

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY HAYES, M.D., et. al. : CIVIL ACTION  
Plaintiffs, :  
 :  
v. :  
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JOHN REED, et. al., : NO. 96-4941  
Defendants. :

MEMORANDUM AND ORDER

Yohn, J. October , 1997

The plaintiffs, eighteen physicians who practice medicine in Pennsylvania,<sup>1</sup> brought this suit against the defendants, in their official capacities, alleging that the CAT Fund certification procedures, initiated against the plaintiffs for failure to pay 1995 emergency surcharges for medical malpractice insurance in excess of basic coverage under the Health Care Services Malpractice Act, 40 P.S. § 1301.701 et seq. ("the Act"), violated the plaintiffs' procedural due process rights under the Fourteenth Amendment.<sup>2</sup> At trial on August 18,

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<sup>1</sup> The eighteen remaining plaintiffs in this case are as follows: 1) Timothy Hayes, M.D.; 2) Emerita Gueson, M.D.; 3) Gregory J. Lynch, M.D.; 4) George Isajiw, M.D.; 5) Alphonse DiGiovanni, M.D.; 6) Ellen Mahony, M.D.; 7) Louis A. Meier, M.D.; 8) Joseph M. McGuckin, M.D.; 9) Maureen Brennan-Weaver, D.P.M.; 10) Alberto J. Larrieu, M.D.; 11) Emely Karandy, D.O.; 12) Robert D. Greenhalgh, M.D.; 13) Steven M. Allon, M.D.; 14) Francis G. Kutney, M.D.; 15) Gary W. Muller, M.D.; 16) Reuben I. Ash, M.D.; 17) Paul H. Noble, M.D.; and 18) Lawrence J. Goren, M.D.

<sup>2</sup> This issue was stated in Count IA of the plaintiffs' original complaint filed in July, 1996. All the other issues in that complaint and in the plaintiffs' various supplemental and amended complaints (e.g., claims of violations of equal protection, substantive due process, and Pennsylvania's

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1997, the parties presented their evidence on this issue. After careful review of that evidence,<sup>3</sup> and the applicable law, the

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<sup>2</sup>(...continued)

Constitution and Administrative Agency Law, as well as claims of negligence, breach of fiduciary duty, and abuse of discretion) were dismissed by this court on March 13, 1997 and July 1, 1997 or have been withdrawn by plaintiffs.

At the August 18, 1997 hearing, the plaintiffs tried to raise for the first time two additional issues not previously raised in Count IA of their complaint: 1) that the Hearing Examiner who heard the evidence was not the same one who issued the final adjudicative decisions in violation of Morgan v. United States, 298 U.S. 468 (1936) and Commonwealth v. Stein, 546 A. 2d 36, 40 (Pa. 1988); and 2) that the CAT Fund's certification resulted in denial of CAT Fund insurance coverage for the non-paying plaintiffs without a hearing or opportunity to be heard in violation of the plaintiffs' procedural due process rights. The plaintiffs agreed that these issues had not been raised previously and sought leave to amend their complaint, conduct discovery and have a trial on them. The court agreed to allow plaintiffs to file a motion to amend the complaint and at the plaintiffs' request to defer a decision on the Count IA issue until a decision had been made on the motion to amend the complaint. Plaintiffs were given until October 2, 1997 to file such a motion and did not do so.

A complete procedural history of this case appears in the opinions mentioned above.

<sup>3</sup> The evidence submitted in this case is extensive and includes the following:

1. Transcripts from the plaintiffs' hearings in front of Hearing Examiner Winnek-Shawer on July 23, 1996 and September 10-12, 1996.
2. Various correspondences among the plaintiffs, the CAT Fund, and the BPOA including:
  - a. The CAT Fund's "green letters" warning the plaintiffs of certification;
  - b. The BPOA's letters notifying the plaintiffs of certification;
  - c. The BPOA's Notices and Orders to Show Cause for the plaintiffs;
  - d. The plaintiffs' answers;
  - e. Several additional letters among the plaintiffs, the CAT Fund, the BPOA and the

(continued...)

court makes the following findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure:

## I. FINDINGS OF FACT

### A. Background

The plaintiffs are health care providers licensed by the Commonwealth of Pennsylvania. See 40 P.S. § 1301.101 et. seq. Defendant, the Medical Liability Catastrophe Loss Fund ("the CAT Fund"), is an executive agency of the Commonwealth of Pennsylvania. Currently, the Director of the CAT Fund is John Reed, who was appointed by Governor Ridge on July 3, 1995.

The Commonwealth of Pennsylvania Insurance Department is an executive agency of the Commonwealth of Pennsylvania. Its current Commissioner is Linda Kaiser who has been Commissioner of the Insurance Department since January 1, 1995.

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<sup>3</sup>(...continued)  
Governor's Office.

3. Administrative records (e.g., Orders to Show Cause, Adjudicative Orders) of various non-plaintiffs including Dr.'s Bakare, Howard, Levin, Navarro, Reitano and Vergara.

4. Transcripts from the Commonwealth Court Injunctive Hearings on 1/21/95 and 6/27/96 (Judge Kelton).

5. Transcript from the Federal Court Injunctive Hearing on 8/29/96 (Judge Yohn).

The Bureau of Professional Occupational Affairs (BPOA) is a bureau of the Department of State of the Commonwealth of Pennsylvania.

Defendants, the State Board of Medical Education and Licensure, the State Board of Osteopathic Examiners and the State Board of Podiatry Examiners ("the Boards") have the authority to revoke, suspend, limit or otherwise regulate the licenses of physicians, issue reprimands, fines . . . ." 40 P.S. § 1301.901.

The CAT Fund is statutorily empowered to provide excess medical malpractice insurance to Pennsylvania health care providers. Pursuant to the Act in effect at the time relevant in this case, all health care providers were required to carry two hundred thousand dollars of primary medical malpractice insurance coverage, which was provided by private insurance carriers. The CAT Fund then supplied an additional one million dollars of coverage per health care provider per occurrence under the Act. See 40 P.S. § 1301.701 (a)(1)(I), (e)(1).

Through annual surcharges, proposed by Director Reed and approved by Commissioner Kaiser, the CAT Fund collected funds from Pennsylvania health care providers, including plaintiffs, for the purpose of maintaining a fund sufficient to pay all final awards, judgments and settlements on medical malpractice claims. 40 P.S. § 1301.701 (e) (2).

B. The 1995 Emergency Surcharge & Prosecution of Plaintiffs

At or about the time Reed became Director of the CAT Fund, it had a \$ 107 million deficit. To ameliorate the deficit, Reed and Kaiser approved the levying of a sixty-eight percent (68%) emergency surcharge upon all Pennsylvania health care providers, including the plaintiffs, payable on December 1, 1995. This emergency surcharge was instituted pursuant to 40 P.S. § 1301.701 (e)(3).<sup>4</sup> The imposition of the emergency surcharge was published in the September 30, 1995 Pennsylvania Bulletin.

The amount of the emergency surcharge was based on a percentage of each physician's primary coverage.<sup>5</sup> Generally, the emergency surcharge amounted to several thousand dollars.

The plaintiffs all failed to pay the 1995 emergency surcharge by December 1, 1995. In early 1996, pursuant to 40 P.S. § 1301.701 and 49 Pa. Code § 16.33, Reed began to "certify" the plaintiffs for their failure to pay the emergency

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<sup>4</sup> See 40 P.S. § 1301.701 (a)(1)(I) ("A health care provider . . . who conducts more than 50% of his health care business or practice within the Commonwealth of Pennsylvania . . . shall be entitled to participate in the fund."); 40 P.S. § 1301.701 (e)(1) ("The fund shall be funded by the levying of an annual surcharge . . . on all health care providers entitled to participate in the fund."); 40 P.S. § 1301.701 (e)(3) ("[The Commissioner shall have the authority . . . if the funds would be exhausted by the payment in full of all claims . . . to determine and levy an emergency surcharge on all health care providers then entitled to participate in the fund].").

<sup>5</sup> "Such emergency surcharge shall be the appropriate percentage of the cost to each health care provider for maintenance of professional liability insurance necessary to produce an amount sufficient to allow the fund to pay in full all claims determined to be final as of August 31, 1981 and August 31 of each year thereafter and the expenses of the office of the director, as of December 31, 1980 and December 31 of each year thereafter." 40 P.S. § 1301.701 (e) (3)

surcharges.<sup>6</sup> The first step in this process was the sending of a "green" letter from the CAT Fund to the physicians which read as follows:

The records of the Medical Professional Liability Catastrophe Loss Fund indicate that you are not in compliance with the requirements of the Health Care Services Malpractice Act, based upon your non-payment of the Emergency Surcharge.

As a consequence of your default, the Fund is statutorily required to make certification to the appropriate licensing authority who will then schedule a formal disciplinary hearing which may result in the suspension or revocation of your license to practice medicine.

You will be formally notified by the appropriate licensing authority of the time and place of that hearing on this alleged violation by a citation and order to show cause.

Between December, 1995 and February, 1996, the CAT Fund sent this letter to all the plaintiffs.

Karen Smith, the CAT Fund Compliance Coordinator at the time, testified that because the plaintiffs did not make payment to the CAT Fund within twenty days of the green letter, she

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<sup>6</sup> "The director shall issue rules and regulations consistent with this section regarding the establishment and operation of the fund including all procedures and the levying of payment and collection of the surcharges . . . ." 40 P.S. § 1301.701 (e) (4); "The failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board." 40 P.S. § 1301.701 (f); "The Director of the [CAT Fund] will furnish the Board office with a certification of the names of those licensed physicians and surgeons who are not in compliance with [the Act] or have not demonstrated compliance. Upon receipt of the certification, the Board will forward a letter to the physician requiring him [sic] to either furnish sufficient evidence of compliance to the [CAT Fund] or to request a hearing." 49 Pa. Code § 16.33.

certified them to the BPOA. (N.T. 9/12/96, Meier Hearing, at 110-11). She did this by forwarding a list of the plaintiffs to the BPOA. (N.T. 9/12/96, Meier Hearing, at 113-14, 119-20).

The BPOA then sent a second letter to the plaintiffs informing them that the CAT Fund had "certified" to it and the appropriate Boards that they had not paid their 1995 emergency surcharge. Specifically, the letter notified the plaintiffs that in order to avoid suspension or revocation of their licenses, they had twenty days to do one of the following: 1) pay the past due amount to their insurance carriers; 2) if payment had been made or an error existed, resolve the matter with the insurance company and the CAT Fund; or 3) request a hearing.

In response to the BPOA letter, none of the eighteen plaintiffs paid their 1995 emergency surcharge or agreed to make arrangements to pay it.

Consequently, in March and April, 1996, the BPOA issued Administrative Notices and Orders to Show Cause. These documents were the equivalent of formal complaints which put the plaintiffs on notice that an administrative disciplinary action had been started against them. They specifically alleged that the plaintiffs failed to pay the 1995 CAT Fund emergency surcharge and warned that the plaintiffs could lose their licenses and be fined up to one thousand dollars. They also provided notice about the plaintiffs' 1) right to defend; 2) right to present evidence in mitigation; 3) right to be represented by an attorney; 4) rights under the Administrative Agency Law; 5) right

to file an answer within 20 days; 6) right to a hearing where the plaintiffs could "appear, with or without counsel, offer testimony or other evidence on their behalf, and confront and cross-examine the Commonwealth's witnesses"; and 7) rights if no action were taken.

In response to the Orders to Show Cause, the plaintiffs filed answers. In the answers, or in other correspondences with the BPOA, the plaintiffs admitted the factual allegations averred in the Orders to Show Cause (i.e., the failure to pay the emergency surcharge).<sup>7</sup>

After the pleadings were filed, the plaintiffs were notified that hearings were to be conducted before a Hearing

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<sup>7</sup> The plaintiffs' answers primarily objected to jurisdiction and asserted that participation in the Fund was voluntary, that the Fund was grossly mismanaged, and that the plaintiffs' certification denied them procedural due process. In response to the plaintiffs' answers, the Commonwealth argued that the Boards had appropriate jurisdiction, that participation was mandatory, that the Fund was not grossly mismanaged, and that the plaintiffs were not deprived of due process.

Several plaintiffs also wrote letters directly to Karen Stevens, the prosecuting attorney in the BPOA. The subject matter and tone of these correspondences varied greatly. For example, Isajiw wrote two letters requesting a hearing, stating that his non-payment was due to financial hardship, and requesting that he be allowed to pay in installments because he was unable to borrow commercially. DiGiovanni requested a hearing and complained that the surcharge forced him to abandon his surgical practice. Greenhalgh protested the imposition of the surcharge, stated that he would not pay it, and highlighted the on-going litigation about it. Muller requested a hearing and explained that he unsuccessfully tried to get financing for the payments. Noble and Goren stated that they were very unhappy about the surcharge because there was no explanation accompanying it.

Examiner in Harrisburg.<sup>8</sup> That notice read in pertinent part as follows:

At the hearing, evidence will be received concerning the allegations set forth in the Order to Show Cause and/or any evidence in mitigation . . . . The Respondent shall appear in person at the hearing and may be represented by counsel. The Respondent has the right to produce witnesses and evidence on his [sic] behalf, to have subpoenas issued on his [sic] behalf for the production of witnesses and documents, and to cross-examine witnesses and examine evidence produced against him [sic]. At the conclusion of the hearing, the hearing examiner shall make a determination as to what, if any, disciplinary action should be imposed.

Hearings on the plaintiffs' failure to pay the emergency surcharges took place in Harrisburg on or about July 23, 1996 and September 10-12, 1996 in front of Hearing Examiner Winnek-Shawer.<sup>9</sup> Daniel Gray, Esq., represented the plaintiffs and, in all but one case, Karen Stevens, Esq., represented the BPOA. The plaintiffs testified on direct and on cross-examination, and in some instances other witnesses testified as well. (N.T. 9/12/96, Meier Hearing, at 109-120)(Karen Smith's Testimony).

As in their pleadings, the plaintiffs all admitted to failing to pay the emergency surcharge, although they gave

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<sup>8</sup> The Boards may appoint hearing examiners who have the power to conduct full evidentiary hearings, including issuing subpoenas, administering oaths, and gathering written or oral testimony. See 40 P.S. § 1301.902, 904.

<sup>9</sup> Hayes' hearing took place in May, 1996. Gueson, Goren and DiGiovanni's hearings took place on July 23, 1996. The rest of the plaintiffs' hearings took place on September 10-12, 1996.

differing reasons for doing so. Some explained that their financial situations were precarious (usually because of lack of clientele, poor reimbursements from Medicare and HMO's and high debt load), and therefore, they could not afford to pay the emergency surcharges. (N.T., Isajiw, DiGiovanni, Mahoney, Brennan-Weaver, Karandy, Kutney). Others testified that they did not pay the fine because they objected to it in principle or they believed that the Commonwealth had improperly handled its imposition. (N.T., Lynch, Meier, McGuckin, Greenhalgh). Others testified that they did not pay the surcharge because they were confused by the Commonwealth's instructions as to payment. (N.T. Noble, Goren).

### C. Adjudications and Appeals

The Hearing Examiner issued her findings in the form of "Adjudication[s] and Order[s]." <sup>10</sup> On August 14, 1996, she suspended Goren for fourteen (14) days and imposed a \$ 460.00 fine. On August 21, 1996, Goren paid his emergency surcharge in full. On September 24, 1996, he filed with the Board an application for review of the Hearing Examiner's Order which was

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<sup>10</sup> Hearing Examiner Winnek-Shawer presided over the hearings of Hayes and Goren and issued their respective Adjudications and Orders. Although she also presided over the other sixteen plaintiffs' hearings, she retired soon after they were concluded, and Hearing Examiner Suzanne Rauer issued the Adjudications and Orders as to all of them, except Francis Kutney. Kutney's Adjudication and Order, although practically identical to the others, was issued by Hearing Examiner Frank C. Kahoe, Jr.

granted by the Board on October 4, 1996.<sup>11</sup> After holding a hearing, the Board determined that because Goren had paid his surcharge immediately after the Hearing Examiner's decision, an active suspension was not necessary.<sup>12</sup>

On May 21, 1996, the Hearing Examiner found Hayes to be in non-compliance and suspended his medical license for two weeks and fined him \$ 1,600.00. On July 15, 1996, Hayes filed with the Board an application for stay of the Hearing Examiner's Order which was granted by the Board on September 12, 1996. By Order dated September 11, 1996, the Board authorized Hayes to file additional documentary evidence, which was filed with his brief on October 1, 1996. After considering the evidence, the Board affirmed the Hearing Examiner's decision although it stayed Hayes' two week suspension. There is nothing in the record as to

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<sup>11</sup> If application for review is made to the Board within 20 days from the date of any decision made as a result of a hearing held by a Hearing Examiner, the Board shall review the evidence, and "if deemed advisable by the [B]oard, hear argument and additional evidence." See 40 P.S. § 1301.905 (a). As soon as practicable, the Board "shall make a decision and shall file the same with its findings of facts on which it is based and send a copy thereof to each of the parties in dispute." See 40 P.S. § 1301.905 (b).

<sup>12</sup> In its December, 1996 Adjudication and Order, the Board stated: "Respondent's delayed payment adversely effects the CAT Fund's solvency. Therefore, some period of suspension is in order. However, in light of the asserted confusion about the nature of the bill Respondent received from his insurer, Respondent's alleged attempts to rectify the problem and his payment of the emergency surcharge after Hearing Examiner's Order, the Board believes an active suspension is not necessary in this case." See December 18, 1996 Goren Adjudication and Order.

whether Hayes has appealed this decision to the Commonwealth Court.

As for the remaining plaintiffs, all were technically suspended by the Hearing Examiner for failing to pay the emergency surcharge, although their respective punishments varied significantly. Several proved that their failure to pay was the result of financial inability, and therefore, their suspensions, although "indefinite," were stayed in favor of probation, which was to continue until they paid their emergency surcharges. See, e.g., June 30, 1997 Adjudication and Orders of Gueson, Brennan-Weaver, Kutney and Mahoney. A payment plan was imposed which allowed these plaintiffs to pay the emergency surcharge in installments. See id. <sup>13</sup>

As for the plaintiffs who attempted to prove financial hardship, but who did not present sufficient evidence proving such, or who defended on grounds of "principle," they were given active suspensions by the Hearing Examiner which were to last

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<sup>13</sup> For example, in the case of Brennan-Weaver, the Hearing Examiner concluded: "Because of Respondent's limited income, and her relatively large emergency surcharge[], the prosecuting attorney recommended that Respondent's license to practice podiatry in the Commonwealth be suspended indefinitely, that Respondent pay a set amount to the CAT Fund directly on an installment payment plan until such time as her 1995 emergency surcharge is paid in full, that the indefinite suspension of her license be stayed in favor of probation until such time as the 1995 emergency surcharge is paid in full, and that in the event Respondent defaults on the installment payment plan the indefinite suspension of her license will be activated until such time as her 1995 emergency surcharge is paid in full. . . . The hearing examiner agrees that the prosecuting attorney's recommendation in this matter is appropriate." June 30, 1997 Brennan-Weaver Adjudication and Order at 13-14.

until payment in full of the emergency surcharge but not to last less than 60 days. See June 30, 1997 Adjudication and Orders of Lynch, Isajiw, DiGiovanni, Meier, McGuckin, Larrieu, Karandy, Greenhalgh, Allon, Muller, Ash, and Noble.<sup>14</sup>

Pursuant to 40 P.S. § 1301.905, plaintiffs Gueson, Lynch, Isajiw, DiGiovanni, Mahony, Meier, McGuckin, Brennan-Weaver, Larrieu, Karandy, Greenhalgh, Allon, Kutney, Muller, Ash and Noble filed with the Board applications for review of their suspension orders. Along with these applications for review, they filed requests for stays of their suspension orders, to the extent they had not been stayed already. On July 25, 1997, Hearing Examiner Rauer denied these plaintiffs' requests for stays and, on August 13, 1997, the respective Boards did the same. The Boards have not yet conducted hearings or reviewed the suspensions of these plaintiffs.

#### D. Other Proceedings

Although the plaintiffs in this case were all suspended in some form or another by the Hearing Examiner, not all

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<sup>14</sup> For example, in the case of Larrieu, the Hearing Examiner concluded: "Based upon Respondent's own testimony, it is clear that he chose, for whatever reason, to expend his available funds on other obligations while not paying the surcharge. It was Respondent's choice to disregard the law, and for that Respondent must suffer the legislatively mandated consequences set forth in [the Act], which require suspension or revocation of Respondent's license to practice medicine in the Commonwealth." June 30, 1997 Larrieu Adjudication and Order at 14.

physicians certified by the CAT Fund and prosecuted by the BPOA have been suspended. The record is replete with examples of non-plaintiff physicians who were certified to the BPOA yet were able to avoid suspension altogether because they had either paid the emergency surcharge or had a legitimate reason for not doing so. For example, in November, 1996, Hearing Examiner Winnek-Shawer found Dr. Ayodeji O. Bakare not guilty of violating the Act when he paid the 1995 emergency surcharge late. Since "no testimony was given" at his hearing, no punishment whatsoever was inflicted. See November, 1996 Bakare Adjudication and Order. In August, 1996, Hearing Examiner Winnek-Shawer found Dr. Hedy Anita Howard not guilty of violating the act because she moved to Maryland and therefore the emergency surcharge did not apply to her. See August 2, 1996 Howard Adjudication and Order. In September, 1996, Hearing Examiner Winnek-Shawer found Dr. Harvey Levin not guilty of violating the Act because at the hearing he successfully proved that he was disabled. Thus, no surcharge payment was required. See September 24, 1996 Levin Adjudication and Order. In February, 1996, Hearing Examiner Winnek-Shawer found Dr. Roberto Navarro not guilty because he successfully proved 1) he had made a good faith attempt to cancel his insurance policy; 2) he was in bankruptcy; and 3) he no longer practiced medicine as of August, 1995. See February 18, 1997 Navarro Adjudication and Order. In January, 1997, Hearing Examiner Winnek-Shawer found Dr. John Reitano not guilty because he had actually paid the emergency surcharge and there had been

confusion as to the payment of the disputed surcharge. See January 28, 1997 Reitano Adjudication and Order. Finally, in August, 1996, Hearing Examiner Frank Kahoe, Jr., withdrew Dr. Roberto Versage's Order to Show Cause, upon motion of the BPOA, because he had already paid the surcharge and no longer practiced in Pennsylvania. See August 20, 1996 Versage Order.

## II. CONCLUSIONS OF LAW

The plaintiffs' procedural due process claim, as set forth in Count IA of their original complaint, is as follows:

The CAT Fund and Insurance Department provided no reasonable notice and opportunity to Plaintiffs or other health care providers for a hearing before such certification, and the State Licensing Boards lack any discretion, and as a matter of Pennsylvania law, must suspend or revoke professional licenses once certification has occurred regardless of the sham notice and hearing with which they provide Plaintiffs.

Accordingly, any notices given by the State Licensing Boards, or "hearings" or proceedings held by the State Licensing Boards, are a sham because the outcome of such hearings is preordained by statute, custom and practice before such notice or hearings are provided, and do not provide notice and a reasonable opportunity for a hearing which complies with due process before Plaintiffs are condemned.

Because those "after the fact" notice and hearings are a sham with a predetermined outcome . . . they violate the due process rights of all Plaintiffs who have suffered certification.

(Comp. ¶83-¶85).

It is undisputed that the plaintiffs' licenses to practice medicine are property interests sufficient to invoke due process protections. See, e.g., Barry v. Barchi, 443 U.S. 55, 64

(1979). "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Procedural due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest. See Mathews v. Eldridge, 424 U.S. 319 (1976); Pennsylvania Coal Mining Ass'n v. Insurance Dept., 370 A. 2d 685 (Pa. 1977); Pennsylvania Bar Association v. Commonwealth of Pennsylvania, 607 A. 2d 850 (Pa. Commw. 1992). The fundamental requirements of due process are notice and a meaningful opportunity to be heard, but the "concept is flexible, calling for procedural protection as dictated by the particular circumstance." Harris v. City of Philadelphia, 47 F. 3d 1333, 1338 (3d Cir. 1995); Kahn v. United States, 753 F. 2d 1208, 1218 (3d Cir. 1985); Hahalyak v. A. Frost, Inc., 664 A. 2d 545 (Pa. Super. 1995).

The license suspension procedures at issue here are governed by the Act, see 40 P.S. § 1301.701, the Administrative Agency Law, see 2 Pa. Cons. Stat. Ann. § 501-508, 701-704, and the General Rules of Administrative Practice and Procedure, see 1 Pa. Code §§ 31.1-35.251, which provide plaintiffs:

1. notice of the law;
2. notice of the hearings;

3. appointment of an impartial hearing examiner;
4. the right to a hearing (40 Pa. Cons. Stat. Ann. § 1301.902);
5. the right to make a record before a Hearing Examiner;
6. the right to seek review by the appropriate Licensing Board, which may receive argument and additional evidence (40 Pa. Cons. Stat. Ann. § 1301.905);
7. the right to review of the Board's decision by the Commonwealth Court. (2 Pa. Cons. Stat. Ann. § 704).<sup>15</sup>

Thus, the main question here is whether the procedures provided by the Acts, and administered by the CAT Fund, the BPOA, the Hearing Examiners and the Boards, satisfy the fundamental elements of due process, namely notice and opportunity to be heard.

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<sup>15</sup> "The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may under any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals)." 2 Pa. Cons. Stat. Ann. § 703.

Applying Mathews' three criteria, the court finds by clear and convincing evidence that the certification procedures used here by the CAT Fund were more than adequate. With regard to Mathews' first prong, the CAT Fund certification was clearly not an adjudication which in any way affected the plaintiffs' private rights to practice medicine. In contrast, as the record makes clear, it was merely a notification, a mechanism by which disciplinary proceedings were initiated only if the plaintiffs failed to clear up their non-payment problems. As the Hearing Examiner correctly pointed out:

Respondent's argument that the CAT Fund's certification to the Board that Respondent failed to pay the 1995 emergency surcharge is an 'adjudication' pre-determining the Board's disciplinary action against Respondent's license is also not persuasive. . . .The issue before the hearing examiner is whether Respondent violated the [Act] by failing to pay the 1995 emergency surcharge. . . . The CAT Fund's certification of non-payment was the instrument that initiated administrative disciplinary proceedings by the Board. Due process rights are protected when Respondent is made sufficiently aware of the charges against him and the procedures by which he can defend himself. Respondent had all due process to which he was entitled in this administrative forum, as is evidenced by the record in this matter.

(Def's Exh. C.)(citations omitted and emphasis added).

As for the second prong, CAT Fund certification presented no risk of an erroneous deprivation of the plaintiffs' licenses. As the record makes clear, if they had already paid the surcharge, or had a legitimate reason for non-payment, plaintiffs had ample opportunity to present such evidence to the Hearing Examiners and to the Boards. If unsuccessful there, they

were able to appeal their case to the appellate courts of the Commonwealth. See 2 Pa. Cons. Stat. Ann. § 704.<sup>16</sup> No additional or alternate safeguards would have better protected the plaintiffs' interests.

Finally, with regard to the third prong, the interests of the Commonwealth weigh firmly against holding hearings before certification. The CAT Fund's mandate is to provide excess medical malpractice insurance to health care providers and to maintain a fund for the purpose of adjusting malpractice claims. See 40 P.S. § 1301.101 et seq. It has neither the statutory power nor the administrative ability to fulfill this mandate while at the same time holding full-evidentiary hearings. Moreover, to do so would likely unnecessarily impinge (i.e., delay) its attempt to raise enough funds to keep the CAT Fund in the black and to ensure that victims of medical malpractice are properly compensated.

In sum, the CAT Fund's certification procedures were procedurally adequate. Through certification, the plaintiffs were properly notified of their failure to pay the emergency surcharge and were given ample opportunity to correct any certification errors. Thus, the fact that there were no hearings prior to certification does not present a due process violation.

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<sup>16</sup> Plaintiffs have already utilized this forum. See Gueson v. Reed, 679 A. 2d 284, 285 (Pa. Commw. 1996) (where the Commonwealth Court denied their application for a preliminary injunction).

The Boards' hearings (including the Hearing Examiners') also satisfied due process. Contrary to plaintiffs assertions, see Plaintiffs' Findings, at 44, the hearings were not "shams" whose outcomes were pre-determined by the fact that the CAT Fund certified the plaintiffs' non-compliance to the Board. Rather, the outcomes were determined upon the plaintiffs' admitted failure to pay the emergency surcharge even though they were statutorily required to do so. The wording of the statute is quite clear--failure to pay the emergency surcharge by those who conduct more than fifty percent of their practice in Pennsylvania will result in suspension of the plaintiffs' licenses.<sup>17</sup> Since they admitted failing to pay and practicing more than fifty-percent in Pennsylvania, they were liable under the Act and suspensions were in order.

Even still, the hearings did not have pre-determined outcomes. The record reveals that they provided a meaningful opportunity for the plaintiffs to put forth reasons why they

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<sup>17</sup> See 40 P.S. § 1301.701 (a)(1)(I) ("A health care provider . . . who conducts more than 50% of his health care business or practice within the Commonwealth of Pennsylvania . . . shall be entitled to participate in the fund."); 40 P.S. § 1301.701(e)(1) ("The fund shall be funded by the levying of an annual surcharge . . . on all health care providers entitled to participate in the fund."); 40 P.S. § 1301.701 (e) (3) ("[The Commissioner shall have the authority . . . if the funds would be exhausted by the payment in full of all claims . . . to determine and levy an emergency surcharge on all health care providers then entitled to participate in the fund."); 40 P.S. § 1301.701 (f) ("The failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board.").

failed to pay, namely that they were financially unable to do so. If they were successful in this regard, and several were, they were given stayed suspensions and probation. See, e.g., June 30, 1997 Kutney Adjudication and Order (staying suspension because of her precarious financial position and disproportionately high surcharge and imposing probation and an installment payment plan). At least one successful plaintiff was not given probation at all. See, e.g., December 18, 1996 Goren Adjudication and Order. However, if the plaintiffs were unsuccessful in this regard, they were given active suspensions until they paid the emergency surcharge. See, e.g., June 30, 1997 Muller Adjudication and Order.

The fact that other non-plaintiff physicians were able to avoid suspension altogether even though they too were certified by the CAT Fund certainly bolsters the conclusion that suspension after certification was never a *fait accompli*. See, e.g., August 21, 1996 Vergara Order Withdrawing Order to Show Cause (successfully proved his prior payment before the hearing); February 17, 1997 Navarro Adjudication and Order (successfully proved he was bankrupt and not practicing); August 2, 1996 Howard Adjudication and Order (successfully proved she had moved to Maryland and was no longer working in Pennsylvania); October 1, 1996 Levin Adjudication and Order (successfully proved he was disabled).

Thus, it is clear from the record that from CAT Fund certification to Board suspension, plaintiffs were afforded

adequate due process. Therefore, the court will not, as plaintiffs request, see Plaintiffs' Findings, at ¶ 176, declare the license suspensions null and void and/or enjoin future license suspension proceedings against plaintiffs.<sup>18</sup>

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<sup>18</sup> In addition to these due process claims, the plaintiffs put forth two arguments in their Proposed Findings. The first, which appears at page 22, involves the determination made by this court as to the involuntariness of CAT Fund participation. See Hayes v. Ridge, 946 F. Supp. 354, 356-7 (E.D. Pa. 1996) (concluding that participation in the CAT Fund was mandatory). Plaintiffs now argue that the phrase "they shall be entitled to participate" in 40 P.S. § 1301.701 (a)(1)(I) only applies to the subject "hospitals located in the Commonwealth" (in the second clause of §1301.701 (a)(1)(I)) and not to the subject "health care provider[s]" (in the first clause of § 1301.701 (a)(1)(I)) and therefore "health care provider[s]" are not automatically deemed participants in the fund for purposes of the emergency surcharge. This reading is wrong. Contrary to the plaintiffs' assertions, the comma after the word "aggregate" (at the end of the first clause) does not act to make the phrase "entitled to participate" applicable only to the second clause (i.e., hospitals). The purpose of the comma is to separate clearly the differing coverage requirements for health care providers and hospitals. Further, the word "they" before "entitled to participate" does not apply to the hospitals only, simply because hospitals is the only plural subject in the sentence. The purpose of the plural word "they" is to refer to the health care providers (other than hospitals) and the hospitals, the two subjects of the sentence. This reading of the statute is buttressed by the fact that the phrase "basic insurance coverage" clearly applies to both subjects of the sentence and there is no comma between it and the language about participating in the fund. Therefore, both of these sections apply to both subjects of the sentence. The plaintiffs' latest attempt to show that participation in the CAT Fund is not mandatory is therefore rejected.

The plaintiffs' second argument is that "[i]t violates the Fourteenth Amendment for the CAT Fund to delegate authority under 31 Pa. Code § 242.12(a) to private insurers to determine who are 'health care providers' within the meaning of 40 Pa. C.S.A. § 1301.103." Plaintiffs' Findings, at 25-30. 31 Pa. Code § 242.12 (a) states: "The insurer or self insurer shall be responsible for making the initial determination of who is a health care provider for purposes of having access to the liability coverage provided by the Fund." Section (b) states:

(continued...)

An appropriate order follows.

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<sup>18</sup>(...continued)

"[T]he initial determination of health care provider status by the insurer or self insurer shall not preclude a review of this determination by the Fund." Because the insurer initially determines who is a health care provider, the plaintiffs argue that the insurer effectively decides, without notice or a hearing, who must pay the emergency surcharge and who will be suspended for not paying the emergency surcharge.

Even assuming the Fourteenth Amendment's due process clause applies to the private insurers, the plaintiffs' argument is wholly without merit. Important in this regard is the fact that the insurer's "health care provider" determination does not in and of itself precipitate liability for the emergency surcharge. Rather, the record reveals that it is the determination that the provider is practicing more than fifty percent in Pennsylvania that more directly precipitates payment of the surcharge. There are health care providers who do not practice over fifty percent in Pennsylvania who have been deemed exempt from the emergency surcharge requirement. Moreover, the Code explicitly gives the CAT Fund the ability to review the insurer's "health care provider" determination. See 31 Pa. Code § 242.12(b). Thus, even if the insurer's unilateral determination did have a clear and direct impact on the physician's private interests (i.e., it resulted in automatic liability for the emergency surcharge), under the Code, that decision could be reviewed by the CAT Fund. Thus, the determination does not present due process problems.

Nevertheless, even if the plaintiffs were correct on this issue, which they obviously are not, it is irrelevant because none of the plaintiffs contend that they are not health care providers.





IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY HAYES, M.D., et. al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
	:	
JOHN REED, et. al.,	:	NO. 96-4941
Defendants.	:	

ORDER

AND NOW, this        day of October, 1997, upon consideration of the eighteen plaintiffs' Count IA (procedural due process) claim in their original complaint, defendants' response thereto, and after trial on the matter on August 18, 1997 , IT IS HEREBY ORDERED that:

- 1) The CAT Fund's certification procedures and the Licensure Boards' subsequent suspension proceedings did not violate plaintiffs' procedural due process rights under the Fourteenth Amendment.
- 2) Judgment is entered in favor of the defendants and against the plaintiffs.
- 3) The Clerk is directed to mark this action closed for statistical purposes.

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William H. Yohn, Jr., Judge