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August 12, 2010

Honorable Douglas F. Gansler
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202

Dear Attorney General Gansler:

I am writing today to request an Opinion of the Attorney General concerning the ownership of the assets of the Injured Workers' Insurance Fund ("IWIF"). Specifically we are seeking your opinion on the following questions:

1. Who owns IWIF's reserves and surplus?
2. Does the State have any claim to IWIF's reserves, surplus or other assets?

The IWIF Senior Management, and Board of Directors, who are appointed by the Governor pursuant to Labor and Employment Art. §10-110, believe it is critical to clarify these issues in light of the various legislative activities during the 2010 Session. The Board believes it needs clear guidance as to its fiduciary duties if a transfer of funds is again proposed in the 2011 Session. This has been a repetitive issue in Maryland as well as other states. See Press Reports from Colorado, Arizona, Oklahoma etc. [attached]

By way of background, IWIF was created in 1914 as the State Accident Fund and has been self-supporting since the beginning. IWIF is a competitive insurer in Maryland, LE Art. §10-106(b) (1), as well as the insurer of last resort, LE Art. §10-106 (b)(3). IWIF receives no tax dollars of any type and pays all of its claims and expenses from premiums and investment income. LE Art. §10-118. IWIF is subject to full Insurance Commissioner financial and market conduct regulation and is a member of the Property and Casualty Guaranty Fund which eliminates any potential State responsibility for IWIF liabilities. LE Art. §§10-105 and 10-107.

In 1968, then Attorney General Burch issued a formal opinion stating:

Furthermore, the rights and obligations of the State Accident Fund and the employer who is insured by the Fund are set forth in the policy of insurance issued by the Fund. Such policy of insurance does not directly or indirectly

empower or give a right to such employer to go against the State of Maryland generally in the event that the Fund becomes insolvent. Therefore, such employer has a right to be protected by the maintenance of adequate reserves, etc.

* * * * *

The monies which the State Accident Fund has accumulated by careful management are in effect a trust fund which belongs to the employers who have purchased workmen's compensation insurance from the State Accident Fund.

* * * * *

For these reasons we feel that the Legislature may not take over monies of the State Accident Fund and apply them to the general State purposes.

53 Opinions of the Attorney General 3, 10-11 [1968]. Despite this opinion, the Governor's Budget (as introduced) in the 2010 Session required a \$20 million transfer of IWIF surplus to the General Fund. This transfer of IWIF funds was not opposed by your office. Instead, AAG Bruce Martin opined:

There is, however, an argument that as long as the GA [General Assembly] was not trying to take an amount that would reduce reserves and the surplus to levels below what is needed for current obligations and the cushion required by MIA, the GA may do so. The 1968 Opinion seemed to address a wholesale taking of funds as opposed to a relatively small amount, as contemplated here. It may be possible to argue that IWIF is free to make rational a business decision that the transfer of the funds would be in the best interest of IWIF.

[E-mail attached]. AAG Bonnie Kirkland reached a similar conclusion in a February 19, 2010 letter [attached].

During hearings on various bills, there was great confusion as to who "owned" IWIF and whether the State could appropriate IWIF surplus or reserves. In fact, the Department of Legislative Services recommended against the \$20 million transfer believing that the State was due much more:

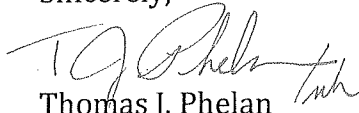
Currently, the General Assembly has the ability to liquidate IWIF and disburse the total amount of its reserves as it sees fit, as described in Section 10-127 of the Labor and Employment Article. If the mutualization process is completed, the State will lose this ability and any claim on the \$287 million held in reserve, not to mention a return on the funds and land it has invested in the business. Because of the longstanding financial relationship between the State and IWIF, the transfer of these reserves may cloud the process of IWIF's move toward privatization. **Therefore, DLS recommends that the committees reject the \$20 million transfer to the general fund in the BRFA.**

Based on this recommendation, the Legislature did delete the \$20 million transfer from the budget. However, there remains great confusion over the ownership of the assets of IWIF.

Our policyholders have a substantial interest in the preservation of the IWIF assets and our Board of Directors is vitally concerned over the scope of its fiduciary duties in the face of a required transfer. Both deserve a clear resolution of these underlying issues. Therefore, we respectfully request your opinion on the ownership of IWIF assets and whether the State may require a transfer of any part of these assets to the State.

Thank you for your consideration of this important request.

Sincerely,

A handwritten signature in black ink, appearing to read "TJ Phelan", with a stylized flourish at the end.

Thomas J. Phelan
CEO & President

TJP:nak

Enclosures

cc: Members, Board of Directors