.

It is a longstanding Wisconsin rule that where several different statutes might apply, they must be construed in a manner that will harmonize them, if possible. *City of Elroy v. LIRC*, 152 Wis.2d 320, 327, 448 N.W.2d 438, 441 (Ct. App. 1989). Were WHCLIP the only scheme embodying state-affiliated back-up insurance for health care providers, we might agree with Faber's and the circuit court's analysis. However, WISF exists specifically for the situation here presented, insurer liquidation, and PCF works in tandem with WISF where the now-uninsured health care provider faces possible exposure on pending claims that exceed WISF's statutory \$300,000 maximum.

We agree with Faber and the circuit court that WHCLIP provides much more complete coverage than WISF/PCF. Specifically, we acknowledge the \$100,000 "gap" between WISF and PCF. However, defects in the WISF/PCF scheme are irrelevant to the question of which scheme applies. The gap was created by the legislature, and it is for that body to remove it should it see fit to do so.

By the Court.—Order reversed and remanded for further proceedings consistent with this opinion.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.