

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

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February 19, 2009

Roger Sevigny, Commissioner  
New Hampshire Insurance Department  
21 South Fruit Street  
Concord, NH 03301

Michael Delaney, Esq., Legal Counsel  
Office of Governor Lynch  
State House  
Concord, NH 03301

Re: Medical Malpractice Joint Underwriting Association - Proposed Transfer of  
Excess Surplus  
Limited Waiver of Attorney/Client Privilege

Dear Commissioner Sevigny and Attorney Delaney:

This will acknowledge that the Governor's Office and the Department of Insurance have informed the Office of the Attorney General of their intent to make a limited waiver of attorney/client privilege with regard to the above referenced matter. Specifically, you intend to make available to the public a memorandum dated February 6, 2009, in which this Office provided you with an opinion regarding the legality of a proposal to transfer, by way of legislative act, excess surplus funds held by the Medical Malpractice Joint Underwriting Association (JUA) to the General Fund.

This release will be strictly construed as a limited waiver of the attorney/client privilege generally attached to all communications with the Office of the Attorney General related to legal advice and representation pursuant to RSA 7:6, RSA 7:8 and other applicable law. Any other such communications with regard to the above referenced matter are deemed to remain privileged.

Very truly yours,

A handwritten signature in black ink, appearing to read "Glenn A. Perlow".

Glenn A. Perlow  
Assistant Attorney General  
Civil Bureau

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**STATE OF NEW HAMPSHIRE**  
**Inter-Office Communication**

**CONFIDENTIAL/ATTORNEY CLIENT PRIVILEGED**

**Date:** February 6, 2009

**FROM:** Glenn A. Perlow                      **AT:** Department of Justice  
Assistant Attorney General              Civil Bureau

**SUBJECT:** Legal Analysis of Proposal to Transfer Excess Funds Held by the Medical  
Malpractice Joint Underwriting Association

**TO:** Roger Sevigny, Insurance Commissioner  
Alexander Feldvebel, Deputy Insurance Commissioner  
Michael Delaney, Legal Counsel, Governor's Office

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This Memorandum will discuss whether it is lawful for the Legislature to transfer excess funds currently held by the New Hampshire Medical Malpractice Joint Underwriting Association (JUA) to the General Fund.

**Introduction**

The JUA was established in 1975 by the Insurance Commissioner, pursuant to his authority under RSA 404-C:1 "to provide such insurance coverage for any risks in this state which are equitably entitled to but otherwise unable to obtain such coverage." The creation of the JUA was a broad public policy response to an increasingly tight market for malpractice insurance at reasonable rates, which was ultimately harming the public by reducing the availability and affordability of health care. The JUA is a state created entity. Its operation is controlled by regulations promulgated by the Commissioner and set forth at Ins 1700. The JUA has no authority independent of the authority granted to it under these regulations.

The JUA provides malpractice insurance at competitive market rates to any eligible health care provider. All insurers eligible to write liability insurance of any kind in New Hampshire must be "members" of the JUA, and are subject to assessment should the JUA be unable to pay losses and expenses from premium collected. Ins 1703.07. As is the case with a private insurance company, accumulated surplus in the JUA is also available to pay losses and expenses when collected premiums are inadequate.

In 1985, the JUA was facing substantial future deficits in meeting expected claims. Following the recommendations of Governor Sununu's Medical Liability

Committee, a Stabilization Reserve Fund Trust (SRFT) was set up to fund all obligations on policies written prior to January 1, 1986. The Trust was capitalized with the then existing assets of the JUA and with a 15% surcharge on all medical malpractice liability insurance sold in the state. This surcharge was in place for a number of years. The SRFT now has a surplus of approximately \$8 million, and the JUA Board is in the process of negotiating a reinsurance agreement whereby a private reinsurer would take over the remaining liabilities of the SRFT for approximately the amount of the remaining surplus, allowing it to be closed.

The JUA's business written on or after January 1, 1986 is separately accounted for and, under Ins 1700, is subject to different rules as to who is assessed or surcharged for any deficit. Member insurers are assessed in the first instance, but may be reimbursed through an assessment of health care providers and a surcharge on liability insurance policies.

Members of the post 1985 JUA have never been assessed. Neither has there been an assessment on health care providers or a surcharge on liability policies. Instead the JUA has accumulated a very large surplus from written premiums and investment income. The amount of the surplus for year end 2008 has not been finalized, but is estimated at somewhere between \$145 and \$160 million. This surplus is a result of very efficient operations, good claims management and sound investments over a number of years by the JUA board and its management staff. The surplus has also accumulated as a result of the fact that the JUA pays neither premium tax under RSA 400-A:32 nor the assessment pursuant to RSA 400-A:39 that funds the operations of the Insurance Department (NHID or "Department").

### **Calculation of Excess Surplus**

The Department has concluded that the current surplus significantly exceeds the amount of capital needed to support the JUA. The Insurance Department has not engaged in any formal actuarial exercise in reaching this conclusion. The Department arrived at its conclusion using a number of assumptions, including: (1) possible changes to the New Hampshire medical malpractice market that would increase the JUA's market share; (2) the JUA's performance and experience over the past 10 years and (3) medical malpractice insurance industry premium to surplus ratios which can be used as a benchmark of financial solvency and stability.

The Department believes that between \$60 and \$120 million could potentially be withdrawn without placing the JUA under any significant financial risk. To be prudent, the Department would recommend a withdrawal in the range of \$90 to \$105 million, leaving a retained surplus of at least \$55 million for the JUA. The Department's view is that this would provide surplus in excess of the current needs of the JUA, thus offering a cushion that would provide sufficient protection against future contingencies including future member assessments. The Department is in the process of having an actuarial firm conduct an analysis of Risk Based Capital levels of the post-1985 JUA. This will provide an alternative measure of financial solvency and stability, and should allow the

Department to either confirm that a surplus of \$55 million is sufficient or to alter that number.

### **Transfer of Excess Surplus**

Pursuant to the administrative rules regulating the JUA, whenever an excess exists, the JUA Board “shall” authorize application of the excess either “against and to reduce future assessments,” or for distribution to “such health care providers covered by the association as is just and equitable.” Ins 1703.07(d). Since there have been no assessments of members to date, the members would not share in any distribution.

A general distribution of the excess to JUA covered health providers is possible under Ins 1703.07(d). However, such a distribution would be problematic, because it would be tantamount to significantly reducing, or even eliminating premiums for coverage, which would have a deleterious effect on the market as a whole. Interference with the market is prohibited by law. RSA 404-C:2, II, directs that the JUA must be operated so as to “create minimum interference with the voluntary market.”

Since at present the excess capital represents a substantial sum of money not otherwise needed, and in light of the State’s current financial situation, the question has arisen whether the State may transfer a portion of the excess funds to the State General Fund for the purpose of supporting access to health care in the state. This would clearly require an act of the Legislature, since there is no provision in the authorizing statute or administrative rules for such a transfer. Whether this transfer would be lawful depends on a legal determination that it would neither impair vested rights in the excess funds nor constitute a taking.

### **Legal Analysis**

While this issue appears to be one of first impression in New Hampshire, state-created entities like the JUA exist in other states, and courts in several of these states have rendered decisions that are instructive. Given the principles outlined in those opinions, and the circumstances presented here, it appears that such a transfer would be lawful.

Based on research conducted, the most likely legal argument to challenge the New Hampshire legislature’s appropriation of excess funds held by the JUA would be an assertion that this action would impair, or take without compensation, a private, vested interest in the funds. *See, e.g. Hughes v. New Hampshire Division of Aeronautics*, 152 NH 30 (2005); *Wisconsin Medical Society, Inc., et al. v. Morgan*, 07-CV-4035 (Cir. Ct. Branch 13, December 18, 2008) (attached). Three constituencies associated with the JUA might contend they hold such an interest: (a) the JUA itself, through its Board of Directors; (b) the member insurers; or (c) the covered health care providers (“insureds”).<sup>1</sup>

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<sup>1</sup> At first glance the “Assessable and Participating Policy Provisions” section of the JUA policy form appears to create a property interest for the insureds; however a closer analysis reveals that this language

In analogous circumstances, where legislatures have transferred or otherwise repurposed excess funds held by similar state-created entities, courts have consistently failed to recognize an actionable interest alleged by similarly-situated challengers. See *Wisconsin Medical Society, Inc., et al. v. Morgan, supra*; *Mississippi Surplus Lines Ass’n v. State of Mississippi*, 442 F. Supp. 2d 335 (S.D. Miss. 2006); *D. Corso Excavating, Inc. v. Poulin*, 747 A.2d 994 (R.I. 2000); *In re Certified Question*, 527 N.W. 2d 468 (Mich. 1994); *Medical Malpractice Insurance Association v. Cuomo*, 74 N.Y.2d 651 (1989); *In the Matter of Medical Malpractice Insurance Association v. Superintendent of Insurance*, 72 N.Y.2d 753 (1988); *Methodist Hospital of Brooklyn, et al. v. State Insurance Fund, et al.*, 64 N.Y.2d 365 (1985). The possible legal challenge of each party will be addressed in turn.

### 1. The JUA Itself

As a creature of the state, the JUA has no vested property interest in the excess funds and no standing to challenge the state’s action. See *Medical Malpractice Insurance Association v. Cuomo*, 74 N.Y.2d 651 (1989). The New York Court of Appeals reviewed an act of the New York Legislature requiring that the Medical Malpractice Insurance Association (MMIA), an entity nearly identical to the JUA, refund stabilization reserve fund charges it had collected from hospitals and applied to offset operating deficits. MMIA had argued that the Legislature could not order the refund because it would amount to an unconstitutional taking of MMIA’s property. The court rejected this argument, stating “[a]s a *creature of statute*, MMIA had no vested property interest in those charges and it was within the Legislature’s prerogative to direct a refund in an effort to reduce over-all health care costs” *Id.* at 653 (emphasis added).<sup>2</sup>

The JUA closely tracks the New York MMIA in structure and purpose. As with the MMIA, the JUA is an entity created by statute (by authority of the Commissioner under RSA 404-C) and it is reasonable to presume that, like the MMIA, it would be deemed “a creature of statute” with “no vested property interest” in the excess funds and no standing to challenge the state’s action. *Medical Malpractice Insurance Association v. Cuomo*, 74 N.Y.2d 651 at 653.

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merely reflects the *possibility* of a disbursement of excess funds to an insured, as provided in the administrative rules.

<sup>2</sup> Several years earlier, in *In the Matter of Medical Malpractice Insurance Association v. Superintendent of Insurance*, 72 N.Y.2d 753 (1988), the New York Court of Appeals rejected similar arguments from the MMIA where an act of the Legislature was interpreted to allow premium rates to be imposed that would force it to operate at a deficit. The court noted “MMIA was created by the Legislature of the State of New York in order to provide much needed medical malpractice insurance....Importantly, although all insurance companies writing personal injury insurance in New York are required to be members of MMIA as a condition of transacting business in this State, MMIA is a non-profit unincorporated association which is a legal entity separate and distinct from its members. Thus, as a statutory entity created by the Legislature, the State’s broad police power can be implemented to foster affordable medical malpractice coverage....” *Id.* at 766 (citations omitted).

## 2. Member Insurance Companies of the JUA

The members of the JUA may argue that since they are subject to assessment to make up any operating shortfall, they have a property interest in the excess funds. However, because the members have never been assessed, it is clear that they do not have a legally recognizable interest in the excess surplus. See Ins 1703.07(c).

## 3. JUA Covered Health Care Providers

In *Wisconsin Medical Society, Inc., et al. v. Morgan*, health care providers who had paid annual assessments to the Wisconsin Injured Patients and Families Compensation Fund (the “Fund”), which pays malpractice claims in excess of the primary private insurance coverage the providers were required by statute to purchase,<sup>3</sup> unsuccessfully challenged the Wisconsin Legislature’s transfer of \$200 million from the Fund to another fund established to provide financial assistance to a variety of healthcare programs.<sup>4</sup> The plaintiffs claimed that the transfer impaired their property interest in the “security and integrity of the fund.” *Id.* at 19.

The plaintiffs asserted that their property interest in the Fund resulted from a contract created by the statutory language establishing the Fund, which states in part “[t]he fund is held in irrevocable trust for the sole benefit of health care providers participating in the fund and proper claimants. Moneys in the fund may not be used for any other purpose of the state.” Wis. Stat. § 655.27 (6). The plaintiffs analogized their interest to that held by members of a state pension fund, in the “security and integrity of the fund.” *Wisconsin Medical Society, Inc., et al. v. Morgan* at 19. The court rejected this argument for several reasons; chief among them that, notwithstanding the rather suggestive enabling language, the plaintiffs had failed to introduce sufficient evidence to overcome the “‘very strong’ presumption against a construction” of a statute that would create a contract. *Id.* at 19. Citing longstanding precedent, the court noted that:

[T]he principle function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

*Id.* at 20 (quoting *National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985)). The court held that even if the plaintiffs were deemed to hold contractual rights as insureds under the Fund, the excess coverage provided by the Fund was all they were entitled to in exchange for the annual assessments they paid; they had no property interest in the Fund surplus. *Wisconsin Medical Society, Inc., et al. v. Morgan* at 21. The same can certainly be said for the New Hampshire health care

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<sup>3</sup> The providers were thus properly characterized as ‘insureds,’ in the same manner as the New Hampshire health care providers covered by the JUA.

<sup>4</sup> The Fund paid on average \$20 million in claims per year, and at the time of the transfer the balance in the Fund was over \$840 million.

providers covered by JUA policies, who have paid market-based premiums and received in exchange comprehensive medical malpractice coverage, even when they presented a risk that the private market might otherwise refuse to cover.

In *Mississippi Surplus Lines Ass'n v. State of Mississippi*, the Mississippi Surplus Lines Association, an entity established pursuant to statute and funded by examination fees assessed on surplus lines insurers, challenged a legislative transfer of excess funds to the state Budget Contingency Fund. The plaintiff alleged that, notwithstanding that it was created by statute, it was a private non-profit corporation funded entirely by private sources, and therefore had a property interest in the transferred funds. The United States District Court for the Southern District of Mississippi rejected these arguments and the characterization of the Association.

The court noted that the Association was created “for the sole purpose of assisting the Commissioner in the performing the Commissioner’s statutory duties. Its bylaws specifically recite that [it] was established to fulfill the statutory role and to ‘relieve the Commissioner...of duties otherwise required of him under the laws of foreign insurance companies;’ no other purpose is identified.” 442 F. Supp.2d at 339. Further, the court noted, the Association collected fees pursuant to a statutory funding mechanism, for statutorily prescribed public purposes, and thus these funds were not akin to private membership dues. *Id.* at 339-41. Thus, excess funds held by the Association were not “profits” for the benefit of the members, but rather public monies dedicated solely to a purpose prescribed by the legislature. *Id.* at 344. The court’s characterization of the Association, and the nature of the funds it held, is clearly applicable to the JUA, and it is reasonable to conclude that New Hampshire courts would likewise hold that neither the JUA nor its members has a vested property or contractual right to the excess funds it holds.

In *D. Corso Excavating, Inc. v. Poulin*, employers and their workers’ compensation carriers sued to obtain reimbursement from the Rhode Island’s Second Injury Fund, which had been eliminated by the legislature prior to their claims having been accepted or adjudged. The petitioners conceded that their claims “were not embodied in any preexisting agreements, preliminary determinations, orders or decrees between” them and the state, but nevertheless argued that by having paid compensation to injured workers with the expectation that they would be reimbursed by the state, they held substantive rights to such reimbursement that could not be abrogated without just compensation. 747 A.2d at 998.

The Rhode Island Supreme Court rejected this contention, holding that the petitioners’ “reimbursement claims were mere ‘floating expectancies or gratuities’ that could be eliminated at any time before the director had agreed to pay them such benefits or was adjudged liable to do so.” *Id.* (citations omitted). The court went on, “[e]ven though [the petitioners] may have relied on the potential availability of [a statutory] benefit...they were not entitled to conclude that these provisions were fossilized in legislative amber.’ To construe such a legislative policy as creating enforceable-contract terms, protected-property interests, other vested-substantive rights would ‘play havoc

with...the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.” *Id.* (citation omitted); *see also Bowen v. Public Agencies Opposed to Social Security Entrapment, et al.*, 477 U.S. 41, 55 (1986). Like the petitioners in *D. Corso Excavating*, the JUA’s insurers and insureds, who by administrative rule each *might* attain a property interest in the excess funds in the future under certain circumstances, have no present substantive rights that could be legally asserted. *See Hughes v. New Hampshire Division of Aeronautics*, 152 N.H. 30, 37 (2005) (if a party’s interest is not vested in the property until certain conditions are met, the party’s “rights ha[ve] not approached the entitlement that can only be removed ‘for cause’ which is the hallmark of property.”).

The Michigan Supreme Court rejected a claim by policyholders, who had purchased workers’ compensation insurance from the state Accident Fund, that they were entitled, as a matter of contractual right, to a share of the profits resulting from a sale of the Fund to Michigan Blue Cross and Blue Shield. *In re Certified Question*, 527 N.W. 2d 468 (Mich. 1994). The court found that there was “no clear legislative intent” with regard to “who would own the proceeds of such a sale.” *Id.* at 781. It noted that the plaintiffs had received the coverage they had paid for, at a reasonable premium, and that the sale did not result in any impairment of that coverage; and held that while the insurance commissioner was statutorily authorized to apply excess funds to a dividend, this was left to his discretion. *Id.* at 783-84.

The court in *In re Certified Question* found persuasive the “rationale of the highest court in New York State...when it ruled on the constitutionality of the transfer of \$190 million from the State Insurance Fund to the state’s general fund.” *See Methodist Hospital of Brooklyn, et al. v. State Insurance Fund, et al.*, 64 N.Y.2d 365 (1985). In that case, the New York Court of Appeals affirmed the legality of a transfer of surplus funds from the New York State Insurance Fund (SIF), a workers’ compensation fund similar in operation to the JUA, in exchange for annual “dry appropriations” to the SIF of the same amount.<sup>5</sup> The court found that “the statement of what the Fund shall consist of and what expenses may be paid from it simply do not deal with what to do with surplus.<sup>6</sup> The surplus being State money the State could have simply taken it with no strings attached.” *Id.* at 376-77.

In conclusion, a significant sampling of relevant case law demonstrates that none of the three constituencies identified above, the JUA itself, through its Board of Directors, the member insurers or the covered health care providers, can demonstrate a private, vested interest in the excess surplus held by the JUA such that it could successfully challenge a legislative act to transfer the funds to the General Fund for the purpose of supporting access to health care services in the state. The JUA is a creature of

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<sup>5</sup> This was essentially an ‘IOU’ each year from the Legislature for the transferred funds.

<sup>6</sup> While the law creating the NH JUA does “deal with what to do with surplus” in that Ins 1707.07(d) addresses the issue of distribution of surplus, any distribution is subject to authorization of the Board, after the review and approval of Commissioner that the distribution is consistent with the purpose of the law. Therefore, again, JUA insureds have only a contingent property interest in excess funds held by the JUA.

statute, and the legislature may exercise control over the excess funds as it deems appropriate.