

THE STATE OF NEW HAMPSHIRE

Belknap Superior Court

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Laconia, NH 03246  
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NOTICE OF DECISION

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CONCORD NH 03301-6397

09-E-0148 Georgia Tuttle MD, et al v. NH Medical Malpractice, et al  
09-E-0151 Georgia Tuttle M.D., et al v. The State of New Hampshire

Please be advised that on 7/29/2009 Judge McGuire made the following order relative to:

Court Order ; Issued

(Copy attached)

07/29/2009

Dana Zucker  
Clerk of Court

cc: KEVIN M FITZGERALD ESQ  
GORDON J. MACDONALD ESQ  
W. SCOTT O'CONNELL ESQ  
KRISTIN M. YASENKA ESQ  
GLENN A. PERLOW ESQ  
MICHAEL P. AYLWARD ESQ  
J. DAVID LESLIE ESQ  
ERIC A. SMITH ESQ

**STATE OF NEW HAMPSHIRE**

BELKNAP COUNTY

SUPERIOR COURT

GEORGIA TUTTLE, M.D., ET AL

v.

NEW HAMPSHIRE MEDICAL MALPRACTICE JOINT UNDERWRITING  
ASSOCIATION, ET AL

Docket No.: 09-E-148

GEORGIA TUTTLE, M.D., ET AL

v.

THE STATE OF NEW HAMPSHIRE

Docket No.: 09-E-151

**ORDER**

Petitioners are present and past policyholders (the "policyholders") of the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA"). Petitioner Georgia Tuttle, M.D., is an individual physician; petitioner Lakes Region General Healthcare is a healthcare charitable trust; and petitioner Derry Medical Center is a healthcare professional association. The State respondents are the Insurance Department for the State of New Hampshire ("Department") and its Commissioner, Roger A. Sevigny (the "Commissioner"), and the State Treasurer, Catherine A. Provencher (together, "the State"). Also named as a respondent is the JUA.

The policyholders seek a declaration that 2009 New Hampshire Laws c.144:1 (the "Act") is unconstitutional. The Act requires the JUA to transfer \$110 million, which the Department has determined to be excess surplus, from the JUA to the general fund. The parties agree that this case presents solely issues

of law and, accordingly, have filed cross-motions for summary judgment. D'Amour v Amica Mut. Ins. Co., 153 N.H. 170, 171 (2005). The facts as stated below are from the parties' agreed statement of facts, the pertinent statute, regulations and policies or representations contained in the parties' pleadings or at oral argument and which the opposing side does not dispute.

### BACKGROUND FACTS

The JUA provides professional liability insurance to medical providers in the State of New Hampshire. The JUA was created in 1975 by rules promulgated by the then Commissioner (Ins. 1700 et seq.) as authorized by RSA chapter 404-C ("Mandatory Risk Sharing Plans") to "make available medical malpractice insurance for such eligible risks", which the Commissioner determines are "not readily available in the voluntary market." The regulations promulgated by the Commissioner also provide the plan of operation ("plan") for the JUA.

Under the plan, all insurers authorized to write liability insurance in the state are required to be members of the JUA. Ins. 1702.01 (2009); RSA 404-C:3. All member insurers are required to participate in the JUA's premiums, expenses, servicing allowances and losses, based on their portion of net direct premiums written in the state. Ins. 1702.03. The plan provides that "[t]o the extent possible, losses and expenses of the association shall be paid from premium written on association businesses, including any amounts earned from the investment of such premium." Ins. 1703.07(a). Members, however, are subject

to assessment in the event of a deficiency. "If these are insufficient, assessments to pay for any deficiency shall be levied as frequently as the board deems necessary and report such assessments to the commissioner." Id.

The JUA has a seven person board of directors that is appointed by the Commissioner from persons nominated by the board, four of whom are initially nominated by the Commissioner. Ins. 1703.04(a), (b). Three of the seven directors are health care providers, two are representatives of member insurers, and two are members of the public. Ins. 1703.04(b) The plan provides that "[t]he Commissioner shall grant the board the authority to exercise all reasonable or necessary powers relating to the operation of the association." Ins. 1703.04(i). The JUA is administered by a manager servicing carrier who is recommended by the board and appointed by the Commissioner. Ins. 1702.04; Ins. 1703.05. Employees of the JUA are not State employees, but are paid from JUA funds.

Board meetings must be publicly noticed and held under the Right to Know Law, Ins. 1703.04(i), and minutes are available to the public under that law. Ins. 1703.03(j).

If any member is aggrieved by an alleged failure of the JUA to comply with the plan or any alleged improper act or ruling in the administration of the JUA, the member may request a formal hearing and ruling by the board of directors. Ins. 1703.15(a). Any formal board ruling may be appealed to the Commissioner. Ins. 1703.15(b).

The JUA is required to provide coverage to "eligible risks." An "eligible risk" means "any health care provider operating legally in the State of New

Hampshire" excluding persons who do not timely tender payment of premium, who have outstanding judgments against them for premium, or who do not provide information necessary to effect insurance. Ins. 1703.01(e). The plan provides that "[c]overage shall be provided under such policies and forms and subject to such rates, rating plans and classification systems as determined by the board to be at the same level as is provided in the voluntary market." Ins. 1703.11(a). Eligible risks insured by the JUA "shall receive the same level of service as is generally available in the voluntary market, including but not limited to, loss prevention assistance and reasonable premium payment plans." Ins. 1702.04.

In 1985, after a hearing, the Commissioner found that the JUA did not have sufficient assets to cover claims arising from policies written from 1975 to 1985. The estimated deficit was approximately \$45 million. (Response of JUA to Cross-Motions for Summ. J., at 8.) To cover this deficit, a 15 percent surcharge was assessed for several years on all medical malpractice liability insurance sold in the state. Ins. 1703.08.

The JUA's business written on or after January 1, 1986 is separately accounted for and, under Chapter Ins.1700, only members or policyholders may be assessed or surcharged for any deficit. Ins. 1703.07. Member insurers are assessed in the first instance, but may be reimbursed through an assessment of policyholders and a surcharge on liability insurance policies. Id. The State has no obligation to contribute money should the JUA run a deficit. Since 1985, the JUA has not had to assess or surcharge its members or policyholders.

In 2008 the JUA was one of the three largest writers of medical malpractice insurance in New Hampshire based on written premiums. It wrote approximately \$8.8 million of a total of the estimated \$40 million in premiums written. The JUA insures over 900 health care providers out of roughly 11,000 health care providers in New Hampshire. The JUA board and its management have accumulated assets of \$152 million.

The JUA issues individual policies to its policyholders. These policies are approved by the Commissioner and are titled "GENERAL LIABILITY POLICY (Assessable and Participating)". Each policy provides that it "has been issued by the (JUA) under the New Hampshire Medical Malpractice Joint Underwriting Association Plan established pursuant to the authority granted by RSA 404-C:1 and by RSA 400-A:15, and is subject to the provisions of the Plan." The policy provisions relating to assessments and dividends are as follows:

12. Assessable Policy Provision. This policy has been issued by the (JUA) under the New Hampshire Medical Malpractice Joint Underwriting Association Plan established pursuant to the authority granted by RSA 404-C:1 and by RSA 400-A:15, and is subject to the provisions of the Plan. The Plan provides, and the named insured agrees, that in the event an underwriting deficit exists at the end of any fiscal year the Plan is in effect, the board of directors of the (JUA) may make a premium contingency assessment against all policyholders during such year, and the named insured shall pay to the (JUA) the named insured's part of the premium contingency assessment based upon the policy premium payment paid by the named insured to the (JUA) with respect to that year. The Plan further provides that the (JUA) shall cancel the policy of any policyholder who fails to pay the premium contingency assessed.
13. Participating Policy Provisions. The named insured shall participate in the earnings of the (JUA), to such extent and upon such conditions as shall be determined by the board of

directors of the (JUA) in accordance with law and as made applicable to this policy, provided the named insured shall have complied with all the terms of this policy with respect to the payment of premium.

These policy provisions relating to assessments and dividends are consistent with the regulations promulgated by the Commissioner in Ins. 1703.07

(a)-(d):

- (a) To the extent possible, losses and expenses of the (JUA) shall be paid from premium written on (JUA) business, including any amounts earned from the investment of such premium. If these are insufficient, assessments to pay for any deficiency shall be levied as frequently as the board deems necessary and report such assessments to the Commissioner.
- (b) [not relevant]
- (c) If premiums written on association business exceed the amount necessary to pay losses and expenses, the board shall apply such excess to repay members for assessment previously levied, in proportion to the amount paid by each member.
- (d) If premiums written on association business exceed the amount necessary to pay losses and expenses, and to reimburse members for all assessments pursuant to Ins. 1703.07(c), then with review and approval by the Commissioner as being consistent with the purpose of this chapter, the board shall authorize the application of such excess in one or both of the following ways: (1) Against and to reduce future assessments of the association; or (2) Distribute the excess to such health care providers covered by the association as just and equitable.

Since 1986, the JUA has attempted to make three distributions of surplus to its policyholders. Proposals for distribution were submitted by the board in 1999 and 2000 and were approved by the Commissioner. The JUA again applied for a distribution in 2001; however, this request was denied. The board has not requested a distribution since that time.

On June 24, 2009, the General Court passed House Bill 2, which was signed by the Governor on June 30, 2009 to become 2009 New Hampshire Laws c. 144:1. In the Act, the General Court found that "the funds held in surplus by the NHMMJUA in the Post-1985 account are significantly in excess of the amount reasonably required to support its obligations as determined by the insurance commissioner." c 144.1, II. The General Court further found that "the purpose of promoting access to needed health care would be better served through a transfer of the excess surplus of the Post-1985 Account to the general fund. Id. The act further provides:

Notwithstanding any other provision of law, the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA), by and through its board of directors, and any person having responsibility and authority for custody or investment of the assets of the NHMMJUA are hereby authorized and directed to transfer no later than July 31, 2009 for the fiscal year ending June 30, 2009 the sum of \$65,000,000, and by June 30, 2010 the additional sum of \$22,500,000 and by June 30, 2011 the additional sum of \$22,500,000 from the Post-1985 Account to the general fund. The sum shall be used for the purpose of supporting programs that promote access to needed health care for underserved persons.

c. 144:1, I

### THE PARTIES' CLAIMS

On June 18, 2009, the petitioner policyholders filed a Verified Petition for Extraordinary Writ and on June 24, 2009, brought a seven count Petition for Declaratory and Injunctive Relief. The Court consolidated these cases on June 28, 2009. Because the Act provides that the excess surplus funds are to be transferred by the JUA by July 31, 2009, the Court ordered dispositive motions to

be filed by July 10, 2009 and reply pleadings by July 17, 2009. The Court heard the matter on July 20, 2009.

The policyholders argue that they are entitled to judgment as a matter of law because the proposed transfer of \$110 million of JUA funds is unconstitutional. Specifically, the policyholders argue that by virtue of their policies and the regulations and statute from which they arise, they have vested contractual rights in any excess surplus of the JUA. Thus, the proposed transfer violates Part I, Article 12 of the New Hampshire Constitution which guarantees that "no part of a man's property shall be taken from him or applied to public uses, without his own consent" and the analogous guarantee in the Fifth Amendment of the United States Constitution that "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."

The policyholders also argue that the Act violates Part I, Article 23 of the New Hampshire Constitution which states: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore should be made...for the decision of civil causes...." "Retrospective law" has been defined as follows: "every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past...."

Opinion of the Justices (Furlough), 135 N.H. 625, 630 (1992) (quoting Woart v Winnick, 3 N.H. 473, 479 (1826)).

The policyholders also contend that the Act violates the contracts clause, Article 1, Section 10 of the Federal Constitution, which declares that "[n]o state shall...pass any...law impairing the obligation of contracts...." "[A]rticle I, section 10 and Part I, article 23 ... offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." Accordingly the Court will analyze these provisions together as the constitutional "contract" provisions. Id.

The policyholders press their claims as policyholders and derivatively. That is, they claim that because the JUA board has not stepped forward to protect its members' and policyholders' contractual, regulatory, and constitutional rights in the excess funds, they may assert those rights on behalf of the JUA. See, e.g., Rieff v Evans, 630 N.W.2d 278, 287 (Iowa 2001) ("Policyholders' standing to sue derivatively is a right much recognized by other jurisdictions."). The State has not contested the policyholders' right to proceed on a derivative basis.

The State objects to the policyholders' motion and cross moves for summary judgment arguing that the policyholders have no vested property right in the excess surplus; rather, "[a]t most, they had a mere expectation of a potential distribution at some point in the future, if they continued to be policyholders and if surplus accumulated, and contingent upon board action in accordance with law." (Respondents' Memorandum of Law in Support of Summ. J., at 13-14.) The State argues that the JUA funds belong to the State because the JUA is an agency of the State. They base this contention on a number of

factors: the JUA was created by statute and Insurance Department regulations; the State, through the Commissioner, has a continuing role in the governance of the JUA; the State supports the JUA through federal and state tax exemptions; and the State essentially capitalized the JUA through its police powers by demanding and forcing the collection of surcharges and assessments. The State further argues that legislative acts are presumed constitutional and the policyholders have not met their burden of proving that the Act is unconstitutional.

#### NATURE OF THE JUA

The State asserts that the excess JUA funds belong to the State because the JUA is an agency of the State. The Court previously found, in granting the policyholders' motion to disqualify the Attorney General's office from representing the JUA, that "[t]he JUA is a quasi-public/private entity ... separate ... from the Insurance Department ... and not part of the executive branch of State government." Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, Belknap County Superior Court, No. 09-E-148 (June 25, 2009). The Court likened the JUA to the New Hampshire Retirement System, which the New Hampshire Supreme Court held is "an independent entity rather than an executive department or agency." State Retirement Sys. v Sununu, 126 N.H. 104, 108 (1985). The parties have filed additional pleadings regarding the nature of the JUA as it pertains to the merits of this case. Since the Court's order of June 25 disqualifying the Attorney General from representing it, the JUA has filed a

pleading in which it asserts that it is not a state agency. For the reasons stated below, the Court concludes that the JUA is not a part of state government.

First, the Court considers the powers and responsibilities of the JUA board. The JUA board has exclusive control over its operating fund. It is charged with exercising "all reasonable and necessary powers relating to the operation of the association." Ins. 1703.04(l). This control includes entering into insurance, employment, and service contracts with private individuals and entities. Ins. 1703.04 (o). While "(t)he expenditure of any moneys appropriated...to carry on the work of any department of State government shall be subject to the approval of the governor, with the advice of the council...", (RSA 4:15), the JUA enters into contracts and conducts other business dealings independently without Governor and Council approval or even that of the Commissioner. Ins. 1703.04(o). The responsibilities of the board also include the exclusive power to operate and manage JUA funds by investing premiums, purchasing and transferring securities and investments, and delegating its authority over investments. Ins. 1703.09 (a)-(j). With regard to the medical malpractice policies provided to healthcare providers such as policyholders in this case, the chairman of the JUA board signs Part I, Terms and Conditions. An authorized representative of the JUA co-signs Part II, Endorsements. Although the Commissioner has approved the policy form, he takes no part in negotiating or executing these individual liability contracts.

A second factor the Court considers in determining the nature of the JUA is how it is funded. All of the money in the JUA fund has come from

assessments of members, premiums paid by policyholders, and investment earnings. The State did not financially contribute to the creation of the JUA and has not contributed any funds since that time. The JUA pays its own operating expenses, including the salaries of all employees. Neither the JUA's revenues nor its operating expenses are included in the State budget. If the JUA runs a deficit, as was the case in 1985, the members and policyholders are assessed to make it up. The State is not responsible for any JUA shortfalls and does not guarantee performance of JUA obligations. See Texas Catastrophe Prop. Ins. Ass'n. v Morales, 975 F.2d 1178, 1183 (5th Cir. 1992) ("Because private money is at risk through CATPOOL, the legislature has not created [a state] agency in CATPOOL. The state can deprive itself of any constitutional rights, as it deems wise, but it cannot prevent private insurers from protecting their own money.").

Other factors also convince the Court that the JUA is an entity independent of the State: (1) the JUA board and its staff are not state employees; (2) the JUA has the capacity to sue and be sued as an entity independent from the State<sup>1</sup>; (3) the JUA's legal services are provided by private counsel; and (4) the JUA has never been represented by the Attorney General.

Cases from other jurisdictions which have considered the nature of similar insurance residual market mechanisms which are state-created but privately funded, have concluded that they are not part of state government. See, e.g., Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio

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<sup>1</sup> See, e.g., N.H. Ins. Guar. Ass'n v. Elliot Hosp., 154 N.H. 571 (2006); Concord Hosp. v. N.H. Med. Malpractice Joint Underwriting Ass'n, 142 N.H. 59 (1997); Concord Hosp. v. N.H. Med. Malpractice Joint Underwriting Ass'n, 137 N.H. 680 (1993).

v. Flores Galarza, 484 F.3d 1, 20 (1st Cir. 2007); In re Advisory Opinion to the Governor – State Revenue Cap, 658 So. 2d 77, 80-81 (Fla. 1985).

Particularly instructive is Texas Catastrophe, in which the plaintiff association sought injunctive relief challenging a state statute requiring the association to be represented by the Texas attorney general in civil actions. 975 F2d 1179-80. The association, a type of assigned risk pool similar to the JUA, was created by a Texas statute that required all insurers in the state to belong to the association as a condition of doing business in the state. Id. at 1179. The association wrote its own policies and paid its own claims. Id. It was funded by private, not public, monies. Id. By statute, the association in Texas Catastrophe operated pursuant to rulemaking procedures adopted by the Texas Board of Insurance with the advice of the association's board of directors. Id. Members of the representative insurance companies comprised a majority of the board of directors. Id.

For reasons not pertinent here, the Texas legislature passed an act declaring the association to be a state agency that must be represented in all legal proceedings by the attorney general's office. Id. at 1180. The association sued arguing that the legislation deprived it of its constitutional right to legal counsel of its choice. Id.

The court in Texas Catastrophe determined that the relevant inquiry is whether the association is part of the state. Id. at 1182. In support of its conclusion that the association is not part of the state, the court relied on the association's private funding and risks: "(i)f (the association) makes a profit, that

money does not go to the state...."If losses exceed premiums, the member companies are assessed, not the public treasury." Id. The fact that losses are subsidized in part through the allowance of tax credits did not change the analysis because tax credits would not eliminate the financial risk to the private entities. Id.

To counter these factors that point to the independence of the JUA, the State relies on the Commissioner's role in establishing the JUA and his authority over certain functions of the JUA. For example, any distribution of dividend can only be accomplished with the approval of the Commissioner. Ins. 1703.07 (d). This oversight by the Commissioner, however, does not change the essential nature of the JUA. "(W)hile the JUA is under some direction by the [State], it is 'private in nature' and is therefore 'not an agency of the [State].'" Flores Galarza, 484 F.3d 1, 20 (1st Cir. 2007) (quoting Arroyo-Melecio v Puerto Rican Am. Ins. Co., 398 F.3d 56, 62 (1st Cir. 2005)).

In characterizing the JUA as a part of state government, the State argues that it essentially capitalized the JUA by using its police powers to require all liability insurers to be members of the JUA, and to demand and force collection of surcharges and assessments, and by making it tax exempt. By doing so, the State appears to argue that the New Hampshire JUA is unique among similar residual market mechanisms. It is not. See Haskel, Should Antitrust Principles be Used to Assess Insurance Residual Market Mechanisms, such as New York's Medical Malpractice Insurance Plan?, 71 Alb. L. Rev. 229, 238-43 (2008). Such entities are by definition state created. Id. Because the State used its police

powers to create the JUA and ensure that surcharges were collected does not negate the private nature of the entity. "That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims." (Texas Catastrophe, 975 F.2d at 1182-83.

Nor does the JUA's tax exempt status make it a part of state government. Being tax exempt is among the various financial benefits unavailable to private insurers that states may offer to mandatory risk sharing plans such as the JUA to shift to the government a portion of the burden of insuring high-risk individuals or entities who would otherwise be unable to find coverage in the voluntary market. Haskel, 71 Alb. L. Rev. at 242.

The State relies on a number of out-of-state cases to support its positions that the JUA is a state agency and JUA policyholders and the members do not have a vested right in the excess surplus. These cases are readily distinguishable in material ways. For example, the State cites Fun N Sun RV, Inc. v State of Michigan, 524 N.W. 2d (Mich. 1994) which rejected the claim of insureds of the State Accident Fund ("SAF") to share in the profits of the sale of SAF to a private insurer. But the SAF was a state agency, not a participating insurance plan, and neither the policies nor the statutory/regulatory framework directed the distribution of sale proceeds.

In Fla. Residential Property and Casualty JUA v United States, 207 F.Supp.2d 1344 (N.D. Fla. 2002), the court determined that the Florida JUA is an

integral part of state government for federal taxation purposes. Among the reasons the court cited were: the JUA was meant to be a temporary entity; any profits or retained earnings of the JUA were required ultimately to go to the state; and JUA employees were given many of the same benefits as state employees. Each of these factors would significantly distinguish the Florida JUA from its New Hampshire counterpart. But, even if these factors were not present, the case would provide no support for the State because the Florida court made it clear that its holding was relevant to the federal tax exemption issue only. It observed that "in various other contexts the State of Florida and its agencies have determined that the JUA is not part of the State of Florida." *Id.* at 1348.

For all of the above reasons, the Court concludes that the JUA is not a part of state government. Thus, the State cannot own JUA funds under that theory.

#### CONSTITUTIONAL "TAKINGS" CLAIMS

Having determined that the State does not own the JUA funds, the Court will address the policyholders' argument that the Act's intended transfer of \$110 million of JUA funds to the general fund is an unconstitutional taking of their property. The Court begins its constitutional analyses by presuming that the Act is constitutional, Gen. Elec. Co. Inc. v Comm'n., N.H. Dept. of Revenue, 154 N.H. 457, 466. (2006), and by recognizing that the policyholders bear the burden of proving it unconstitutional. State v Theriault, 158 N.H. 123, 125 (2008).

In deciding the policyholders' "takings" claims, the Court uses the same analysis under both Part I, Article 12 of the New Hampshire Constitution and the Fifth Amendment to the Federal Constitution. Sanderson v Town of Candia, 146 N.H. 598, 600 (2001) ("Because the Federal Constitution affords the plaintiff no greater protection than does the State Constitution (regarding whether a taking occurred), we do not undertake a separate federal analysis.")).

"In order to assert the constitutional claim that the program constitutes a "taking of ... property in violation of the fifth and fourteenth amendments to the United States Constitution and Part One, article twelve of the New Hampshire Constitution, a (party) would have to show that he possessed a specific property interest and that he, in fact, had been unjustly deprived of that property interest."

Petition of New Hampshire Bar Ass'n, 122 N.H. 971, 975 (1982).

The specific property interest the policyholders claim in this case is a contractual and statutory / regulatory right to the beneficial interest in surplus JUA funds. "(C)ontracts are among the more traditional forms of property" accorded constitutional protection. Ribley Tramway Co. v Stickney, 129 N.H. 140, 147 (1987). "Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." United States Trust Co. of New York v New Jersey, 431 U.S. 1, 19 (1977).

Protected property rights may also be created by statute or regulation. Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules—or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Duffley v New Hampshire Interscholastic Athletic Ass'n, Inc., 122 N.H. 484, 491 (1982) (quoting Bd. of Regents v Roth, 408 U.S. 564, 577 (1972)). "The hallmark of property is an individual entitlement grounded in law, which cannot be removed except for cause." Hughes v N.H. Div. of Aeronautics, 152 N.H. 30, 37 (2005) (quoting Riblett, 129 N.H. at 146).

Applying this law, the policyholders have a property right in any excess surplus JUA funds, a right grounded both in their policies or contracts with the JUA and in the regulations promulgated by the Commissioner for the creation and governance of the JUA.

Basic rules apply to the interpretation of contracts.

"Generally, '(t)he construction of a written contract is a question of law for this court.'... When interpreting contracts, the intent of the parties is determined based on an objective reading of the agreement as a whole.... Contractual language is construed according to its common meaning...and this court will give a contract the same meaning as would a reasonable person ...."

Riblett, 129 N.H. at 146 (citations omitted).

In this case, the policy language is clear and unambiguous—beginning with its title: "GENERAL LIABILITY POLICY (Assessable and Participating)" (emphasis added). "Participating policies" contain terms that "expressly provide that such policies are entered to share in the profits of the company to the extent that such profits are apportioned from time to time to the respective mutual plan policies by the company's board of directors." Ohio State Life Ins. Co. v Clark, 274 F.2d 771, 773 (6th Cir. 1960). Mutual insurance companies are participating companies because they do not raise money by issuing capital stock but by charging their policyholders premiums that exceed the amount actuarially

anticipated to pay policy benefits and expenses. See UNUM Corp. v United States, 130 F.3d 501, 503 (1st Cir. 1997). "The excess portions of these premiums are accumulated, retained, and invested as 'surplus'.... Surplus generally belongs to the mutual insurer's members in proportion to their contributions, and is generally returned to policyholders through policyholder dividends." Id. The flip side of a mutual insurance company agreement applies as well to the JUA, that is, the policies are assessable. In the event of a shortfall in the insurer's ability to pay claims or meet operation costs, the policyholders, and, in this case, the members of the JUA, are assessed a surcharge to raise the necessary revenue.

That JUA policyholders have a right to participate in excess earnings is also spelled out in the body of the policy. The insured "shall participate in the earnings of the company, to such extent and upon such conditions as shall be determined by the board of directors in accordance with law and as made applicable in this policy." Ins. Contract, Conditions P. 4, ¶ 13 (emphasis added). The JUA has offered an assessable and participating policy approved by the Commissioner since its inception with no hint in the record that anyone had ever intended otherwise. Indeed, dividends were paid out to policyholders in 1999 and 2000. As well, members and policyholders were assessed in 1985 when the Commissioner, after a hearing, found that the JUA did not have sufficient assets to cover claims arising from policies issued from 1975 to 1985.

The policyholders' property rights are grounded just as clearly in the regulations promulgated by the Commissioner in establishing the JUA in 1975

and have remained unchanged since. "(T)he board shall authorize the application of such excess in one or both of the following ways: (1) against and to reduce future assessments of the association; or (2) distribute the excess to such health care providers covered by the association as just and equitable. Ins. 1703.07 (d) (emphasis added). The regulations provide for no other option to distribute excess surplus.<sup>2</sup>

The facts of this case are similar to those in Flores Galarza, 484 F.3d at 11-12, where the petitioner Compulsory Liability Joint Underwriting Association of Puerto Rico ("JUA-PR") sued the Commonwealth's Secretary of the Treasury ("Secretary") arguing that the Commonwealth had violated the federal constitutional prohibition against taking private property without just compensation. Under the Puerto Rican mandatory risk sharing scheme, insurance premiums were paid directly to the Secretary who then was required to remit them to the JUA-PR. Id. at 7. At some point the Secretary began withholding the premiums to alleviate the cash-flow problems of the Commonwealth. Id., at 8-9. After analyzing the structure and purpose of the JUA-PR, the First Circuit held that the JUA-PR had alleged a constitutionally protected property right in "that portion of the insurance premiums not owed to privately insured motorists or their insurers (Earned Premiums)."<sup>3</sup> Id. at 29. The First Circuit also found a vested property right in the overstated reserve funds

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<sup>2</sup> The Commissioner amended the purpose section of the regulations in December 2008 apparently in an attempt to broaden his authority over JUA funds. However, Ins. 1703.07(d) was not modified.

<sup>3</sup> "While the Secretary collects the insurance premiums and holds them for some unspecified amount of time before relinquishing them to the JUA, the Secretary is not an insurer—he is merely the custodian of these funds. As a custodian, the Secretary has no entitlement to the premiums, and his woefully undeveloped argument that the premiums do not vest in the JUA until the Secretary transfers them does not convince us otherwise." Id. at 29.

"which consists of the cushion set aside by the JUA to ensure that the reserve was large enough to meet all of the requests for reimbursement by insureds who purchased private insurance." Id. at 31.

The State counters the plain language of the policy and regulations with two related arguments as to why the policyholders' rights are not vested but contingent: 1) no dividends have been declared or distributed as to the present surplus; and 2) any distribution must be made "in accordance with the law" which may change, as it did, to provide other means to distribute the surplus. The State's arguments are unavailing.

As to the first point, "(t)he rights of policyholders are controlled by their policies of insurance and any applicable provisions." Ohio State Life Ins., 274 F.2d at 775. As stated above, JUA policies are assessable and participating. Under a participating plan, policyholders have "a vested contract right to the beneficial interest in the surplus." Id. at 777. This beneficial right is a "proprietary right." Id. at 778. "This...does not mean that the mutual plan policyholders are entitled to receive from the surplus as dividends on their policies more than is provided by the terms of their policies. As policyholders their rights are controlled by the provisions of their policies." Id.<sup>4</sup>

Here, the policyholders do not have a mere unilateral expectation of a dividend. They have a vested right based on contractual language, regulatory requirements, and the nature and history of the JUA, including that dividends

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<sup>4</sup> While the State is correct that the JUA is not strictly a mutual insurance company, its policies are "assessable and participating" which is the relevant characteristic it shares with mutual insurance companies. For this reason, the Court relies on cases involving mutual insurance companies to the extent they are relevant.

were paid and surcharges assessed in the past. Moreover, the beneficial interests that JUA policyholders have in any excess surplus go beyond receiving dividends in the future. The “assessable” nature of their policies and consistent regulations point to the present benefit provided by any excess surplus. The surplus guards against having insufficient assets to cover JUA obligations which would have to be covered by assessments against policyholders and members. Taking JUA funds would decrease investment earnings which are important to the JUA’s ability to meet operating costs and malpractice claims.

The State’s second point, that any distribution must be made in accordance with the law, is equally unpersuasive. As quoted above, “policyholders shall participate in the earnings of the company to such extent and upon such conditions as shall be determined by the board of directors...in accordance with law as made applicable to the policy” Interpreting this paragraph as a whole, it is evident that “in accordance with law as made applicable to the policy” is a qualifying phrase that obliges the board, in determining whether a dividend should be declared, to comply with applicable law. See Mountain Valley Mall Assocs. v Municipality of Conway, 144 N.H. 642, 652 (2000). (“(Q)ualifying phrases are to be applied to the words or phrases immediately preceding and are not to be construed as extending to others more remote.”) Each policy specifically states what the applicable law is. The policy states that it “has been issued by the (JUA) under the New Hampshire Medical Malpractice Joint Underwriting Association Plan established pursuant to the authority granted by RSA 404-C:1 and by RSA 400-A:15, and is subject to the

provisions of the Plan.” Nothing would suggest otherwise. Certainly, “in compliance with the law as made applicable to this policy” does not contemplate that the State, which is not even a party to the contract, could pass a law appropriating the JUA funds to use for its own purposes.

For the above reasons, the Court finds that the Act violates the “takings” clauses of the State and Federal Constitutions.

### CONSTITUTIONAL “CONTRACT” PROVISIONS

The analysis under the constitutional “contract” provisions, Part I, Article 23 of the New Hampshire Constitution and Article 1, Section 10 of the Federal Constitution, is similar to that of the “takings” provisions and leads to the same result. In determining whether the State has violated the contract provisions by impairing the obligation of contracts, the “inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.” Opinion of the Justices (Furlough), supra at 631 (quoting General Motors Corp. v Romein, 112 S. Ct. 1105, 1109 (1992)).

As discussed above, the policyholders undoubtedly have a contractual relationship with the JUA, and the Act impairs that contractual relationship. The State argues, however, that any impairment is not substantial.

“The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights

and obligations are binding under the law, and the parties are entitled to rely on them.”

Opinion of the Justices (Furlough), *supra* at 633 (quoting Allied Structural Steel Co. v Spannaus, 438 U.S. 234, 245 (1978)).

In this case, the policyholders entered into contracts, consistent with state regulations, which provided that excess surplus be declared at the discretion of the JUA board and, with the approval of the Commissioner, be distributed to policyholders as dividends or applied against future assessments. The contracts also require the return of unearned premiums from the same surplus funds. The Act seeks to transfer \$110 million of the entire \$152 million JUA fund into the general fund of the State. This is a substantial impairment of the policyholders' contracts. See Lower Village Hydroelectric Assocs., L.P. v Claremont, 147 N.H. 73 (2001). As discussed above, the State will bear no responsibility to cover any shortfall that may result from taking the JUA funds. Thus, not only is the likelihood that the policyholders will receive a dividend decreased, but the likelihood that members and policyholders may be assessed to cover future liabilities is increased.<sup>5</sup>

Having determined that the Act would substantially impair the policyholders' contractual rights, the Court “next conduct(s) a balancing test to determine whether the power exercised by the State’s enactment of (the Act) is reasonable and necessary to serve an important public purpose.” Lower Village,

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<sup>5</sup> In its response to the policyholders' and State's memoranda, the JUA challenged the validity of the State's actuarial report and expressed concern “that the \$110 million demanded by House Bill 2 would place it at risk of future operating shortfalls.” The JUA requested that the Court order that the JUA is entitled to perform its own independent assessment of whether a surplus actually exists. As the Court stated at the outset of the July 20, 2009 hearing, it will not consider such a request.

supra, at 77. Courts “generally defer to the judgment of the legislature in determining whether a particular act is reasonable and necessary to serve an important public purpose.” Id. However, “when the State attempts to abrogate its own contractual responsibilities, ‘complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.’” Id. (quoting Opinion of the Justices (Furlough), 135 N.H. at 635). While the State is not a party to the contracts at issue in this case, clearly the rationale behind giving the State less deference when it is a party to a contract applies here because the State’s self-interest is certainly at stake.

The State seeks to transfer \$110 million in JUA funds to the general fund to address current fiscal obligations. However, “(f)inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts.” Opinion of the Justices (Furlough), 135 N.H. at 635 (quoting Carlstrom v State, 694 P.2d 1, 5 (Wash. 1985)). “A government entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.” United States Trust Company of New York, Trustee, 431 U.S. at 26.

The State argues that its purpose in taking the \$110 million “is more than mere financial.” The State cites the legislative finding in the Act that “the purpose of promoting access to needed health care would be better served through a transfer of the excess surplus of the post-1985 account to the general fund.”

However, simply because the legislature has stated the particular use, that is, the specific fiscal obligation, to which the funds would be put, does not change the analysis of the necessity and reasonableness of the taking.

Finally, the State argues that

“(t)he distribution sought by the petitioners ...has the potential to severely disrupt the voluntary (insurance) market. Providing a distribution of excess surplus would effectively reduce the price of insurance through the JUA and provide an incentive for health care providers to seek coverage from the JUA in preference to the voluntary market. The effect could be dramatic.”

(State Respondents' Memorandum of Law in Support of Summ. J., at 25.)

The State argues that giving \$110 million to the policyholders would violate the statutory requirement that implementing regulations must “establish procedures that will create minimum interference with the voluntary market.” RSA 404-C:2, II.

This argument is based on the unwarranted assumption that if the State does not get the \$110 million, the policyholders will, thus receiving a “windfall.” As the Court made clear at the outset of the July 20, 2009 hearing, it has no authority, and will not attempt, to order any distribution of the surplus funds. Dividends can only be distributed pursuant to the procedures contained in the policy and regulations: by request of the JUA board and approval of the Commissioner. The board has not requested a distribution since 2001 and the record contains no evidence that they had intended to do so this year. Moreover, in its pleading, the JUA has taken the position that a surplus may not exist at all and argues that “it should be entitled to perform its own independent assessment of whether a surplus exists to avoid endangering the interests of its policyholders

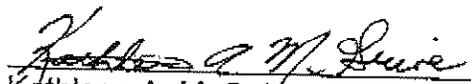
and causing injury to the general public or unjust and unwarranted future assessments of innocent parties." (JUA Memorandum of Law in Response to Parties' Cross Motions for Summ. J., at 8-9.) The upshot of the Court's order will be that the purported JUA surplus will stay put unless distributed through the means established in the regulations governing the JUA.

For all of the above reasons, the Court finds that the JUA is not a part of state government and that the policyholders have met their burden of proving that 2009 New Hampshire Laws C. 144:1 constitutes both a taking of property belonging to the JUA, its members and policyholders, in violation of Part I Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, and an impairment of their contract obligations in violation of Part I Article 23 of the New Hampshire Constitution and the Article I Section 10 of the United States Constitution.

As such, the Act is declared unconstitutional and shall not be enforced, and accordingly the JUA board of directors shall not transfer funds to the general fund. No costs or attorney's fees are awarded.

**SO ORDERED.**

7/29/09  
Date

  
Kathleen A. McGuire  
Presiding Justice