BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
APPROPRIATIONS COMMITTEE

TESTIMONY OF SUSAN M. SERSHA, PRESIDENT AND CEO,
PENNSYLVANIA PROFESSIONAL LIABILITY JOINT
UNDERWRITING ASSOCIATION
March 5, 2020

Chairman Saylor, members of the House Appropriations Committee, and Committee Staff, I appear before you today at your request. My name is Susan M. Sersha, and I am the President and CEO of the Pennsylvania Professional Liability Joint Underwriting Association ("JUA"). With me today is Dr. Martin D. Trichtinger, Chairman of JUA's Board of Directors. I'd like to thank Dr. Trichtinger for rescheduling 42 patient appointments so that he could participate in the hearings yesterday and today. I would also like to thank the Committee for accommodating my schedule.

We understand that the Committee based its request for JUA to appear today on the requirement in Act 15 of 2019 that JUA appear and testify as to the fiscal status of the JUA. While we believe Act 15 is invalid and are challenging it in court, we are happy to be able to share information about the JUA and its critical mission. We believe ensuring the availability of professional medical liability insurance for Pennsylvania's medical professionals is a legitimate matter of legislative inquiry. We also seek to place before the Committee and the public the facts about JUA's creation, its operating history, and recent court decisions that recognize JUA's private entity status, to inform the ongoing debate over JUA's future.

Act 15 is the most recent of several pieces of legislation that affect the JUA. With respect to two of the prior statutes, Chief Judge Conner of the federal district court for the Middle District of Pennsylvania, ruled that JUA is a private entity whose assets are private property.

These remarks, which I request be made part of the Committee's record, provide an overview of JUA's forty-plus year history as a private nonprofit entity, its role in the medical professional liability insurance market, the status of JUA's legal challenges to Pennsylvania statutes enacted in 2016, 2017, 2018 and 2019 that target JUA and its funds and attempt to treat JUA as something it never has been, an agency of the Commonwealth. We will also address current fiscal status[1] of JUA and note that JUA is not seeking an appropriation, and will resist accepting an appropriation if one is made.

JUA's History and Status as a Private Nonprofit Entity

JUA is a private nonprofit association of Pennsylvania insurers that has enjoyed IRS 501 (c)(6) tax exempt status as an entity separate and apart from the Commonwealth since its founding in late 1975. The 1975 CAT Fund statute called for the creation of an entity such as JUA and gave Pennsylvania's insurance commissioner an option: Assure that "professional liability insurance" will be available to health care providers who cannot obtain it "through ordinary methods," either through a plan established as part of Pennsylvania's government, or through a non-government plan established and governed by private

1 JUA interprets the Committee's interest in JUA's "fiscal" status as the word is used to denote financial status (as opposed to the word's other meaning, i.e., government budgeting).

insurers subject to the insurance commissioner's regulatory authority and supervision.[2] The commissioner chose the non-governmental option and approved JUA's operations plan, two weeks after it was filed in December 1975. That approved plan correctly described JUA as "a non-profit unincorporated association constituting a legal entity separate and distinct from its members." I would note that JUA began its existence not at the Insurance Department or any other Commonwealth agency, but at a desk outside Fred Anton's office at the Pennsylvania Manufacturers' Association Insurance Company. PMA provided office space and someone to answer the phone to help get JUA off the ground.

As the history of JUA's origins illustrates, JUA is not, was never intended to be, and never has been part of the Commonwealth government. JUA has never been funded by the Commonwealth. From 1975 through 2002, JUA was governed by a Board of Directors controlled by its private insurer members, funded by premiums paid by health care providers in exchange for JUA's acceptance of risk, staffed by private sector employees who enjoyed no state health or pension benefits, quartered in office space privately leased and paid for, subjected to taxes like any other private entity,[3] free of public

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2 CAT Fund statute § 801 ("the Commissioner shall establish and implement or approve and supervise a plan"... "The plan may be implemented by a joint underwriting association...."); § 803 ("Subject to the supervision and approval of the commissioner, insurers may consult and agree with each other and with other appropriate persons as to the organization, administration and operation of the plan...").

3 JUA immediately applied for and was granted IRC § 501(c)(6) status in 1976, but has always paid the Pennsylvania premium tax applicable to insurers. An arm of the

disclosure requirements like other non-governmental entities, and regulated in its sale of insurance like any other private insurer.[4]

When the MCARE statute replaced the CAT Fund statute in 2002, the legislature hardwired into it the previously-established non-governmental model for JUA. Under the MCARE statute, JUA continued its existence as a private, separate, legal entity – a nonprofit association. The MCARE statute made it clear that JUA was intended to continue as it had previously existed and operated: *i.e.,* as, a private nonprofit association.[5] An unincorporated nonprofit association "is a legal entity distinct from its members and managers." 15 Pa. C.S. § 9114 (a). Such an association has "the same powers as an individual to do all things necessary or convenient to carry on its purposes," 15 Pa. C.S. § 9114(c), and "all matters relating to the activities of the nonprofit association are decided by its managers" *i.e.*, JUA's Board, 15 Pa. C.S. § 9128 (5). *See generally,* 15 Pa. C.S. §§ 9111-9135 (inclusive provisions of the Pennsylvania Uniform Unincorporated Nonprofit Association Law).

JUA is regulated as an insurance company. It is "authorized to write insurance" in accordance with the Insurance Company Law of

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Pennsylvania government would be exempt from taxation and would have had no reason to do either.

[4] As discussed later in my testimony, my description of JUA is not merely JUA's "position." It has now been twice adopted as a matter of fact and law by Chief Judge Conner of the United States District Court for the Middle District of Pennsylvania in striking down the JUA provisions of Act 44 of 2017 and Act 41 of 2018.

[5] MCARE statute § 5107(b) ("To the extent possible ... the joint underwriting association is authorized to administer [the JUA provisions of the MCARE Act] as a continuation of the former Article VIII of the Health Care Services Malpractice Act.").

1921 – *i.e.*, it has the same authorization as its private member insurers. JUA is required to "[s]ubmit rates and any rate modification to the department for approval in accordance with the Casualty and Surety Rate Regulatory Act" – *i.e.*, it is subject to the same comprehensive regulatory scheme that applies to other private medical professional liability insurers.

In short, from its inception in 1975, JUA has always operated autonomously as a nonprofit medical professional liability insurer, guided by a Board whose members are largely drawn from member insurers and health care providers, funded not by the Commonwealth but exclusively by premiums paid by insureds, staffed by employees who are not directed by, paid by, or otherwise part of the Commonwealth, and treated for all tax, commercial, and regulatory purposes as a non-governmental entity.

JUA's Role in the Market Medical Professional Liability Insurance

The insurance industry is cyclical, such that there are periods when health care providers have relatively little difficulty in obtaining coverage, and periods when coverage is more difficult to obtain. Easier periods are known as "soft markets" characterized by low rates, high limits, flexible contracts, and accessible coverage. More difficult periods are known as "hard markets," when premiums increase and capacity for most types of insurance decreases. Hard markets can be caused by a number of factors, including falling investment returns for insurers, increases in frequency or severity of losses, and regulatory intervention deemed to be against the interests of insurers. During a

hard market, some insurers may withdraw from the market entirely, merge with other insurers, or become insolvent. All of these actions result in less competition in the market. A soft market is always followed by a hard market.

The medical professional liability insurance industry in Pennsylvania has experienced three hard markets since the early 1970's. The crisis associated with the first hard market led to the passage of the CAT Fund statute and the establishment of JUA. The second hard market was in the 1980's and eventually led to legislation that limited punitive damages in medical malpractice cases. The most recent hard market was in the early 2000's and led to the passage of the MCARE Statute in 2002, as well as court rule changes that eliminated medical malpractice venue shopping in 2002 and required that a Certificate of Merit be obtained before filing a medical malpractice case (2003). The medical professional liability insurance market has been relatively soft since 2006, but there are signs that it has begun to harden again.

For example, JUA wrote more premium in 2020 than in the prior year, after consecutive years of premium decrease. This was a result of having written insurance for nursing homes which we had not written for years. The coverage availability problem for this class presaged the hard market experienced in 2002. We also see indications that the reinsurance market is tightening.

JUA plays an important role in providing insurance during both soft and hard markets, but has been instrumental in providing capacity and stability during hard markets. JUA is also able to step in

to provide insurance where there are unexpected lapses or gaps in coverage. The recent Hahnemann Hospital closing and St. Christopher's Hospital sale, which displaced over a thousand health care providers, is an example. As the health care providers searched for new positions, they learned that coverage for past acts (tail coverage) they had through Hahnemann would disappear, that not all of their new employers planned to provide it, and most other insurers were not offering prior acts coverage. Over the past two months JUA's small staff completed 1,225 quotes for these displaced health care providers and will provide coverage to health care providers who wish to insure with JUA. More than providing coverage in exchange for a premium, JUA's Board has authorized the use of a portion of JUA's safely distributable surplus to fund part of the cost of the necessary tail coverage for these health care providers, many of whom are residents who already face student loan debt and for whom a substantial unexpected bill for critically necessary professional liability coverage will be out of reach on a resident's salary. This type of disposition of safely distributable surplus is in line with the approach the Pennsylvania Insurance Commissioner has advocated for other nonprofits such as Blue Cross and Blue Shield.

JUA's Challenges to Act 85(2016), Act 44(2017), Act 41(2018) and Act 15(2019)

In requiring JUA to accept a Commonwealth appropriation JUA does not want and to endure the application of a series of statutes applicable only to government agencies, we believe Act 15 is on shaky ground.

Since 2016 the General Assembly has passed four statutes that, notwithstanding 40 plus years of private nonprofit operations, attempt for the first time to treat JUA as a Commonwealth agency and take JUA's assets. As Chief Judge Conner of Pennsylvania's Middle District most recently summarized, none of the first three statutes has gone into effect, two have been struck down as to JUA in their entirety, and the fourth, JUA's challenge to Act 15 of 2019, is subject to JUA's pending lawsuit:

> The legislative and litigational volley leading to the instant lawsuit [a challenge to Act 15 of 2019] began in 2016, with the General Assembly's first attempt to access some of the Association's assets. Act 85 of 2016 directed the Association to make a $200,000,000 loan to the Commonwealth from its unappropriated surplus. See Act of July 13, 2016, No. 85 ("Act 85"), § 18. Next came Act 44 of 2017, in which the General Assembly repealed Act 85, declared the Association to be "an instrumentality of the Commonwealth," and ordered the Association, under threat of abolishment, to pay $200,000,000 to the State Treasurer for deposit into the General Fund. See Act of October 30, 2017, No. 44 ("Act 44"), §§ 1.3, 13. Act 41 of 2018, enacted the following year, took the most drastic steps to date, attempting to fold the Association into the Department, shift control of the Association to a board of political appointees, oust the Association's president, and mandate transfer of all of the Association's assets to the Department within 30 days. See Act of June 22, 2018, No. 41 ("Act 41"), § 3.
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> The Association answered each enactment with a lawsuit raising constitutional challenges to the legislation and seeking declaratory and injunctive relief. The first of those lawsuits, concerning Act 85, has been held in abeyance at the parties' request pending the outcome of litigation as to Act 44 and Act 41. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright, No. 1:17-CV-886, Doc. 34 (M.D. Pa. June 14, 2018). In the second lawsuit, JUA I, we preliminarily and later

> permanently enjoined enforcement of Act 44 against the Association, holding that notwithstanding its statutory origin, the Association is a private entity, its surplus funds are private property, and Act 44's attempt to take those funds without just compensation violated the Takings Clause of the Fifth Amendment. See JUA I, 324 F. Supp. 3d at 532-40. In the third lawsuit, JUA II, we preliminarily and later permanently enjoined Act 41, concluding that the legislation was an attempt to do indirectly what JUA I told the General Assembly it could not do directly—take the Association's funds. See JUA II, 2018 WL 6617702, at *14-15.[6]

The essence of the court's decision in JUA I striking down Act 44 of 2017 is that JUA is a private entity, not the Commonwealth or an instrumentality or agency of the Commonwealth, and the state may not take JUA's funds. As the court reasoned there:

> The Association's function is inherently private. It is, at its core, an insurance company. The Association is comprised of private insurer members, governed by a private board, and supported by private employees. It is funded by privately paid premiums and is tasked to provide medical malpractice coverage to private persons practicing medicine within the Commonwealth. It does not "exist wholly to serve the State," nor is it engaged in work otherwise tasked by statute to the state's insurance commissioner. Cf. MSLA, 261 Fed.Appx. at 785–86. That the Association's private operations work an incidental public benefit does not render its function a public one.
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> The Joint Underwriting Association is created by statute. But in the same legislation that created the Association, the General Assembly relinquished control thereof, for all material intents and purposes, to the Association's board of

[6] *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf*, 2019 WL 3216658 (M.D. Pa. 2019) at * 3. A copy of the court's decision is attached as Appendix C. A copy of the district court's decision striking down Act 44 of 2017 ("JUA I") is attached as Appendix A. A copy of the decision striking down Act 41 of 2018 ("JUA II") is attached as Appendix B.

> directors. The legislature had the option to tightly circumscribe the Association's operations and composition of its board, cf. MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1036– 37 (citing MCKINNEY'S INSURANCE LAW § 5501 et seq.); to establish the Association as a special fund within the state's treasury, cf. 40 PA. STAT. & CONS. STAT. ANN. § 1303.712(a); or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General Assembly cannot claim carte blanch access to the Association's assets. We hold that the Joint Underwriting Association is a private entity, and its surplus funds are private property. The Commonwealth cannot take those funds without just compensation.[7]

Building on JUA I, the essence of the court's decision in JUA II is that because JUA is a private entity possessed of private property, the state cannot change that status through *post hoc* legislation, as was attempted in Act 41 of 2018:

> We reiterate what we observed in closing in JUA I: when it created the Joint Underwriting Association, the General Assembly chose to solve a public health problem through a private, nonprofit association, over which the Commonwealth retained limited control, in which the Commonwealth had no financial interest, and for which the Commonwealth bore no responsibility. The Commonwealth cannot legislatively recapture this private association for the purpose of accessing its assets. The provisions of Act 41 which attempt to accomplish that objective are violative of the Takings Clause of the Fifth Amendment to the United States *Constitution.*[8]

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[7] JUA I, Appendix A, at 535-536; 538 (emphasis added).

[8] JUA II, Appendix B at 343 (emphasis added).

In JUA III, the pending challenge to Act 15 of 2019, in the context of JUA's request for a preliminary injunction, the court's brief review of the merits of JUA's challenge offers little comfort to defenders of Act 15. While the court denied JUA's request for a preliminary injunction, it did so because the court accepted representations by counsel for the General Assembly and counsel for Governor Wolf that despite Act 15's immediate effective date, Act 15's attempts to "recapture" JUA by subjecting JUA to the budget process and various statutes applicable only to Commonwealth agencies would not go into effect immediately, such that JUA was not in danger of suffering the "immediate and irreparable" harm required for a court to issue a preliminary injunction. On the merits of JUA's challenge to Act 15, however, the court signaled that JUA I and JUA II appear to preempt Act 15's major requirements, including the ability to legislatively force JUA to accept a budget appropriation:

> The Association has arguably demonstrated a significantly better than negligible" likelihood of success on the merits of at least some of its claims. See id. Our holdings in JUA I and JUA II stand for the threshold propositions that the Association is a private entity, its assets are private property, and the Fifth Amendment prohibits the Commonwealth from either directly or indirectly taking those assets for public use without just compensation. See JUA I, 324 F. Supp. 3d at 538; JUA II, 2018 WL 6617702, at *14. While JUA I and JUA II are not dispositive as to the new claims raised in this case, they are controlling as to these issues, and they confirm that there are limits to the Commonwealth's power over the Association.
>
> Act 15 tests the outer bounds of our prior holdings, tasking the court to answer the difficult question that we acknowledged but did not need to resolve in JUA II: *what degree of authority, if any, may the Commonwealth exercise over the Association? The answer is informed by our prior*

> *rulings. Defendants cite no decisional law that would support Act 15's attempt to require the Association to accept Commonwealth appropriations, comply with Commonwealth budgeting processes, relocate its operations to Commonwealth-owned facilities, or assent to representation by Commonwealth attorneys. These provisions of Act 15 seemingly run headlong into the court's rulings in JUA I and JUA II that the Association is a private entity with constitutional rights.*[9]

JUA offers this recapitulation of the status of its legal challenges to Act 15 and its predecessor statutes not to relitigate the points before the Committee but rather to apprise the Committee, to the extent members are not already aware, of JUA's unique position in the budgetary process. A federal court has decided twice that JUA is a private entity. There is a substantial likelihood that the same court will decide that those prior decisions doom all or a portion of the provisions of Act 15. Moreover, although the General Assembly and the Governor have taken appeals from the decisions declaring Act 44 and Act 41 unconstitutional, the United States Court of Appeals for the Third Circuit has on its own initiative put those appeals on hold because of the pending litigation over Act 15.

At this point, it seems prudent to stop legislating over JUA and allow the courts to decide the issues before them. In the interim, JUA neither wants nor needs an appropriation.

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[9] JUA III, Appendix C, at *5 (emphasis added).

JUA's Fiscal Status

JUA's fiscal status is solid. Please refer to the latest financial report attached as Appendix D that will be the basis of the JUA's required filing with NAIC and the PA Insurance Department on March 1, 2020.

JUA's Budgetary Request

JUA is not making a request for an appropriation, for all the reasons previously stated, nor will one be accepted.

The JUA position stated above is based on JUA continuing as a private nonprofit association that continues to hold and control its assets as private property under the direction of its Board of Directors.

APPENDIX A

JUA I
(ACT 44 OF 2017)

324 F.Supp.3d 519
United States District Court, M.D. Pennsylvania.

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION, Plaintiff

v.

Tom WOLF, in his Official Capacity as Governor of the Commonwealth of Pennsylvania, Defendant

CIVIL ACTION NO. 1:17–CV–2041

Signed 05/17/2018

Synopsis

Background: State-created nonprofit joint underwriting association, which provided medical professional liability insurance to those unable to obtain coverage at competitive rates, brought action against Pennsylvania governor, in which state legislature intervened, alleging that Pennsylvania statute requiring association to pay $200 million into state's general fund or face abolishment was unconstitutional. Both parties moved for summary judgment.

Holdings: The District Court, Christopher C. Conner, Chief Judge, held that:

[1] association's claims were not precluded by political subdivision standing doctrine;

[2] association was not the "government itself," as would have precluded its claims;

[3] association was not a public entity or instrumentality, as would have precluded its claims;

[4] statute sought to take funds from association for a public purpose without just compensation; and

[5] permanent injunction was warrant to prevent irreparable harm to association.

Association's motion granted.

West Headnotes (18)

|1| **Eminent Domain**
Persons entitled to sue

States
Rights of action against state or state officers

State-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, was not a political subdivision, and thus its § 1983 claim against Pennsylvania governor and state legislature, alleging that Pennsylvania statute requiring it to surrender $200 million in surplus funds or face abolishment violated Fifth Amendment Takings Clause was not precluded by "political subdivision standing doctrine"; association was not empowered with governmental authority, since it had no power to tax, issue bonds, or exercise eminent domain, and instead operated as an insurance business, providing coverage to policyholders who paid premiums, which was inherently nongovernmental. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

|2| **Civil Rights**
Substantive or procedural rights

Section 1983 is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. 42 U.S.C.A. § 1983.

|3| **Civil Rights**
Nature and elements of civil actions

To state a § 1983 claim, plaintiffs must show a deprivation of a right secured by the Constitution and the laws of the United States by a person acting under color of state law. 42 U.S.C.A. § 1983.

|4| **Eminent Domain**

Property and Rights Subject of Compensation

Fifth Amendment Takings Clause applies not only to the taking of real property, but also to government efforts to take identified funds of money. U.S. Const. Amend. 5.

|5| **Eminent Domain**

What Constitutes a Taking; Police and Other Powers Distinguished

Claims under the Fifth Amendment Takings Clause generally fall into two categories—physical takings and regulatory takings. U.S. Const. Amend. 5.

|6| **Constitutional Law**

Governmental entities

Counties, municipalities, and other subdivisions owing their existence to the state generally cannot assert constitutional claims against their creator.

|7| **Counties**

Nature and status

Municipal Corporations

Relation to state

Counties, municipalities, and other such entities are creatures of the state, developed for the better ordering of government.

|8| **Constitutional Law**

Entities Protected By, or Subject To, Constitutional Provision

A political subdivision has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.

|9| **Constitutional Law**

Governmental entities

The "political subdivision standing doctrine" applies equally to all of a state's political subdivisions, barring any federal claim against the state thereby.

|10| **Eminent Domain**

Persons entitled to sue

States

Rights of action against state or state officers

State-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, was not the "government itself," and thus association was not precluded from bringing § 1983 claim Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature, asserting Pennsylvania statute calling for it to surrender $200 million in surplus funds or face abolishment was unconstitutional; while association was created by state statute, there was no indication state retained for itself the authority to appoint association's leadership, and state was not entitled to disclaim constitutional liability by delegating its legislative prerogatives to private corporate entity. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

|11| **Eminent Domain**

Persons entitled to sue

States

Rights of action against state or state officers

State-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, was not a public entity or instrumentality, and thus was not precluded from § 1983 Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature, arising out of passage of statute calling for association to surrender $200 million in state funds or face abolishment; while association was created by statute, association's

function was inherently private, since it was comprised of private insurer members, was funded by privately-paid premiums and provided medical malpractice coverage to private persons practicing medicine, and association was subject to only de minimis state regulation. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[12] **Eminent Domain**

Particular acts and regulations

Pennsylvania statute calling for state-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, to surrender $200 million in surplus funds or face abolishment, sought to take funds from association for public purpose, as element of association's § 1983 Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature; statute explained that state was in need of revenue from all possible sources to balance its budget and provide for health, welfare, and safety of state's residents, and indicated that funds would be taken for medical assistance payments for capitation plans. U.S. Const. Amend. 5.

[13] **Eminent Domain**

Particular acts and regulations

Pennsylvania statute calling for state-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, to surrender $200 million in surplus funds or face abolishment sought to take funds from association without just compensation, as element of association's § 1983 Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature; while governor asserted that association would not suffer from forced transfer of "excess" surplus that was unnecessary to preserve association's insurance function, funds remained private property of association, which was entitled to use or set aside such funds for its nonprofit purposes. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[14] **Eminent Domain**

Nature and Extent of Right Taken

In determining what compensation the Constitution requires under the Fifth Amendment Takings Clause, courts examine not the value gained by the government but the loss to the property owner. U.S. Const. Amend. 5.

[15] **Injunction**

Grounds in general; multiple factors

Before a court may grant permanent injunctive relief, a plaintiff must prove: first, that it will suffer irreparable injury absent the requested injunction; second, that legal remedies are inadequate to compensate that injury; third, that balancing of the respective hardships between the parties warrants a remedy in equity; and fourth, that the public interest is not disserved by an injunction's issuance.

[16] **Civil Rights**

Property and housing

Declaratory Judgment

Adequacy of other remedy

Legal remedies were inadequate to compensate injury to state-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, resulting from Pennsylvania statute that called for association to surrender $200 million in surplus funds or face abolishment, supporting association's claim for permanent injunction in § 1983 action against Pennsylvania governor and state legislature alleging violation of Fifth Amendment Takings Clause; sovereign immunity foreclosed an award of monetary damages to association, and a combination of declaratory and injunctive relief was only way to ensure that association would

not suffer irreparable injury. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[17] **Civil Rights**
Property and housing

Balancing of equities favored issuance of permanent injunction, in action by state-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, alleging § 1983 Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature, arising from Pennsylvania statute that called for association to surrender $200 million in surplus funds or face abolishment; statute effected direct loss of $200 million to association, as well as indirect loss of interest on those funds, and cost of liquidation of association's investment portfolio, which was a considerable constitutional injury far surpassing legislature's frustration in redrawing its budget. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

[18] **Civil Rights**
Property and housing

Issuance of permanent injunction was in public interest, in action by state-created nonprofit joint underwriting association, which provided medical professional liability insurance to those in Pennsylvania unable to obtain coverage at competitive rates, alleging § 1983 Fifth Amendment Takings Clause claim against Pennsylvania governor and state legislature, arising from Pennsylvania statute that called for association to surrender $200 million in surplus funds or face abolishment; while legislature intended to use association's $200 million to balance state budget and provide for health and safety of state residents, legislature could not achieve this legitimate end through illegitimate means. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

Attorneys and Law Firms

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MEMORANDUM

Christopher C. Conner, Chief Judge

*523 On October 30, 2017, defendant Tom Wolf, in his capacity as Governor of the Commonwealth of Pennsylvania, signed into law Act 44 of 2017, P.L. 725, No. 44 ("Act 44"). The Act, *inter alia*, mandates that the Pennsylvania Professional Liability Joint Underwriting Association ("Joint Underwriting Association" or "Association") transfer $200,000,000 of its "surplus" funds for deposit into the Commonwealth's General Fund by Friday, December 1, 2017. Act 44 includes a "sunset" provision purporting to abolish the Association should it fail to comply with its deadline. The Association seeks a declaration that Act 44 violates the United States Constitution.

I. Factual Background & Procedural History [1]

The Joint Underwriting Association is a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. (See Doc. 60 ¶ 1; Doc. 72 ¶ 1; Doc. 74 ¶ 1). The General Assembly created the Association in 1975 in response to a "hard market" [2] for medical malpractice insurance in the Commonwealth. (See Doc. 63 ¶ 1; Doc. 65 ¶ 2). The Association was initially established and organized by the Pennsylvania Health Care Services Malpractice Act of 1975, P.L. 390, No. 111 ("Act 111"). The General Assembly repealed Act 111 on March 20, 2002, enacting in its place the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 PA. STAT. & CONS. STAT. ANN. § 1303.101 *et seq.*

A. The MCARE Act and the Joint Underwriting Association

The MCARE Act is a sweeping piece of legislation. The Act's overarching goal is to ensure a "comprehensive and high-quality health care system" for the citizens of the Commonwealth. Id. § 1303.102(1). In pursuit of this objective, the Act seeks to guarantee that medical professional liability insurance is "obtainable at an affordable and reasonable cost," to ensure prompt and fair resolution of medical negligence cases, and to reduce and eliminate medical errors. Id. § 1303.102(3)–(5). The Act includes ***524** patient safety rules and reporting obligations, see id. §§ 1303.301–.315, establishes requirements relating to reduction and prevention of health care associated infections, see id. §§ 1303.401–.411, and develops standards for medical professional liability litigation and compensation, see id. §§ 1303.501–.516.

The MCARE Act also establishes a Medical Care Availability and Reduction of Error Fund ("the MCARE Fund"). See id. §§ 1303.711–.716. The General Assembly designed the MCARE Fund as a "special fund" within the state treasury to be administered by the Insurance Department of Pennsylvania ("the Department"). Id. §§ 1303.712(a), –.713(a). The Fund provides a secondary layer of medical professional liability coverage for physicians, hospitals, and other health care providers in the Commonwealth. See id. § 1303.711(g). It is funded primarily by annual assessments ("MCARE assessments") on health care providers as a condition of practicing in the Commonwealth. See id. § 1303.712(d)(1).

Additionally, the MCARE Act continues operation of the Joint Underwriting Association. Id. § 1303.731(a). Unlike the MCARE Fund, the General Assembly did not establish the Association as a "special fund" or a traditional agency within the Commonwealth's governmental structures. See id.; cf. id. §§ 1303.712(a), –.713(a). Instead, the General Assembly "established" the Association as "a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association." Id. § 1303.731(a). Like its predecessor, see Act 111, § 802, the MCARE Act mandates membership in the Association for insurers authorized to write medical professional liability insurance in the Commonwealth, 40 PA. STAT. & CONS. STAT. ANN. § 1303.731(a). Currently, the Association has 621 member insurance companies. (Doc. 60 ¶ 43).

The Association is charged by statute with offering medical professional liability insurance to health care providers and entities who "cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess of those applicable to [those] similarly situated." 40 PA. STAT. & CONS. STAT. ANN § 1303.732(a). The MCARE Act sets forth broad parameters for achieving this objective, to wit:

> The [Joint Underwriting Association] shall ensure that the medical professional liability insurance it offers does all of the following:
>
> (1) Is conveniently and expeditiously available to all health care providers required to be insured under section 711.
>
> (2) Is subject only to the payment or provisions for payment of the premium.
>
> (3) Provides reasonable means for the health care providers it insures to transfer to the ordinary insurance market.
>
> (4) Provides sufficient coverage for a health care provider to satisfy its insurance requirements under section 711 on reasonable and not unfairly discriminatory terms.
>
> (5) Permits a health care provider to finance its premium or allows installment payment of premiums subject to customary terms and conditions.

Id. § 1303.732(b)(1)–(5). The Association insures "all comers" who certify that they cannot obtain coverage at competitive rates. (P.I. Hr'g Tr. 11:3–13:8; Doc. 60 ¶ 42). According to the Association, its insureds generally fall into four categories: (1) providers with a history of malpractice ***525** occurrences, (2) providers practicing high-risk specialties, (3) providers who have gaps in coverage, or (4) providers reentering the medical profession after loss or suspension of license or voluntary withdrawal from practice. (Doc. 60 ¶ 42).

The Association, like other insurers in the Commonwealth, is "supervised" by the Department through the Insurance Commissioner ("Commissioner"). 40 PA. STAT. & CONS. STAT. ANN. § 1303.731(a); see, e.g., id. §§ 221.1–a to –.15–a, 1181–99. The MCARE Act prescribes four "duties" to the Association. Id. § 1303.731(b). It requires the Association to submit a plan of operations to the Commissioner for approval. Id. § 1303.731(b)(1). It tasks the Association to submit rates and any rate modifications for Department approval. Id. § 1303.731(b)(2) (incorporating 40 PA. STAT. & CONS. STAT. ANN. §§ 1181–99). It requires the Association to "[o]ffer medical professional liability insurance to health

care providers" as described above. See id. § 1303.731(b)(3). And it directs the Association to file its schedule of occurrence rates with the Commissioner, which she uses to set a "prevailing primary premium" for calculating the annual MCARE assessments for all health care providers in the Commonwealth. Id. § 1303.731(b)(4) (incorporating 40 PA. STAT. & CONS. STAT. ANN. § 1303.712(f)). The Act insulates the Commonwealth from the Association's debts and liabilities. Id. § 1303.731(c).

The MCARE Act provides that all "powers and duties" of the Association "shall be vested in and exercised by a board of directors." Id. § 1303.731(a). The board's composition, and all of the Association's operative principles, are set forth in a plan of operations developed by the Association with Department assistance and approval. (Doc. 60 ¶ 44; Doc. 63 ¶¶ 13–16); see also 40 PA. STAT. & CONS. STAT. ANN. § 1303.731(b)(1). The plan establishes a 14–member board of directors, which consists of the current Association president; eight representatives of member companies chosen by member voting; one agent or broker elected by members; and four health care provider or general public representatives who may be nominated by anyone and are appointed by the Commissioner. (Doc. 60 ¶ 45). Under the plan, the Association may be dissolved (1) "by operation of law," or (2) at the request of its members, subject to Commissioner approval. (Id. ¶ 46). The plan provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as the Board may determine subject to the approval of the Commissioner." (Id. ¶ 47).

The Joint Underwriting Association writes insurance policies directly to its insured health care providers. (See Doc. 63 ¶ 27; Doc. 65 ¶ 19). Policyholders pay premiums directly to the Association. (See Doc. 60 ¶ 65). The Association is funded exclusively by policyholder premiums and investment income. (Id. ¶ 54). It is not and has never been funded by the Commonwealth, and it holds all premiums and investment funds in private accounts in its own name. (Id. ¶¶ 51, 54, 65–69). The Association currently insures approximately 250 policyholders. (Doc. 63 ¶ 26; Doc. 65 ¶ 20). The typical medical professional liability policy issued by the Association covers a one-year period, with a limit of $500,000 per claim and aggregate limits of $1,500,000 for individuals and $2,500,000 for hospitals. (Doc. 63 ¶ 27).

The Association maintains contingency funds—its "reserves" and its "surplus"—which allow the Association to fulfill its insurance obligations in the event of greater-than-anticipated claims or losses. (See Doc. 60 ¶¶ 108–12). An insurer's "reserves" are the "best estimate of funds ... need[ed] to pay for claims that have been incurred but not yet paid." (Id. ¶ 109). Its "surplus" represents "capital after all liabilities *526 have been deducted from assets." (Id. ¶ 111). The surplus operates as a "backstop" to ensure that unforeseen events do not impede an insurer's ability to meet obligations to its insureds. (Id. ¶ 112). As of December 31, 2016, the Joint Underwriting Association maintained a surplus of approximately $268,124,500. (See id. ¶ 115; Doc. 63 ¶ 32; Doc. 65 ¶¶ 23, 30).

B. Act 85 of 2016

On July 13, 2016, Governor Wolf signed into law Act 85 of 2016, P.L. 664, No. 85 ("Act 85"). Act 85 is wide-ranging in scope, but its principal effect was to amend the General Appropriation Act of 2016 and balance the Commonwealth's budget. Act 85, § 1. Among other things, Act 85 provides for certain transfers to the Commonwealth's General Fund. See id. § 1(7). Pertinent *sub judice*, Section 18 of Act 85 amends the Commonwealth's Fiscal Code to require a $200,000,000 transfer to the General Fund from the Joint Underwriting Association. The relevant language states:

> Notwithstanding Subchapter C of Chapter 7 of [the MCARE Act], the sum of $200,000,000 shall be transferred from the unappropriated surplus of the Pennsylvania Professional Liability Joint Underwriting Association to the General Fund. The sum transferred under this section shall be repaid to the Pennsylvania Professional Liability Joint Underwriting Association over a five-year period commencing July 1, 2018. An annual payment amount shall be included in the budget submission required under Section 613 of the Act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929.

Id. § 18 (codified prior to repeal at 72 PA. STAT. & CONS. STAT. ANN. § 1726–C).

The Association did not transfer funds to the Commonwealth pursuant to Act 85. (Doc. 60 ¶ 96). On May 18, 2017, the Association commenced a lawsuit—also pending before the undersigned—challenging the constitutionality of Act 85. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright, No. 1:17–CV–886, Doc. 1 (M.D. Pa.). The lawsuit names as the sole defendant Randy Albright in his capacity as the Commonwealth's Secretary of the Budget. Id., Doc. 12. Secretary Albright moved to dismiss the Association's complaint on August 22, 2017. Id., Doc. 14. That motion is held in abeyance pending resolution of the Association's claims herein.

C. Act 44 of 2017

Governor Wolf signed Act 44 into law on October 30, 2017, in another attempt to bring balance to the state budget. Act 44, § 1. Therein, the General Assembly expressly repeals Act 85. Id. § 13. Act 44, *inter alia*, amends the Fiscal Code to include certain "findings" concerning the Joint Underwriting Association's relationship to the Commonwealth and the nature of its unappropriated surplus. Id. § 1.3. The General Assembly in Act 44 specifically "finds" as follows:

> (1) As a result of a decline in the need in this Commonwealth for the medical professional liability insurance policies offered by the joint underwriting association under Subchapter B of Chapter 7 of the MCARE Act, and a decline in the nature and amounts of claims paid out by the joint underwriting association under the policies, the joint underwriting association has money in excess of the amount reasonably required to fulfill its statutory mandate.
>
> (2) Funds under the control of the joint underwriting association consist of premiums paid on the policies issued under Subchapter B of Chapter 7 of the MCARE Act and income from investment. The funds do not belong to any of the members of the joint underwriting *527 association nor any of the insureds covered by the policies issued.
>
> (3) The joint underwriting association is an instrumentality of the Commonwealth. Money under the control of the joint underwriting association belongs to the Commonwealth.
>
> (4) At a time when revenue receipts are down and the economy is still recovering, the Commonwealth is in need of revenue from all possible sources in order to continue to balance its budget and provide for the health, welfare and safety of the residents of this Commonwealth.
>
> (5) The payment of money to the Commonwealth required under this article is in the best interest of the residents of this Commonwealth. [3]

Id. Following these findings, Act 44 mandates the monetary transfer at the heart of this litigation: "On or before December 1, 2017, the joint underwriting association shall pay the sum of $200,000,000 to the State Treasurer for deposit into the General Fund." Id. Per the Act, the funds shall be appropriated by the General Assembly to the Department of Human Services "for medical assistance payments for capitation plans." Id.

Act 44 contains two additional pertinent provisions. Its "no liability" clause purports to immunize the Association as well as its officers, board of directors, and employees from liability arising from the transfer mandated by Act 44. Id. It also contains a "sunset" clause which threatens to abolish the Association if it fails to meet the Act's demands. Id. Specifically, that clause states that if the Association fails to transfer the $200,000,000 by the Act's deadline, the provisions of the MCARE Act creating it will immediately expire, the Association will be abolished, and its assets will be transferred to the Insurance Commissioner for administration of the Association's functions. Id. Act 44 then directs the Insurance Commissioner to transfer the $200,000,000 for deposit into the Commonwealth's General Fund "as soon as practicable after receipt." Id.

D. Procedural History

The Association commenced the instant litigation on November 7, 2017, challenging the constitutionality of Act 44. In its verified complaint, the Association asserts that Act 44 violates the Substantive Due Process Clause, the Takings Clause, and the Contract Clause, as well as the doctrine of unconstitutional conditions. The Association seeks declaratory and injunctive relief pursuant to Section 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. The verified complaint names Tom Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania, as defendant. With the court's leave, the General Assembly of the Commonwealth of Pennsylvania joined this litigation as intervenor defendant.

The Joint Underwriting Association sought both a temporary restraining order and preliminary injunction. We denied the temporary restraining order but accelerated proceedings on the Association's request for a preliminary injunction.

Following extensive briefing by the parties and *amicus*, an evidentiary hearing, and oral argument, we preliminarily enjoined enforcement of Act 44 pending full merits review of the Joint Underwriting Association's claims. Cross-motions for summary judgment by the Joint Underwriting Association, Governor Wolf, and the General *528 Assembly are presently before the court and ripe for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. City of Lebanon, 331 F.Supp.2d 311, 315 (M.D. Pa. 2004); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Only if this threshold is met may the cause of action proceed. See Pappas, 331 F.Supp.2d at 315.

Courts are permitted to resolve cross-motions for summary judgment concurrently. See Lawrence v. City of Phila., 527 F.3d 299, 310 (3d Cir. 2008); see also Johnson v. Fed. Express Corp., 996 F.Supp.2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

[1] The Joint Underwriting Association levies a fourfold objection to Act 44 through the prism of Section 1983. It contends *first*, that Act 44 violates its right to substantive due process; *second*, that Act 44 is an unconstitutional taking of private property; *third*, that Act 44 substantially interferes with the Association's contracts with its insureds and its members; and *fourth*, that Act 44 impermissibly conditions the Association's exercise of constitutional rights. The Association asks the court to declare Act 44 unconstitutional and permanently enjoin its enforcement. Our analysis begins and ends with the Association's Takings Clause claim.

A. The Association's Takings Clause Claim

[2] [3] Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials. 42 U.S.C. § 1983. The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. Gonzaga Univ. v. Doe, 536 U.S. 273, 284-85, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a Section 1983 claim, plaintiffs must show a deprivation of a "right secured by the Constitution and the laws of the United States ... by a person acting under color of state law." Kneipp, 95 F.3d at 1204 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)). Governor Wolf does not dispute that he is a state actor. We must thus assess whether Act 44 deprives the Association of rights secured by the Fifth Amendment to the United States Constitution.

[4] [5] The Fifth Amendment's Takings Clause prohibits the government from taking private property for public use without just compensation. U.S. CONST. amend. V. The Takings Clause is made applicable to the states by the Fourteenth Amendment. See U.S. CONST. amend. XIV; Murr v. Wisconsin, 582 U.S. ——, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017) (citing *529 Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). It applies not only to the taking of real property, but also to government efforts to take identified funds of money. See, e.g., Phillips v. Wash. Legal Found., 524 U.S. 156, 160, 164-65, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Takings claims generally fall into two categories—physical and regulatory. See Yee v. City of Escondido, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). The Association's claim concerns an alleged physical taking, to wit: that Act 44 is an unlawful attempt to expropriate $200,000,000 from the Association's private coffers. [4]

Governor Wolf and the General Assembly rejoin that the Association is a creature of statute—a public entity having no constitutional rights against its creator. Defendants alternatively contend, assuming *arguendo* that we deem the

Association and its funds to be private in nature, that the Association has no interest in its surplus and, therefore, no "just compensation" is due. Defendants further submit that even if the Association prevails on the merits, it is not entitled to permanent injunctive relief. We address defendants' arguments *seriatim*.

1. *Taking of "Private Property"*

Defendants collectively adjure that the Joint Underwriting Association is a state entity and thus cannot assert a takings claim against the Commonwealth. Their respective positions take several forms. The General Assembly invokes the political subdivision standing doctrine, which originated in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). Governor Wolf urges the court to look to principles governing state actor liability developed in Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). Defendants then jointly remonstrate that, regardless of the doctrine applied, the Association—or at minimum its surplus funds—are public in nature. We begin with the General Assembly's argument.[5]

***530 a. The Association as a "Political Subdivision"**

|6| |7| |8| |9| Counties, municipalities, and other subdivisions owing their existence to the state generally cannot assert constitutional claims against their creator. Trs. of Dartmouth Coll., 17 U.S. (4 Wheat.) at 660–61. Such entities are creatures of the state, developed "for the better ordering of government." Williams v. Mayor of Balt., 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933) (collecting cases). A political subdivision accordingly "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Id. The doctrine applies equally to all of a state's "political subdivisions," barring any federal claim against the state thereby. Williams v. Corbett, 916 F.Supp.2d 593, 598 (M.D. Pa. 2012) (citations omitted), aff'd *sub nom.* Williams v. Gov. of Pa., 552 Fed.Appx. 158 (3d Cir. 2014) (nonprecedential).

The General Assembly recognizes that the Joint Underwriting Association is not a political subdivision in the usual sense. (See Doc. 62 at 8–11; Doc. 71 at 12–14). It nonetheless maintains that the doctrine is "not *limited* to municipalities and subdivisions" and in fact extends to *any* state-created entity. (Doc. 62 at 9–10). The General Assembly is correct that, in appropriate circumstances, courts apply the doctrine to bar Section 1983 suits by entities similar in kind to traditional political subdivisions. See Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist., 908 F.Supp.2d 597, 606–14 (M.D. Pa. 2012); see also Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104, 1107–08 (9th Cir. 1999).[6] None of these cases supports the General Assembly's suggestion that the Commonwealth is insulated from suit by *any* entity it creates.

The central inquiry in the cases cited by the General Assembly is whether a relationship between plaintiff and defendant is "sufficiently analogous" to that between a state and its municipalities. In Pocono Mountain, for example, the court held that the link between a public charter school and its chartering public school district was sufficiently similar to that between a municipality and the state for purposes of barring the charter school's Section 1983 lawsuit against the district. Pocono Mountain, 908 F.Supp.2d at 611. In addition to the formation component, the court noted the school district's narrow circumscription of the charter school's authority, highlighting the degree of control reserved by the district, as well as the charter school's inherently municipal function. Id. at 611–12. Courts consistently apply Pocono Mountain to foreclose charter schools' suits against their chartering school districts. See, e.g., I-Lead Charter Sch.-Reading v. Reading Sch. Dist., No. 16-2844, 2017 WL 2653722, at *3–4 (E.D. Pa. June 20, 2017), appeal filed, No. 17-2570 (3d. Cir.); Reach Acad. for Boys & Girls, Inc. v. Del. Dep't of Educ., 8 F.Supp.3d 574, 578 (D. Del. 2014). But no case has extended Pocono Mountain beyond its charter school context.

The General Assembly's reliance on Palomar is farther afield. Indeed, Palomar ***531** supports the Association's position that the political subdivision standing doctrine should *not* apply to it. Palomar involved a health care district established by a California statute as a "public corporation." Palomar, 180 F.3d at 1107. The district was imbued by statute with distinctly governmental functions. See id. at 1107–08. For example, the state statutorily authorized the district to levy taxes and issue bonds. Id. at 1107. The state also granted to the health care district the power of eminent domain. Id. The Ninth Circuit Court of Appeals had no difficulty determining that the health care district was a political subdivision of the state. Id. at 1108.

The Joint Underwriting Association is neither a political subdivision nor "sufficiently analogous" to one for Section 1983 purposes. The Association is not empowered with governmental authority: it has no power, for example, to tax,

to issue bonds, or to exercise eminent domain. Its mission, while beneficial to the public, is inherently nongovernmental. In the vernacular, it is an insurance business, possessing none of the traditional characteristics of a political subdivision. We are also cognizant that the Third Circuit has observed that support for the political subdivision doctrine "may be waning with time." Amato v. Wilentz, 952 F.2d 742, 755 (3d Cir. 1991). For all of these reasons, we decline the General Assembly's invitation to declare the nonprofit Joint Underwriting Association a "political subdivision" of the Commonwealth.

b. The Association as the "Government Itself"

[10] Governor Wolf's reliance on Lebron fares no better. The Supreme Court in Lebron supplied "guideposts" for federal courts to assess whether a defendant is a government actor subject to Section 1983 liability. See Sprauve v. W. Indian Co., 799 F.3d 226, 229–30 (3d Cir. 2015) (citing Lebron, 513 U.S. 374, 115 S.Ct. 961). Lebron sued the National Railroad Passenger Corporation, widely known as "Amtrak," alleging that Amtrak's rejection of his political billboard display violated the First Amendment. See Lebron, 513 U.S. at 376–77, 115 S.Ct. 961. Tasked to decide whether Amtrak was a proper Section 1983 defendant, the Supreme Court bypassed traditional analyses concerning whether and when private action is attributable to the state and instead asked whether Amtrak was itself a "government entity," and thus a "state actor" for purposes of Section 1983. See id. at 378, 383, 394–400, 115 S.Ct. 961.

The Court jettisoned Amtrak's assertion that its enabling statute—which disclaimed it as a federal agency—was dispositive. Id. at 392–93, 115 S.Ct. 961. Concluding that Amtrak was in fact a government entity subject to Section 1983 liability, the Court underscored two factors: *first*, that Amtrak was "established by a special statute for the purpose of furthering governmental goals," and *second*, that Amtrak was subject to extensive governmental control. See Sprauve, 799 F.3d at 231 (citing Lebron, 513 U.S. at 397–98, 115 S.Ct. 961). The Court found an "important measure of control" to be the fact that "a majority of the governing body of the corporation was appointed by the federal or state government." See id. To find that Amtrak was not a state actor, the Court concluded, would be to allow the government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." Lebron, 513 U.S. at 397, 115 S.Ct. 961.

As a threshold matter, an essential aspect of Lebron—that the federal government "retain[ed] for itself permanent authority to appoint a majority of [Amtrak's] directors," Lebron, 513 U.S. at 400, 115 S.Ct. 961—is indisputably lacking *sub judice*. ***532** More importantly, application of Lebron to the Association would betray the Court's *ratio decidendi*. The Court sought to ensure that government could not shirk constitutional *liability* by delegating its legislative prerogatives to a private corporate entity. Governor Wolf rejoins that whether a party asserts or disclaims constitutional liability is "an empty distinction," (Doc. 82 at 3 n.3), but his claim is accompanied by no citation, and the court has separately found no support therefor. Indeed, the only authority exploring Governor Wolf's argument flatly refutes it. See Ill. Clean Energy Comm. Found. v. Filan, 392 F.3d 934, 938 (7th Cir. 2004) (rejecting state's reliance on Lebron to foreclose takings claim when state demanded that state-authorized trust turn $125 million over to state). Lebron has no application in this posture. [7]

c. The Association as a "Public Entity"

[11] We thus come to the *essentia* of defendants' argument: that the Joint Underwriting Association is nonetheless a public "entity" or "instrumentality" and cannot state a constitutional claim against the Commonwealth. Fortunately, in resolving this question, we do not write upon a blank slate. The Association is not the only state-created insurer-of-last-resort. Nor is the Association the first state-affiliated insurer to resist state action impacting its constitutional rights. As is often the case, examples are our best teachers. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

i. The Jurisprudential Landscape and Characteristics Examined

Defendants insist that we need not look beyond the fact of state creation to define the Joint Underwriting Association's relationship with the state. But for all of the ink spilled on the issue, neither defendant identifies a single decision that turns *exclusively* on the fact that an association was created by statute. Our research reveals no support for this uncritical proposition. *Per contra*, at least two federal courts have rejected defendants' position.

The First Circuit Court of Appeals, for example, dismissed the Commonwealth of Puerto Rico's contention that Puerto Rico's joint underwriting association, being "a state-created entity," lacked standing to challenge actions taken by its creator. See

***533** Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 20 (1st Cir. 2007). The court in Asociacion relied on an earlier First Circuit decision that expounded the nature of the association's relationship with the government. Id. (citing Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 62 (1st Cir. 2005)). The court underscored several factors, to wit: that the association's members, not the government, shared in its profits and losses; that the association, through its members, bore the risk of insuring Puerto Rico's high-risk drivers; that the association managed its own day-to-day affairs; that it had "general corporate powers" to sue and be sued, enter contracts, and hold property; and that it was designated by statute as "private in nature, for profit," and subject to Puerto Rico's insurance code. See Arroyo-Melecio, 398 F.3d at 61-63.

The court found that the association was not a public entity, even though it was "under some direction by the Commonwealth." Asociacion, 484 F.3d at 20 (quoting Arroyo-Melecio, 398 F.3d at 62). Indeed, the court acknowledged that the legislature created the association, dictated its form and purpose, offered tax exemptions to compensate for the association's assumption of public risks, and held approval power over the association's plan of operations. See Arroyo-Melecio, 398 F.3d at 61-63. On balance, the association and its funds were overwhelmingly "private in nature," id. at 62, and the association was held to be a proper Section 1983 plaintiff. See Asociacion, 484 F.3d at 20 (citing Arroyo-Melecio, 398 F.3d at 62).

The Fifth Circuit Court of Appeals reasoned similarly in finding that the Texas Catastrophe Property Insurance Association had standing to sue the state attorney general under Section 1983. Tex. Catastrophe Prop. Ins. Ass'n v. Morales, 975 F.2d 1178, 1181-83 (5th Cir. 1992). The state of Texas established the association as an assigned risk pool to write windstorm, hail, and fire insurance policies in parts of the state, and required all property insurers to join as a condition of operating in Texas. Id. at 1179. The association wrote its own policies and paid its own claims, which were funded first by policyholder premiums and, as needed, from member assessments. Id. The state subsidized the association's losses with tax credits. Id. Its plan of operations was adopted by the state's board of insurance with input from the association's board of directors, a majority of which was comprised of member company representatives. Id. The association's board was statutorily "responsible and accountable" to the state's board of insurance. Id.

The association hired its own legal counsel for decades. Id. at 1179-80. The legislature eventually amended the relevant statute to proclaim that the association "is a state agency" and to require the association to use the state's attorney general for legal representation. Id. at 1180. When the association brought suit claiming a violation of its right to counsel, the attorney general rejoined that the association, as a creature of statute, is necessarily "a state agency" with no constitutional rights as against its creator. Id. at 1180, 1181. The Fifth Circuit disagreed. It emphasized that the state government did not contribute to the association, nor did it share in the association's losses, which were borne by the association's members alone. Id. The association's monies, in sum, were wholly private—"private money directed to pay private claims." Id. at 1183. The court observed that although the state could deprive *itself* of any constitutional right it chooses, the association was not "truly a part of the state" for that purpose. Id.

The General Assembly directs the court to two cases that reached a contrary result. The first originates from the same medical malpractice insurance crisis from ***534** which the Joint Underwriting Association arose. See Med. Malpractice Ins. Ass'n v. Superintendent of Ins. of State of N.Y., 72 N.Y.2d 753, 537 N.Y.S.2d 1, 533 N.E.2d 1030, 1031 (1988) ("MMIA"), *cert. denied*, 490 U.S. 1080, 109 S.Ct. 2100, 104 L.Ed.2d 661 (1989). New York state created the Medical Malpractice Insurance Association, a nonprofit unincorporated association, to offer insurance that was "no longer readily available in the voluntary market." Id. The association was governed by an exhaustive statutory framework dictating the composition of its board and its plan of operation and authorizing the superintendent of insurance to unilaterally order amendments to the plan. See MCKINNEY'S INSURANCE LAW §§ 5503, 5508 (1988). When the superintendent set new rates that would require the association to operate at a loss, the association challenged the reasonableness of his approach. MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1032. Pertinent here, the association complained that the rate change effected a "confiscatory" taking in violation of the state and federal constitutions. See id., 537 N.Y.S.2d 1, 533 N.E.2d at 1032-33.

The New York Court of Appeals dismissed the association's argument in short order. The court stated that the association "is a creature of statute, and all of its rights, obligations and duties have been defined by the Legislature." Id., 537 N.Y.S.2d 1, 533 N.E.2d at 1036. It noted that the statute

authorized the association to operate only during "fixed periods of time" as the superintendent deemed necessary. Id. And it emphasized that the association's operations were "subject to the [s]uperintendent's extensive and direct control." Id. The court further noted that the association was separate and distinct from its members and held and invested its funds separately from its members. Id., 537 N.Y.S.2d 1, 533 N.E.2d at 1037. The court accordingly rejected the association's claim that the superintendent's actions were confiscatory. Id., 537 N.Y.S.2d 1, 533 N.E.2d at 1036–37. In a later decision, the same court held that, based on its decision in MMIA, the state could order the association to transfer its reserve funds without implicating the Takings Clause. See Med. Malpractice Ins. Ass'n v. Cuomo, 74 N.Y.2d 651, 543 N.Y.S.2d 364, 541 N.E.2d 393, 393–94 (1989).

The General Assembly also identifies as support the Fifth Circuit's unpublished decision in Mississippi Surplus Lines Association v. Mississippi, 261 Fed.Appx. 781 (5th Cir. 2008), affg 442 F.Supp.2d 335 (S.D. Miss. 2006) ("MSLA"). Mississippi's insurance law required the state's insurance commissioner to regulate all insurance companies doing business in the state, including unlicensed "surplus lines insurers." Id. at 783. The commissioner was tasked to determine whether these insurers met various requirements of state law, to review applications and collect fees from agents seeking to place insurance with those insurers, to review biannual surplus lines premium reports, and to collect a premium tax on all surplus lines premiums received. Id.

The statute permitted the commissioner to delegate its surplus lines responsibilities to a "duly constituted association of surplus lines agents," and to allow the association to levy a one percent examination fee on the insurers for its services. Id. The commissioner did so, asking a group of "private individuals" to form a nonprofit to "assist him with his duties," and the Mississippi Surplus Lines Association was born. Id. at 784. The association collected the examination fees as authorized by statute and invested the surplus. See id. In response to budget shortfalls several years later, the legislature amended the statute and ordered the association to transfer $2 million of the fee surplus to the insurance department for eventual transfer to the *535 state's budget fund. Id. The association sued, challenging the amendment as an unconstitutional taking. Id.

The Fifth Circuit panel looked to both the nature of the association and the nature of its funds before concluding that both were "public in nature." Id. at 785. The court acknowledged that the association had some private features—noting, for example, that the association hired its own employees and bore its own losses—but found that the association did not have "overwhelmingly private characteristics" sufficient to establish it as a private entity. Id. at 785–86. In particular, the court observed that the association's mission was "wholly to serve the state" and that it "operate[d] under conditions imposed by state law." Id. at 786. The court further concluded that the funds in question were public monies, having been accrued as a direct result of an explicit statutory provision authorizing collection of the fees and for the "sole purpose" of supporting the insurance commissioner's work. Id. at 786–87. The court contrasted the association's funds with those at issue in Morales, finding that the latter were appropriately deemed private funds where premiums paid into the risk pool "had a private end use—insuring businesses against risk and paying those businesses' claims." Id. at 787 (quoting Morales, 975 F.2d at 1183).

ii. Characteristics of the Joint Underwriting Association and Its Funds

The General Assembly posits that several features distinguish this case from Asociacion and Morales and align it with MMIA and MSLA. It contends that, in the former cases, the members' financial interests were implicated by the legislatures' actions, whereas the Joint Underwriting Association's members share neither in its profits nor its losses. (Doc. 71 at 9–10 & n.6). It also holds up as conclusive that the enabling statute for Puerto Rico's joint underwriting association explicitly identified the association as "private" and "for profit." (Id. at 9–10). We agree with the General Assembly's assertion that these facts differentiate the instant case from Asociacion and Morales. But we disagree with the General Assembly's assertion that these factual distinctions are dispositive.

No decision cited by the General Assembly supports its contention that an entity's public or private status turns on for-profit versus nonprofit nature or a statutory designation. Nor has any court suggested, as the state legislature intimates, that the fact of state creation (and the attendant possibility of state abolition) is alone determinative. Instead, all courts facing our present inquiry have holistically examined the entity's relationship with the state. See Asociacion, 484 F.3d at 20 (adopting Arroyo-Melecio, 398 F.3d at 60–63); Morales, 975 F.2d at 1181–83; MSLA, 261 Fed.Appx. at 784–86; MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1031, 1036–37. These courts have considered a variety of factors, including the nature of the association's function, the degree of control reserved in the

state (or the level of autonomy granted to the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated. Viewed through this prism, we are compelled to find that the Joint Underwriting Association is a private entity as a matter of law.

The Association's function is inherently private. It is, at its core, an insurance company. The Association is comprised of private insurer members, governed by a private board, and supported by private employees. It is funded by privately-paid premiums and is tasked to provide medical malpractice coverage to private persons practicing medicine within the Commonwealth. It does not "exist wholly to serve the State," nor is it engaged in work otherwise tasked by statute to the state's insurance ***536** commissioner. Cf. MSLA, 261 Fed.Appx. at 785–86. That the Association's private operations work an incidental public benefit does not render its function a public one.

The Association is subject to *de minimis* Commonwealth supervision, and its statutory treatment indicates that the Association is private rather than public. *In toto*, three statutory sections are dedicated to the Association. See 40 PA. STAT. & CONS. STAT. ANN. §§ 1303.731–.733. The first "establishe[s]" the Association as a nonprofit, sets forth "duties" largely applicable to all insurers, and defines its membership to include all insurers writing medical malpractice insurance within the state. Id. § 1303.731(a)–(b). It also disclaims Commonwealth responsibility for the Association's debts and liabilities. See id. § 1303.731(c). The second section describes the particular type of insurance to be offered—medical professional liability insurance for providers and entities otherwise unable to obtain coverage at reasonable rates. Id. § 1303.732(a). It sets forth broad-based policy objectives to that end, *i.e.*: that coverage be "conveniently and expeditiously available," and that the Association "provide[ ] sufficient coverage" on "reasonable and not unfairly discriminatory terms." Id. § 1303.732(b). Its third and final provision requires the Association's board to file any deficit with the Commissioner for approval before borrowing funds to satisfy the deficit. Id. § 1303.733.

Defendants' assertion that the statute subjects the Association to imperious control is belied by the statutory language and the record. The statute merely states that the Association is "supervised" by the Commissioner. Id. § 1303.731(a). But the Commissioner wields regulatory authority over all Commonwealth insurers, and the MCARE Act does not articulate a uniquely prescriptive role for the Commissioner in overseeing the Joint Underwriting Association. To the contrary, the Act grants nearly unfettered autonomy to the Association's board—all of its "powers and duties" are "vested in and [to be] exercised by a board of directors." Id. Importantly, the statute is silent as to the composition or operations of the board. Cf. MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1036–37. Board composition is instead defined by the Association's plan of operations, which provides for a board of directors comprised predominantly of representatives elected by the Association's members. See *supra* at pp. 525–26; (see also Doc. 60 ¶ 45).

The General Assembly asserts that the MCARE Act ties the Association's hands with respect to a key function—setting its rates. The statute does require the Association to submit its rates and any rate modification to the Department for approval—in accordance with rate-setting provisions applicable equally to every insurer in the Commonwealth. 40 PA. STAT. & CONS. STAT. ANN. § 1303.731(b)(2) (incorporating 40 PA. STAT. & CONS. STAT. ANN. §§ 1181–99). The legislature also argues that the Commissioner holds "revisionary power" over the Association's rates and can "unilaterally 'adjust [the JUA's] prevailing primary premium.' " (Doc. 71 at 19 (quoting 40 PA. STAT. & CONS. STAT. ANN. § 1303.712(f))). This assertion is simply incorrect. The provision the legislature cites concerns the Commissioner's authority to determine the *MCARE assessment* levied on each health care provider in the state. 40 PA. STAT. & CONS. STAT. ANN. § 1303.712(d), (f). That assessment is calculated based upon the "prevailing primary premium" submitted for approval by the Association. Id. The statute permits the Commissioner to adjust the prevailing primary premium for the purpose of calculating MCARE assessments; it does not authorize the Commissioner to unilaterally reset the Association's rates. See id. § 1303.712(f).

***537** Both defendants asseverate that the Association may be dissolved "by operation of law," positing that this "alone, establishes absolute governmental control." (Doc. 66 at 19–20; see also Doc. 62 at 7–9). Preliminarily, it is not the MCARE Act but the Association's own plan of operations, developed by the board with the Commissioner's approval, which sets procedures for dissolution. The Act's silence on this point hardly indicates legislative intent to retain control over the Association. Moreover, neither defendant identifies support for the claim that the state's ability to dissolve a nonprofit confers total control thereof to the state. Nor could they. *Any* nonprofit in the Commonwealth may be dissolved

by operation of law. See 15 PA. CONS. STAT. § 9134(a)(5) ("A nonprofit association may be dissolved ... under law other than this chapter."). The Commissioner also has the authority to dissolve private insurers in the Commonwealth under certain circumstances, and even private insurers must secure Commissioner approval to voluntarily dissolve. See 15 PA. STAT. & CONS. STAT. ANN. § 21205(a); 40 PA. STAT. & CONS. STAT. ANN. §§ 221.1–.52. Surely, these provisions do not divest all such entities of their constitutional rights anent the Commonwealth.

The MCARE Act meaningfully circumscribes the Association's authority in only two ways: by requiring it to file any deficit with the Commissioner for approval thereby to borrow funds, see id. § 1303.733, and by subjecting its plan of operations to Commissioner approval, see id. § 1303.731(b)(1). These provisions are similar in kind to those applicable to other insurers: all insurers in the Commonwealth, for example, are subject to some level of Department review in the event of severe financial impairment, see 40 PA. STAT. & CONS. STAT. ANN. §§ 221.6–a to –221.9–a, and all insurers must submit material amendments to their articles of incorporation, including proposed changes to the scope of their business, to the Department for approval, see 15 PA. STAT. & CONS. STAT. ANN. § 21204. With minor and immaterial exceptions, the Joint Underwriting Association is no more closely managed by the Commonwealth than any other private insurer authorized to write insurance in the state.

We must also consider the nature of the funds in dispute. See MSLA, 261 Fed.Appx. at 785, 786–87. The General Assembly likens the Association's surplus to the fees collected on the commissioner's behalf in MSLA, positing that the surplus here, too, was "collected under the auspices of the state for the purpose of funding MSLA's operation on behalf of the state." (See Doc. 62 at 15 (quoting MSLA, 442 F.Supp.2d at 344)). Beyond this selective quotation, the General Assembly finds no footing in MSLA. The court in MSLA distinguished the case before it—which concerned fees collected by a nonprofit association performing the commissioner's statutory duties—from Morales—where a nonprofit association offered catastrophe insurance at the direction of the legislature. MSLA, 261 Fed.Appx. at 787 (citing Morales, 975 F.2d at 1179, 1183). The funds in the former case had a "public end use" and were not private property for Fifth Amendment purposes. Id. The latter, however, were indisputably private—"[i]t was private money directed to pay private claims," and thus "had a private end use—insuring businesses against risk and paying those businesses' claims." Id. So too is it here.

The Association has never received Commonwealth funding. The only provision of the MCARE Act that concerns the Association's finances *distances* the Commonwealth therefrom, expressly disclaiming state responsibility for the Association's debts and liabilities. 40 PA. STAT. & CONS. STAT. ANN. § 1303.731(c). The Association ***538** is funded exclusively by private premiums—paid by private parties in exchange for private insurance coverage—and any interest generated on those premiums. As a nonprofit association, Pennsylvania law authorizes the Association to "acquire, hold[,] or transfer ... an interest in" the funds, see 15 PA. CONS. STAT. § 9115(a), and to "use[ ] or set aside" those funds "for the nonprofit purposes" of the Association, see id. § 9114(d). We find that the Association's surplus is the private property of the Association.

Defendants lastly contend that the surplus will inevitably escheat to the state. Specifically, the General Assembly avers that it could dissolve the Association by statute and order the Commissioner to refuse any proposed distribution of assets offered by the Association's board. (Doc. 62 at 17–18; see Doc. 73 at 19, 22 n.8). It submits that, in this scenario, the Association's assets would sit "unclaimed" until the funds escheat to the state by operation of law. (Doc. 62 at 17–18). This argument rests on several assumptions: *first*, that the General Assembly succeeds in passing a law to dissolve the Association, and, *second*, that the Commissioner rejects every proposed asset distribution submitted by the board. The General Assembly further assumes, without explanation, that the hierarchical statutory windup framework governing nonprofit dissolution "does not otherwise apply" to justify its invocation of the last-resort escheat alternative. (Id. at 17). We find no merit in this argument. Moreover, even if the legislature's hypothetical actualized in the future, it would not deprive the Association of its *present* possessory right in the surplus.

The Joint Underwriting Association is created by statute. But in the same legislation that created the Association, the General Assembly relinquished control thereof, for all material intents and purposes, to the Association's board of directors. The legislature had the option to tightly circumscribe the Association's operations and composition of its board, cf. MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1036–37 (citing MCKINNEY'S INSURANCE LAW § 5501 *et seq.*); to establish the Association as a special fund within

the state's treasury, cf. 40 PA. STAT. & CONS. STAT. ANN. § 1303.712(a); or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General Assembly cannot claim *carte blanch* access to the Association's assets. We hold that the Joint Underwriting Association is a private entity, and its surplus funds are private property. The Commonwealth cannot take those funds without just compensation.

2. *For "Public Use" and Without "Just Compensation"*

[12] We turn to the final two elements of the Joint Underwriting Association's takings claim: that the private property is taken "for public use" and "without just compensation." U.S. CONST. amend. V. The parties do not dispute that Act 44 seeks to repurpose the Association's surplus for public use. The General Assembly will utilize the funds to remedy the Commonwealth's budget deficits. See Act 44, § 1.3(4). Act 44 explains that the state "is in need of revenue from all possible sources in order to continue to balance its budget and provide for the health, welfare and safety of the residents of this Commonwealth." Id. In pursuit of this objective, the General Assembly earmarks the anticipated transfer "for medical assistance payments for capitation plans." Id. Act 44 thus purports to take the surplus funds for "public use."

*539 [13] [14] There is also no genuine dispute that Act 44 fails to provide "just compensation" for its *per se* taking of the Association's funds. U.S. CONST. amend. V. In determining what compensation the Constitution requires, we examine not the value gained by the government but the loss to the property owner. See Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (quoting Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910)). For this reason, the Supreme Court has long held that "even if there was technically a taking" of private property, there can be no recovery under the Fifth Amendment when "nothing of value" is taken from the property owner. Marion & Rye Valley Ry. Co. v. United States, 270 U.S. 280, 281–85, 46 S.Ct. 253, 70 L.Ed. 585 (1926).

The General Assembly intimates that the Joint Underwriting Association cannot prevail on its takings claim because it will not "actually *feel* ... pain" from the forced transfer of $200,000,000 of its surplus. (Doc. 71 at 20–21). It submits that the funds subject to Act 44 constitute "excess" surplus which is both unnecessary to preserve the Association's insurance function and is unable to be put to other use given the Association's narrow nonprofit purpose. (See id.) In other words, the General Assembly posits that because the Joint Underwriting Association has not identified a present need or intended use for the $200,000,000 subject to Act 44, the Fifth Amendment requires no compensation for the Act's proposed transfer thereof.

The parties dispute whether the $200,000,000 targeted by Act 44 is in fact "excess" surplus. Competing expert reports debate this question at length. This dispute, genuine though it may be, is ultimately immaterial. Even if the surplus funds are "excess" and unnecessary to maintain the Association's solvency in a forthcoming hard market, the funds remain the private property of the Association. Pennsylvania law firmly establishes that profits earned by a nonprofit association may "be used or set aside for the nonprofit purposes" thereof. See 15 PA. CONS. STAT. § 9114(d). Neither defendant identifies authority supporting their self-serving proposition that the Association's failure to identify a present purpose for the funds dilutes the value thereof to zero. Nor is there any support for Governor Wolf's view that, because the Association cannot articulate an immediate plan for divesting of its surplus, the General Assembly is free to take those funds for use toward what it deems a better purpose. (See Doc. 73 at 22–23). Accordingly, we reject defendants' claim that the $200,000,000 surplus targeted by Act 44 is "valueless."

There are no genuine disputes of material fact *sub judice*. The Rule 56 record leads inescapably to the following conclusions. The Joint Underwriting Association is a private entity, and monies in its possession are private property. Act 44 endeavors to take a substantial portion of these funds—$200,000,000—for the public purpose of remedying longstanding imbalances in the Commonwealth's budget. Act 44 not only fails to provide "just" compensation; it fails to provide *any* compensation whatsoever. We find Act 44 to be an unconstitutional taking of private property in contravention of the Fifth Amendment to the United States Constitution.

B. Permanent Injunctive Relief

[15] Our inquiry does not end with a determination that the Joint Underwriting Association has prevailed on the merits of its Fifth Amendment claim. Before the court may grant permanent injunctive relief, the Association must

prove: *first*, that it will suffer irreparable injury absent the *540 requested injunction; *second*, that legal remedies are inadequate to compensate that injury; *third*, that balancing of the respective hardships between the parties warrants a remedy in equity; and *fourth*, that the public interest is not disserved by an injunction's issuance. See eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citations omitted).

[16] We have already determined that the constitutional injury effected by Act 44 is irreparable. (See Doc. 41 at 25). Sovereign immunity forecloses an award of monetary damages against the Commonwealth in this litigation. See Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs., 730 F.3d 291, 319 (3d Cir. 2013). We reject the General Assembly's eleventh hour suggestion that we allow the unconstitutional taking to occur and force the Association to try its luck in state court. (See Doc. 62 at 33–34). For the same reason, we find that there is no adequate legal remedy to compensate plaintiff's injury. The Third Circuit Court of Appeals has explicitly stated that "the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature." Temple Univ. v. White, 941 F.2d 201, 214–15 (3d Cir. 1991). A combination of declaratory and injunctive relief is the only way to ensure that the Association does not suffer an irreparable injury.

[17] [18] The remainder of the factors also favor the Association's request. Act 44 effects a direct loss of $200,000,000 to the Association as well as the indirect loss of both the interest on those funds and the cost of liquidating its investment portfolio. It inflicts a considerable and irreparable constitutional injury which far surpasses the General Assembly's frustration in returning to the budgetary drawing board. As concerns the public interest, we do not doubt that the General Assembly's intention was as stated—to achieve the estimable goals of balancing the state's budget and providing "for the health, welfare and safety of the residents of this Commonwealth." Act 44, § 1.3. As we have already held, the General Assembly cannot achieve this legitimate end through illegitimate means. (See Doc. 41 at 26–27). The public interest is furthered—not disserved—by permanently enjoining enforcement of a plainly unconstitutional statute. See Jamal v. Kane, 105 F.Supp.3d 448, 463 (M.D. Pa. 2015) (Conner, C.J.). We will grant the Association's request for permanent injunctive relief.

IV. Conclusion

Through Act 44, the General Assembly attempts to take by legislative requisition the private property of a private association to remedy its perpetual budgeting inefficacies. This it cannot do. Act 44 is plainly violative of the Takings Clause of the Fifth Amendment to the United States Constitution. We will grant summary judgment, declaratory judgment, and permanent injunctive relief to the Joint Underwriting Association. An appropriate order shall issue.

All Citations

324 F.Supp.3d 519

Footnotes

1 Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." LOCAL RULE OF COURT 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. Id. Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts. (See Docs. 60, 63, 65, 72, 74, 76, 77). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

2 The cyclical nature of insurance markets is described in academic literature as follows: "Property/liability insurance markets alternate between hard and soft markets in a phenomenon known as the underwriting cycle. In soft markets, underwriting standards are relaxed, prices and profits are low, and the quantity of insurance increases. In hard markets, underwriting standards become restrictive, and prices and profits increase. There are many policy cancellations or non-renewals, and policy terms (deductibles and policy limits) are tightened as the quantity of insurance coverage generally decreases." Seungmook Choi *et al.*, *The Property/Liability Insurance Cycle: A Comparison of Alternative Methods*, 68 S. ECON. J. 530, 530 (2002).

3 Act 44 twice references Subchapter *B* of Chapter 7 of the MCARE Act in describing the Association's function. The court notes that it is Subchapter *C* of Chapter 7 of the MCARE Act that establishes and defines the Association and its mission. See 40 PA. STAT. & CONS. STAT. ANN. §§ 1303.731–.733.

4 Because this case concerns a *per se* physical taking, defendants' reliance on the Third Circuit's decision in American Express Travel Related Services, Inc. v. Sidamon–Eristoff ("Amex"), 669 F.3d 359 (3d Cir. 2012), is misplaced. The court in Amex addressed a regulatory taking—a statutory amendment that retroactively reduced the presumptive abandonment period for unclaimed travelers checks from fifteen to three years. Id. at 364–66. The court opined that "[t]hose who do business in [a] regulated field" cannot claim that a later amendment to the relevant statutory framework "interferes with its investment-backed expectations" as required for a regulatory takings claim. Id. at 371 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986)). Act 44 is not a regulatory taking. It directly targets and endeavors to take money from the Joint Underwriting Association alone. See Act 44, § 1.3. Amex has no application under these circumstances.

5 Preliminarily, the General Assembly asserts that Act 44's *ipse dixit* statement that the Association is an "instrumentality" of the Commonwealth is enough to make it so. We rejected this argument in our preliminary injunction opinion, (see Doc. 41 at 22), and we reject it again now. The General Assembly's citation to Harristown Development Corp. v. Commonwealth, 532 Pa. 45, 614 A.2d 1128 (1992), does not persuade us otherwise. The legislature invokes Harristown for the Pennsylvania Supreme Court's statement that an entity "is an agency if the General Assembly says it is." (Doc. 71 at 2–3 (quoting Harristown, 614 A.2d at 1131)). This selective quotation of Harristown divorces the decision from critical context. The plaintiff in Harristown sought declaratory judgment that the state could not apply open records and open meetings laws to it based solely on the volume of business it did with the state. Id. at 1129–31. The court determined that the General Assembly could define "agency"—"*as that term appears in the Sunshine Act and the Right to Know Law*"—as it saw fit. Id. (emphasis added). No court has extended the quoted passage from Harristown beyond its open records and open meetings context.

6 Both the General Assembly and Governor Wolf also identify the Eleventh Circuit's decision in United States v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986), as a bar to the Association's lawsuit. In State of Alabama, the Eleventh Circuit Court of Appeals opined without analysis that the political subdivision standing doctrine applicable to cities and counties "extends logically to other creatures of the state such as state universities." Id. at 1456. This thin holding concerning an indisputably public university offers precious little insight to aid our analysis of a private nonprofit's relationship to the state.

7 For the same reason, we reject the General Assembly's repeated reliance on Justice Ginsburg's majority opinion in Hess v. Port Authority Trans–Hudson Corp., 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), and Justice Brennan's concurrence in Port Authority Trans–Hudson Corp. v. Feeney, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990). This pair of cases concerns the amenability of the Port Authority Trans–Hudson Corporation ("PATH"), a bistate railway created under the Constitution's Compact Clause, to suit in federal court. Both opinions express the unremarkable maxim that "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." Hess, 513 U.S. at 47, 115 S.Ct. 394; see also Feeney, 495 U.S. at 313, 110 S.Ct. 1868 (Brennan, J., concurring) (noting that "political subdivisions exist solely at the whim and behest of their State"). The Justices make this point, however, in the context of explaining that such ultimate authority—which is true of *any* state-created entity—renders state control nondispositive to an Eleventh Amendment inquiry. See Hess, 513 U.S. at 47–48, 115 S.Ct. 394; Feeney, 495 U.S. at 313, 110 S.Ct. 1868 (Brennan, J., concurring) (observing that political subdivisions are too far removed from the state to receive Eleventh Amendment protection "*even though* these political subdivisions exist solely at the whim and behest of their State" (emphasis added)). The General Assembly's theory that state creation is determinative finds no support in Hess or Feeney.

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APPENDIX B

JUA II
(ACT 41 OF 2018)

381 F.Supp.3d 324
United States District Court, M.D. Pennsylvania.

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION, Plaintiff
v.
Tom WOLF, in his Official Capacity as Governor of the Commonwealth of Pennsylvania, et al., Defendants

CIVIL ACTION NO. 1:18-CV-1308
|
Signed 12/18/2018

Synopsis

Background: State-created nonprofit joint underwriting association, which provided medical professional liability insurance to those unable to obtain coverage at competitive rates, filed § 1983 action against Pennsylvania governor, state legislators, and state insurance commissioner, alleging that state statute absorbing association into state Insurance Department to access association's surplus funds was unconstitutional taking. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Christopher C. Conner, Chief Judge, held that:

[1] doctrine of issue preclusion did not apply to bar association's takings claim;

[2] association was not public entity precluded from asserting takings claim;

[3] statute purporting to transform association into governmental entity violated Takings Clause; and

[4] permanent injunction was warranted.

Association's motion granted.

West Headnotes (12)

[1] **Civil Rights**
Substantive or procedural rights

Section 1983 is not source of substantive rights, but serves as mechanism for vindicating rights otherwise protected by federal law. 42 U.S.C.A. § 1983.

[2] **Civil Rights**
Nature and elements of civil actions

To state § 1983 claim, plaintiffs must show deprivation of right secured by Constitution and laws of United States by person acting under color of state law. 42 U.S.C.A. § 1983.

[3] **Eminent Domain**
Property and Rights Subject of Compensation

Takings Clause applies not only to taking of real property, but also to government efforts to take identified funds of money. U.S. Const. Amend. 5.

[4] **Judgment**
Scope and Extent of Estoppel in General

Four elements are prerequisite to application of issue preclusion: (1) identical issue was previously adjudicated; (2) issue was actually litigated; (3) previous determination was necessary to decision; and (4) party being precluded from relitigating issue was fully represented in prior action.

[5] **Judgment**
Matters which could not have been adjudicated

Collateral estoppel generally will not apply when controlling facts or legal principles have changed significantly since prior judgment.

|6| **Judgment**

What constitutes diversity of issues

Judgment

Matters which could not have been adjudicated

Doctrine of issue preclusion did not apply to bar state-created nonprofit joint underwriting association's claim that state's attempt to access its surplus funds violated Takings Clause, even though court had ruled that state's previous attempt to take funds was unconstitutional taking, where first action was based on association's status as de facto private entity, and state had amended statute in attempt to reclaim association as purely governmental entity. U.S. Const. Amend. 5.

|7| **Eminent Domain**

Necessity of just or full compensation or indemnity

State, by ipse dixit, may not transform private property into public property without just compensation. U.S. Const. Amend. 5.

|8| **Eminent Domain**

Persons entitled to sue

State-created nonprofit joint underwriting association was not public entity, and thus was not precluded from asserting § 1983 Takings Clause claim against Pennsylvania governor and state legislature, arising out of passage of statute purporting to transform association into governmental entity housed within Commonwealth's insurance department and operating under control and oversight of Commonwealth's insurance commissioner, even though state had created association in response to medical malpractice insurance crisis, where association, since its inception, had been private institution, had operated like private insurance company for decades, was privately funded and organized, and had never received public funding. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

|9| **Eminent Domain**

Particular acts and regulations

Pennsylvania statute purporting to transform state-created nonprofit joint underwriting association into governmental entity housed within Commonwealth's insurance department and operating under control and oversight of Commonwealth's insurance commissioner in order to access association's surplus funds violated Takings Clause, despite Commonwealth's contention that it was not taking anything from association, only giving it new legislative manifestation, where statute dismantled private entity and transferred its assets in toto, as well as its administration, to Commonwealth. U.S. Const. Amend. 5.

1 Cases that cite this headnote

|10| **Injunction**

Grounds in general; multiple factors

Before court may grant permanent injunctive relief, plaintiff must prove that: (1) it will suffer irreparable injury absent requested injunction; (2) legal remedies are inadequate to compensate that injury; (3) balancing of respective hardships between parties warrants remedy in equity; and (4) public interest is not disserved by injunction's issuance.

|11| **Civil Rights**

Property and housing

Monetary damages were inadequate to compensate injury to state-created nonprofit joint underwriting association as result of Pennsylvania statute purporting to transform association into governmental entity housed within Commonwealth's insurance department and operating under control and oversight of Commonwealth's insurance commissioner, for purposes of evaluating association's motion for permanent injunction in its § 1983 action alleging violation of Takings Clause; sovereign immunity would foreclose award of monetary

damages in suit against Commonwealth, such that equity alone provided appropriate remedy. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[12] **Civil Rights**

Property and housing

Issuance of permanent injunction was in public interest in state-created nonprofit joint underwriting association's § 1983 action alleging that Pennsylvania statute purporting to transform it into governmental entity housed within Commonwealth's insurance department and operating under control and oversight of Commonwealth's insurance commissioner violated Takings Clause, despite Commonwealth's contention that public had considerable interest in legislative discretion and unencumbered lawmaking process reflecting public will. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

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Held Unconstitutional

40 Pa. Stat. Ann. §§ 323.1-A, 323.2-A, 323.11-A, 323.12-A, 323.13-A, 323.21-A, 1303.731

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MEMORANDUM

Christopher C. Conner, Chief Judge

***326** In May of this year, we entered judgment in Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf ("JUA I"), No. 1:17-CV-2041 (M.D. Pa.), declaring portions of Act 44 of 2017, P.L. 725, No. 44 ("Act 44"), to be violative of the Takings Clause of the Fifth Amendment to the United States Constitution and permanently enjoining enforcement of the Act's operative provisions. Finding the Pennsylvania Professional Liability Joint Underwriting Association (the "Joint Underwriting Association" or "Association") to be a private entity and its assets to be private property, we concluded that the state cannot expropriate to its own use funds held in the Association's coffers.

The General Assembly responded by enacting Act 41 of 2018, P.L. 273, No. 41 ("Act 41"), on June 22, 2018. Act 41 deploys JUA I as a blueprint, endeavoring to avoid the constitutional infirmities that felled Act 44. Specifically, Act 41 purports to transform the Joint Underwriting Association into a governmental entity housed within the Commonwealth's Insurance Department ("Department") and operating under the control and oversight of the Commonwealth's Insurance Commissioner ("Commissioner"). It also seeks to accomplish indirectly what JUA I forbade the state from doing directly—forcing the transfer of the Association's assets to the Department. By order of July 18, 2018, we preliminarily enjoined enforcement of Act 41 pending merits review of the Joint Underwriting Association's constitutional claims. The parties' cross-motions for summary judgment are now before the court.

I. Factual Background & Procedural History [1]

The factual backdrop of this litigation is outlined *in extenso* in this court's summary judgment opinion in JUA I and our preliminary injunction opinion in this action, familiarity with which is presumed. See generally JUA I, 324 F.Supp.3d 519 (M.D. Pa. 2018); Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf ("JUA II"), 328 F.Supp.3d 400 (M.D. Pa. 2018). We reiterate salient facts for context in addressing the parties' Rule 56 arguments.

A. The Joint Underwriting Association

The Joint Underwriting Association was established by statute as a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. The General Assembly created the Association in 1975 in response to a decline in the availability of medical malpractice insurance in the Commonwealth. (Doc. 33 ¶ 3). The Association was initially established and organized by the Pennsylvania Health Care Services Malpractice Act of 1975, P.L. 390, No. 111 (the "CAT Fund Statute").

*327 The CAT Fund Statute authorized the Commissioner to either "establish and implement" or "approve and supervise" a "plan" for ensuring that medical professional liability insurance is made "conveniently and expeditiously" available to providers in the Commonwealth who cannot obtain insurance on the open insurance market. See CAT Fund Statute, § 801 (codified prior to repeal at 40 PA. STAT. AND CONS. STAT. ANN. § 1301.801). Section 801 provided that the plan "may be implemented by a joint underwriting association," id., and Section 803 permitted insurers to consult and agree with each other as to "organization, administration and operation of the plan" and rates for coverage, id. § 803(a) (codified prior to repeal at 40 PA. STAT. AND CONS. STAT. ANN. § 1301.803). An "Ad Hoc Industry Committee" of insurers submitted the Joint Underwriting Association's original proposed plan of operations to the then-Commissioner, who approved same on December 30, 1975. (Doc. 33 ¶¶ 7-8). The plan established a 12-member board of directors, one member of which was appointed by the Commissioner, and vested authority in the board to "decide all matters of policy and have authority to exercise all reasonable and necessary powers relating to the operation of the Association which are not specifically delegated by the plan to others or reserved to members of the Association." (Id. ¶¶ 9, 11). The statute authorized the Commissioner to dissolve the plan if he deemed it unnecessary and authorized the Association to borrow funds from the state in the event of a deficit. CAT Fund Statute, §§ 803(b), 808 (codified prior to repeat at 40 PA. STAT. AND CONS. STAT. ANN. §§ 1301.803(b), -.808). The Association was granted Section 501(c)(6) status by the Internal Revenue Service in 1976 and has since maintained that status. (Doc. 33 ¶¶ 12-14).

The General Assembly repealed the CAT Fund Statute on March 20, 2002, replacing it with the current statutory framework, the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 PA. STAT. AND CONS. STAT. ANN. § 1303.101 *et seq.* The MCARE Act is a sweeping piece of legislation, with an overarching goal of ensuring a "comprehensive and high-quality health care system" for the citizens of the Commonwealth. Id. § 1303.102(1). Among other things, the MCARE Act establishes the Medical Care Availability and Reduction of Error Fund ("the MCARE Fund"), id. §§ 1303.711-.716, as a "special fund" within the state treasury to be administered by the Department, id. §§ 1303.712(a), -.713(a). The Fund offers a secondary layer of medical professional liability coverage for physicians, hospitals, and other health care providers and is funded primarily by annual assessments on those providers as a condition to practice in the Commonwealth. See id. § 1303.712(d)(1).

The MCARE Act continued operation of the Joint Underwriting Association. Id. § 1303.731(a). Unlike the MCARE Fund, the Association was not established as a "special fund" or a traditional agency within the Commonwealth's governmental structures. See id.; cf. id. §§ 1303.712(a), -.713(a). Instead, the General Assembly "established" the Association as "a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association." Id. § 1303.731(a). Like its predecessor, the MCARE Act mandates membership in the Association for insurers authorized to write medical professional liability insurance in the Commonwealth. Id.

The MCARE Act requires the Association to offer medical professional liability insurance to health care providers and entities who "cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in *328 excess of" rates applicable to those similarly situated. Id. § 1303.732(a). The Act sets forth broad parameters for achieving this objective, tasking the Association to ensure that its insurance is conveniently and expeditiously available, offered on reasonable and not unfairly discriminatory terms, and subject only to the payment of a premium for which payment plans must be made available. Id. § 1303.732(b)(1)-(5). The MCARE Act prescribes four "duties" for the Association. Id. § 1303.731(b). It requires the Association to (1) submit a plan of operations to the Commissioner for approval, (2) submit rates and any rate modifications for Department approval, (3) offer insurance as described *supra*, and (4) file its schedule of occurrence rates with the Commissioner. See id. § 1303.731(b)(1)-(4).

The Association, like other insurers licensed to operate within the Commonwealth, is "supervised" by the Department through the Commissioner. Id. § 1303.731(a); see, e.g., id. §§ 221.1-a to -.15-a, 1181-99. The MCARE Act otherwise provides that all "powers and duties" of the Association "shall be vested in and exercised by a board of directors." Id. § 1303.731(a). The board's composition, and all of the Association's operative principles, are set forth in a plan of operations developed by the Association with Department assistance and approval. (See Doc. 33 ¶¶ 38-41); JUA I, 324 F.Supp.3d at 536. The existing plan establishes a 14-member

board of directors, which consists of the current Association president; eight representatives of member companies chosen by member voting; one agent or broker elected by members; and four health care provider or general public representatives who may be nominated by anyone and are appointed by the Commissioner. (Doc. 33 ¶ 38). Under the plan, the Association may be dissolved (1) "by operation of law" or (2) at the request of its members, subject to Commissioner approval. (Id. ¶ 40). The plan provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as the Board may determine subject to the approval of the Commissioner." (Id. ¶ 41).

The Joint Underwriting Association writes insurance policies directly to its insured health care providers, and those policyholders pay premiums directly to the Association. (See id. ¶ 52). The Association is funded exclusively by policyholder premiums and investment income generated therefrom. (Id. ¶¶ 46, 49, 50-51). It is not and has never been funded by the Commonwealth, (id. ¶ 49), and it has historically held all premiums and investment funds in private accounts in its own name, (Doc. 41 ¶¶ 8-9; Doc. 52 ¶¶ 8-9; see also Doc. 58 ¶¶ 8-9). Prior to enactment of Act 41, the MCARE Act insulated the Commonwealth from the Association's debts and liabilities. See 40 PA. STAT. AND CONS. STAT. ANN. § 1303.731(c); (Doc. 33 ¶ 32). The Association has never borrowed money to fund its operations, either in its current form or under the CAT Fund Statute which authorized the Association to borrow from the state. (Doc. 33 ¶¶ 19, 50). In the event of a deficit, the Association's plan of operations contemplates assessments on members in the form of a loan as one method of keeping the Association afloat. (See Doc. 33-6 at 3). The Association has never assessed its members under this provision. (Doc. 33 ¶ 46).

The Association maintains contingency funds—its "reserves" and its "surplus"—which allow the Association to fulfill its insurance obligations in the event of greater-than-anticipated claims or losses. See JUA I, 324 F.Supp.3d at 525-26; (see also Doc. 33 ¶¶ 60, 62, 64, 72-74). An insurer's "reserves" are the "best estimate of funds ... need[ed] to pay for claims that have been incurred but not yet paid." (See Doc. *329 33 ¶ 72). Its "surplus" represents "capital after all liabilities have been deducted from assets." (See id. ¶ 73). The surplus operates as a "backstop" to ensure that unforeseen events do not impede an insurer's ability to meet obligations to its insureds. (See id. ¶ 74). As of December 31, 2016, the Joint Underwriting Association maintained a surplus of $ 268,124,502. (Id. ¶ 58).

B. Recent Legislative Acts Concerning the Association

On July 13, 2016, Governor Wolf signed into law Act 85 of 2016, P.L. 664, No. 85 ("Act 85") (codified prior to repeal at 72 PA. STAT. AND CONS. STAT. ANN. § 1726-C). Act 85 is wide-ranging in scope, but its principal effect was to amend the General Appropriation Act of 2016 and balance the Commonwealth's budget. Act 85, § 1. Among other things, Act 85 provided for certain transfers to the Commonwealth's General Fund. See id. § 1(7). Pertinent here, Section 18 of Act 85 amended the Commonwealth's Fiscal Code to require a $ 200,000,000 transfer to the General Fund from the Joint Underwriting Association, repayable over a five-year period that was to begin in July 2018. Id. § 18.

The Association did not transfer funds to the Commonwealth pursuant to Act 85. (Doc. 33 ¶ 93). On May 18, 2017, the Association commenced a lawsuit, also pending before the undersigned, challenging the constitutionality of Act 85. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright, No. 1:17-CV-886, Doc. 1 (M.D. Pa. May 18, 2017). At the parties' request, that litigation has been held in abeyance pending resolution of appeals filed in JUA I.

On October 30, 2017, Governor Wolf signed Act 44 into law in another attempt to bring balance to the state budget. Act 44, § 1. Therein, the General Assembly expressly repealed Act 85. Id. § 13. Act 44, *inter alia*, purported to amend the Commonwealth's Fiscal Code to include certain "findings" concerning the Joint Underwriting Association's relationship to the Commonwealth and the nature of its unappropriated surplus. Id. § 1.3. Specifically, the General Assembly "found" that the Association is an "instrumentality of the Commonwealth" and "[m]oney under the control of the [Association] belongs to the Commonwealth." Id. Act 44 then mandated a monetary transfer from the Association to the state—$ 200,000,000 to the State Treasurer for deposit in the General Fund—for appropriation to the Department of Human Services. Id. Act 44 contained a "sunset" clause threatening to abolish the Association if it failed to make the transfer. Id.

The Association responded with a second lawsuit, JUA I, challenging the constitutionality of Act 44. We preliminarily enjoined enforcement of Act 44 and accelerated proceedings on the merits of the Association's claims. JUA I, No. 1:17-CV-2041, 2017 WL 5625722 (M.D. Pa. Nov. 22, 2017). On

May 17, 2018, we issued a memorandum opinion concluding that the Association is a private entity and its surplus funds are private property that the Commonwealth cannot take without just compensation. JUA I, 324 F.Supp.3d at 538. We entered judgment in favor of the Association, declaring Act 44 to be violative of the Fifth Amendment and permanently enjoining enforcement of the provisions thereof relevant to the Association. Both the Commonwealth and the General Assembly appealed our judgment to the Third Circuit Court of Appeals. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf, No. 18-2323 (3d Cir.). The appeals remain pending.

On June 22, 2018, Governor Wolf signed into law the legislation subject to this lawsuit. Act 41 is the General Assembly's ***330** third attempt in as many years to gain access to the Association's funds. The Act endeavors to fundamentally reshape the Joint Underwriting Association and alter its governance structure to give the Commonwealth direct control of the Association's assets and operations. See Act 41, §§ 3-5. Specifically, Act 41 does the following:

(1) Finds that "placing the Association within the Department will give the Commissioner more oversight of expenditures and ensure better efficiencies in the operation of the Association";

(2) Declares that the Association "shall continue as an instrumentality of the Commonwealth" and "shall operate under the control, direction and oversight of the Department";

(3) Replaces the Association's current member-led board with a state-controlled board, consisting of three gubernatorial appointees and one member appointed by each of the president *pro tempore* and the minority leader of the Pennsylvania Senate and the speaker and the minority leader of the Pennsylvania House of Representatives, with the chair of the board to be appointed by the Governor;

(4) Installs a new executive director to be hired by the Commissioner and compensated by the Commonwealth, to whom authority to act on behalf of the Association will be transferred within 30 days of the Act's effective date;

(5) Assumes Commonwealth liability for any claims or liabilities of the Association arising under its insurance policies;

(6) Mandates that the new board prepare and submit a new plan of operations to the Commissioner for approval within 60 days of the Act's effective date;

(7) Articulates with specificity the duties and responsibilities of and the authority granted to the new board; and

(8) Provides that all documents, papers, and assets in the Association's possession shall be transferred to the Department within 30 days of the Act's effective date.

Id. § 3. Act 41 was scheduled to take effect on July 22, 2018. Id. § 7.

C. Procedural History

The Joint Underwriting Association commenced this lawsuit with the filing of a verified complaint on June 28, 2018, subsequently filing an amended complaint on July 3, 2018. Therein, the Association challenges the constitutionality of Act 41 under 42 U.S.C. § 1983. The Association asserts that Act 41 violates the Substantive Due Process Clause (Count I), the Takings Clause (Count II), and the Contract Clause (Count III). It seeks declaratory and injunctive relief pursuant to Section 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201 (Count IV). The amended complaint identifies two groups of defendants: Tom Wolf, Governor of the Commonwealth, and Jessica K. Altman, Insurance Commissioner of Pennsylvania, whom we will refer to as the "executive defendants," and a group we refer to as the "legislative defendants," comprising Joseph B. Scarnati, President *Pro Tempore* of the Senate; Jay Costa, Minority Leader of the Senate; Michael Turzai, Speaker of the House of Representatives; and Frank Dermody, Minority Leader of the House of Representatives.[2] All defendants are sued in their official capacities.

***331** The Association moved for a temporary restraining order and preliminary injunction contemporaneously with the commencement of this case. We denied the request for temporary restraining order and expedited proceedings on the request for a preliminary injunction. Following oral argument on July 6, 2018, we granted the Association's motion and preliminarily enjoined enforcement of Act 41 pending merits review of the Association's claims. See generally JUA II, 328 F.Supp.3d 400. Cross-motions for summary judgment filed by the Joint Underwriting Association, the executive defendants, and the legislative defendants are ripe for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. City of Lebanon, 331 F.Supp.2d 311, 315 (M.D. Pa. 2004); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Only if this threshold is met may the cause of action proceed. See Pappas, 331 F.Supp.2d at 315.

Courts are permitted to resolve cross-motions for summary judgment concurrently. See Lawrence v. City of Phila., 527 F.3d 299, 310 (3d Cir. 2008); see also Johnson v. Fed. Express Corp., 996 F.Supp.2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

The Joint Underwriting Association raises four claims in its amended complaint. The Association asserts *first*, that Act 41 violates its right to substantive due process; *second*, that Act 41 is an unconstitutional taking of private property; *third*, that Act 41 substantially interferes with the Association's contracts with its insureds and its members; and *fourth*, that it is entitled to a declaration that Act 41 is unconstitutional for each of the above reasons pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. As in JUA I, we begin and end our analysis with the Association's Takings Clause claim.

A. The Association's Takings Clause Claim

[1] [2] Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials. ***332** 42 U.S.C. § 1983. The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. Gonzaga Univ. v. Doe, 536 U.S. 273, 284-85, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a Section 1983 claim, plaintiffs must show a deprivation of a "right secured by the Constitution and the laws of the United States ... by a person acting under color of state law." Kneipp, 95 F.3d at 1204 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)). Defendants do not dispute that they are state actors. We must thus determine whether Act 41 deprives the Association of rights secured by the Fifth Amendment to the United States Constitution.

[3] We have previously articulated the fundamental principles of takings law, see JUA I, 324 F.Supp.3d at 528-29, and those principles have equal application here. The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. U.S. CONST. amend. V. The Takings Clause is made applicable to the states by the Fourteenth Amendment. See U.S. CONST. amend. XIV; Murr v. Wisconsin, 582 U.S. ——, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017) (citing Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). It applies not only to the taking of real property, but also to government efforts to take identified funds of money. See, e.g., Phillips v. Wash. Legal Found., 524 U.S. 156, 160, 164-65, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Takings claims generally fall into two categories—physical and regulatory. See Yee v. City of Escondido, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

Our decision in JUA I applied these settled principles in the context of the unique constitutional question then before us. Because the parties' summary judgment motions concenter upon JUA I, we briefly revisit the *ratio decidendi* undergirding that decision.

1. JUA I

JUA I rejected arguments by Governor Wolf and the General Assembly that the Joint Underwriting Association is either the state itself or an arm thereof with no constitutional rights against its creator. We found Governor Wolf's reliance on the United States Supreme Court's decision in Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 115 S.Ct. 961, 130

L.Ed.2d 902 (1995), which supplied "guideposts" for courts to assess whether a defendant is a government actor subject to Section 1983 liability, to be misplaced. JUA I, 324 F.Supp.3d at 531-32. And we disagreed with the General Assembly that, by virtue of its statutory roots, the Association is akin to a political subdivision with "no privileges or immunities" against its state creator. Id. at 530-32 (quoting Williams v. Mayor of Balt., 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)).

Drawing on a body of illustrative federal and state court decisions,[3] we observed *333 that courts typically look to a number of nonexhaustive considerations in assessing the public-versus-private nature of state-affiliated insurance associations, including "the nature of the association's function, the degree of control reserved in the state (or the level of autonomy granted the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated." Id. at 535. We carefully examined the Association's enabling legislation, the nature of the Association's function and the manner in which it performed that function, its governance and operational structure, the relative lack of Commonwealth control and the total dearth of Commonwealth responsibility, and the private source of the Association's funds before holding that both the Association and its assets are overwhelmingly private in nature. Id. at 535-38.

As to the Association itself, we determined that it is "at its core, an insurance company," funded exclusively by privately-paid premiums and largely indistinguishable from other private insurers in the Commonwealth. Id. at 535-36. Of greater import than the Association's function was its near-total independence from the state. We rejected defendants' assertion that the Commonwealth retained authoritative control over the Association, observing that the MCARE Act vested all "powers and duties" of the Association "in and [to be] exercised by" its member-led board of directors. Id. (alteration in original) (quoting 40 PA. STAT. AND CONS. STAT. ANN. § 1303.731(a)). We found that a limitation on rate-setting and a requirement that the Commissioner approve deficits were not meaningfully distinguishable from regulations applicable to other private insurers in the Commonwealth. Id. at 536-37. And we noted that it was not the MCARE Act but the Association's own plan of operations which set procedures for dissolution. Id. at 537. Hence, we held that the Association is no more a Commonwealth entity "than any other private insurer authorized to write insurance in the state." Id.

Turning to the nature of the Association's surplus funds, we noted that the Association has never received public funding and that the MCARE Act (as it then-existed) expressly disclaimed state responsibility for the Association's debts and liabilities. Id. at 537-38 (citing 40 PA. STAT. AND CONS. STAT. ANN. § 1303.731(c)). We also underscored that the Association is sustained exclusively by private premiums, "paid by private parties in exchange for private insurance coverage," as well as investment income and interest generated on those premiums. Id.

For these many reasons, we held as a matter of law that the Joint Underwriting Association is a private entity and that its surplus funds are private property. Id. at 538. We observed that the Commonwealth made a choice when it created the Association in 1975, and that its choice has present-day constitutional consequences:

> The legislature had the option to tightly circumscribe the Association's operations and composition of its board, to establish the Association as a special fund within the state's treasury, or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General *334 Assembly cannot claim *carte blanche* access to the Association's assets.

Id. (citations omitted). The result, we said, is that the Commonwealth cannot take private property acquired by the Association without just compensation. Id.

The *essentia* of our holding in JUA I is that the state "released the Association from any residual sovereign mooring" when it relinquished control of the Association to the board and disclaimed responsibility therefor. JUA II, 328 F.Supp.3d at 410 (quoting JUA I, 324 F.Supp.3d at 538). The question raised in the matter *sub judice* is whether the Commonwealth,

through Act 41, can reclaim the Association as a purely governmental entity and gain access to its surplus funds. The Association asks the court to assign *res judicata* effect to our judgment in JUA I and answer this inquiry in the negative. Defendants rejoin that the answer is an unequivocal "yes," insisting that the court either reconsider and abandon JUA I or find it to be distinguishable given the new statutory landscape brought by Act 41.

2. *Issue Preclusion*

|4| The Joint Underwriting Association invokes the doctrine of issue preclusion, also referred to as collateral estoppel. Federal law of issue preclusion derives from the Restatement (Second) of Judgments, which provides that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. ——, 135 S.Ct. 1293, 1303, 191 L.Ed.2d 222 (2015) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1980)); Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 288 F.3d 519, 525 (3d Cir. 2002)(same). Four elements are prerequisite to application of issue preclusion: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action."[4] Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 249 (3d Cir. 2006) (citation omitted). The Third Circuit has also considered two additional elements, to wit: "whether the party being precluded 'had a full and fair opportunity to litigate the issue in question in the prior action,' " and "whether the issue was determined by a final and valid judgment." Id.

|5| |6| The Joint Underwriting Association contends that resolution of the dispositive issue in this case begins and ends with JUA I. But collateral estoppel generally will not apply when "controlling facts or legal principles have changed significantly since the [prior] judgment." Karns v. Shanahan, 879 F.3d 504, 514 (3d Cir. 2018) (alteration in original) (quoting Montana v. United States, 440 U.S. 147, 155, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). We are here presented with a different legislative act and a different constitutional question than were before us in JUA I. At issue there was whether the Joint Underwriting Association was a public or private entity, ***335** and whether its funds were public or private property. See JUA I, 324 F.Supp.3d at 529-38. We held that both the Association and its funds were private in nature and that the state could not take those funds without just compensation. See id. at 538.

The issue now before the court is different. As we have already framed it, the dispositive inquiry is "[w]hether the Commonwealth can now recapture the Association through *post hoc* legislation—irrespective of private rights and interests accrued by the Association over more than four decades"—without constitutional consequence. See JUA II, 328 F.Supp.3d at 410-11. Our disposition of the Fifth Amendment issue raised by Act 41 is assuredly informed by JUA I. And many of the same constitutional concerns are implicated by this newest legislation. But the enactment of Act 41 alters the legal landscape, compelling scrutiny anew. Accordingly, we cannot find that the issues raised in JUA I are "identical" to the issues presently before the court.

3. *Merits*

We turn to the merits and begin from a simple premise: the Association, as it existed on May 17, 2018, is a private entity, and its funds are private property that cannot be taken by the government without just compensation. See JUA I, 324 F.Supp.3d at 538. From there, the parties' arguments take three divergent tacks. The executive defendants contend that Act 41 merely complies with JUA I by implementing criteria set forth therein to reconstitute the Association as a public entity. The legislative defendants assert that the holding in JUA I is in error, that the Joint Underwriting Association is a public entity in which the Commonwealth alone is interested, and that the state can do with the Association what it pleases. And the Association maintains that Act 41, like its predecessor Act 44, effects an unconstitutional taking of its private property. The court addresses each argument *seriatim*.

a. Executive Defendants: Answering JUA I

The executive defendants rely on Act 41 itself as the answer to the constitutional inquiry before the court. They remonstrate that Act 41 checks each of the boxes drawn by JUA I to transform the Association into a Commonwealth entity. (See Doc. 44 at 6-11). They answer the court's inquiry of whether the state can retrospectively recapture a private entity and assume ownership of its private property with a firm but wholly unsupported "yes." (Id. at 6-9).

We expressed skepticism at the preliminary injunction stage with respect to this contention, which we construed as

intimating that "with a legislative vote and the stroke of the Governor's pen, what were private funds yesterday may become public funds tomorrow." JUA II, 328 F.Supp.3d at 410. We further observed that, notwithstanding the "wide leeway" rightly accorded to legislative prerogative, the executive defendants had offered no jurisprudential support for their claim that the Commonwealth could transfigure into public property what the court had already declared to be private. Id. at 410 (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978)).

[7] The executive defendants offer no meaningful response to our expressed concerns. They move through the components parts of Act 41, explaining how each "answers" and satisfies the public-entity hallmarks found to be lacking in JUA I. (See Doc. 44 at 6-9). But they fail to provide any authority for the proposition that the state can declare public what it created as—and a court has confirmed to be—a private entity. The law is to the contrary. ***336** Indeed, the Supreme Court's takings jurisprudence expressly rejects the suggestion that the state, by legislative say-so, may make public what was previously private, admonishing that "a State, by *ipse dixit*, may not transform private property into public property without just compensation." Webb's Fabulous Pharms., Inc., 449 U.S. at 164, 101 S.Ct. 446. Accordingly, we will deny the executive defendants' motion for summary judgment on the Joint Underwriting Association's takings claim.

b. Legislative Defendants: Revisiting JUA I

The legislative defendants do not engage with the constitutionality of Act 41 directly. They approach this case similarly to JUA I, reviving their assertion that the General Assembly created the Joint Underwriting Association, and that only the Commonwealth is interested in the Association, such that the Association necessarily is a public entity and its funds public property. No change in law, fact, or perspective supports the requested departure from JUA I. It is this court's view that the legislative defendants' assertions of error are most appropriately raised in the pending direct appeal of JUA I. Nonetheless, for the sake of completeness, we respond to those arguments herein. [5]

The legislative defendants turn first to the Supreme Court's decision in Trustees of Dartmouth College v. Woodward ("Dartmouth"), 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), which they claim reinforces their assertion that the General Assembly retains "absolute discretion over the entities it creates." (Doc. 37 at 17). Defendants hold Dartmouth up for their view that a state's power over entities it creates turns exclusively on the "presence or absence of non-state interests." (Id. at 18 (emphasis omitted)). We agree that the existence of non-state interests is to be considered in assessing whether the state may wield its power, unrestrained by the federal Constitution, over an entity. We disagree, however, that this is the only relevant consideration, or that our decision in JUA I in any way conflicts with Dartmouth.

Dartmouth arose under the Contract Clause of the United States Constitution. In 1754, Reverend Eleazer Wheelock established Dartmouth College at his own and other private benefactors' expense, named trustees thereof, and applied to the crown for a charter of incorporation. Id. at 631. The charter was granted and Dartmouth College was born. Id. at 631-32. In 1816, the legislature of New Hampshire attempted to amend the charter to seize control of the college as a public institution. See id. at 626-27. The Dartmouth lawsuit followed.

The Supreme Court rejected the attempted takeover as a violation of the Contract Clause. The decision establishes that the United States Constitution does not bar the state from regulating its own public institutions but *does* protect private corporations as against the state. See id. at 630-31, 638. Whether an entity is a public or private institution turns not on the commercial ***337** or charitable nature of the services provided, see id. at 669-73 (Story, J., concurring), but on the entity's status *vel non* as an "instrument[ ] of government," see id. at 638 (Marshall, C.J.). The Court stated that a government charter is a "grant of political power" and establishes a public entity "if it create a civil institution, to be employed in the administration of the government, or if the funds of the [entity] be public property, or if the state ..., as a government, be alone interested in its transactions." Id. at 629-30. Where it creates such an institution, the government "may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States." Id. at 630.

Concurring justices endeavored to put a finer point on the distinction. Justice Washington compared governmental entities, which he described as "the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king, or government, may bestow upon it, and having no other founder or visitor than the king or government," with private institutions, those "endowed and founded by private persons,

and subject to their control, laws and visitation, and not to the general control of the government." Id. at 661 (Washington, J., concurring). Justice Story added that a public entity exists solely for a "public purpose[ ]" and "its whole interests and franchises are the exclusive property and domain of the government itself." Id. at 668-69, 672 (Story, J., concurring). By contrast, he said, where "the foundation be private, though under the charter of the government, the corporation is private." Id. at 668-69.

The legislative defendants posit that the Joint Underwriting Association is precisely the governmental instrument contemplated by Dartmouth, maintaining that the Commonwealth and only the Commonwealth is interested in its business. (Doc. 53 at 8). But as three lawsuits, more than a thousand pages of briefing, and multiple judicial opinions evince, the constitutional question *sub judice* is quite different from that presented in Dartmouth. Yes, the General Assembly did create the Association in response to a medical malpractice insurance crisis in the Commonwealth. But in the same act that created the Association, the legislature relinquished near-total control thereof and renounced responsibility therefor, establishing the Association as a nonprofit with its own statutory rights, disclaiming liability for its debts and obligations, and vesting all powers and duties in its member-led board. See JUA I, 324 F.Supp.3d at 536. We discern no tension between Dartmouth and JUA I. The Association does not neatly fit into any of the categories of public entities described in Dartmouth: it is not, as defendants submit, "a civil institution ... employed in the administration of the government"; it has never been funded by or endowed with "public property"; and the state has never been "alone interested in its transactions." See Dartmouth, 17 U.S. (4 Wheat.) at 629-30.

It is for this reason that we looked to other cases involving constitutional claims brought by state-created insurance associations. The legislative defendants also oppugn our assessment of those opinions, which included the Fifth Circuit's decision in Texas Catastrophe Property Insurance Ass'n v. Morales, 975 F.2d 1178 (5th Cir. 1992); the First Circuit's decisions in Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007), and Arroyo-Melecio v. Puerto Rican American Insurance Co., 398 F.3d 56 (1st Cir. 2005); and the New York Court of Appeals' decision in *338 Medical Malpractice Insurance Ass'n v. Superintendent of Insurance ("MMIA"), 72 N.Y.2d 753, 537 N.Y.S.2d 1, 533 N.E.2d 1030 (1988). In each of those cases, we determined, the courts "holistically examined the entity's relationship to the state," by examining such considerations as the "nature of the association's function, the degree of control reserved in the state (or the level of autonomy granted to the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated." JUA I, 324 F.Supp.3d at 535 (citations omitted).

The legislative defendants asseverate that these cases stand, at most, for the proposition that "a state-created entity may *sometimes* assert constitutional claims on behalf of private citizens," but only when the individual rights of those private citizens are themselves implicated. (Doc. 37 at 24 (emphasis added)). For example, in Morales, the Fifth Circuit held that the statutorily-established Texas Catastrophe Property Insurance Association (CATPOOL) was not in fact "part of the state" and had standing to sue Texas for deprivation of its right to counsel. See Morales, 975 F.2d at 1182-83. In Asociación, the First Circuit concluded that Puerto Rico's statutorily-established joint underwriting association could assert a takings claim against the government. See Asociación, 484 F.3d at 20 (quoting Arroyo-Melecio, 398 F.3d at 62). Defendants assert that these results obtained solely because member companies shared in the respective associations' profits and losses, such that the state alone was not interested in the associations' success or failure. (Doc. 53 at 12-14). According to defendants, the Constitution protected the "private interests" of the associations' members but did not protect the insurance associations themselves. (Id. at 12).

We disagreed with defendants' narrow characterization of these decisions in JUA I, and we do so again now. The Morales court did note that CATPOOL's members shared in its profits and losses. Morales, 975 F.2d at 1182-83. But it *also* observed, as we did in JUA I, that the state treasury was not liable for CATPOOL's debts or losses; that the state chose not to fund CATPOOL with taxpayer dollars and had elected not to organize and control it within the state government itself; and that the nature of the funds in question was entirely private, to wit: "private money directed to pay private claims." Id. Channeling Dartmouth, the Morales court concluded that "[t]he act creating CATPOOL is not a 'grant of political power,' as in the case of a municipality or other political subdivision," nor is CATPOOL " 'employed in the administration of the government.' " Id. at 1183 (citing Dartmouth, 17 U.S. (4 Wheat.) at 629-30). The court held that CATPOOL was not "truly a part of the state" and thus possessed and could sue for violation of its right to counsel. Id.

The First Circuit reasoned similarly in determining that Puerto Rico's statutorily-created joint underwriting association is private in nature and has standing to assert a constitutional claim against its creator. See Asociación, 484 F.3d at 20 (citing Arroyo-Melecio, 398 F.3d at 62). The court in Asociación drew on its earlier decision in Arroyo-Melecio, an antitrust case, which discussed at length the relationship between the underwriting association and the government. See id. The court recognized that the legislature created the association, dictated its form and purpose, exempted the association's profits from income taxes, and held approval power over its operating plan. See Arroyo-Melecio, 398 F.3d at 61-63. It nonetheless found that the association was not a governmental entity, highlighting that the association's members, not the government, shared in its profits and losses and bore its insurance risk alone; that the association managed its own affairs; that it had "general corporate *339 powers" to sue and be sued, enter contracts, and hold property; that it was designated by statute as "private in nature, for profit"; and that, although the association was "under some direction by the commonwealth," the commissioner was neither a member of its board nor involved in its "day-to-day affairs." See id. Each of these factors, not just member financial interest, informed the First Circuit's conclusion that the association is more akin to an ordinary private insurer than it is part of the state. See id. The court accordingly allowed the association to bring a Section 1983 takings claim against government officials. See Asociación, 484 F.3d at 20 (citing Arroyo-Melecio, 398 F.3d at 62).

Defendants cite to the New York Court of Appeals' decision in MMIA, the only case where a court found that a statutorily-created insurer could not sue the state. The appeals court looked to the statutory scheme creating New York's Medical Malpractice Insurance Association ("MMIA") and determined that the MMIA could not directly assert a takings claim against the superintendent of insurance. See MMIA, 537 N.Y.S.2d 1, 533 N.E.2d at 1036-37. In reaching that result, the court underscored many of the same factors that we weighed in JUA I: it noted that the state and the superintendent of insurance tightly controlled the association[6]; that the statutory framework comprehensively outlined the association's rights, duties, and obligations; that the MMIA "may operate only for fixed periods of time" and only if the superintendent of insurance deemed its function necessary; and that its "operations are subject to the Superintendent's extensive and direct control." Id. The court held that the association was part of the state and could not raise a takings claim. Id.

In closing, the court noted what it was not deciding: whether the regulations at issue may be confiscatory as to "the individual insurance companies which are members of MMIA and are required to make up any deficit which may be incurred by MMIA." Id., 537 N.Y.S.2d 1, 533 N.E.2d at 1037. The legislative defendants invoke this afterthought as support for their view that a state-created institution cannot claim constitutional protection against its creator unless it is defending "*individual* property interests" in a representative capacity. (Doc. 53 at 15). We are unpersuaded that the MMIA court intended its *obiter dictum*, offered only after extensive discussion of MMIA's statutory framework and the extensive degree of state control, as the ultimate and singular delimiter of constitutional capacity to sue.[7]

*340 [8] As in JUA I, we again reject the suggestion that a statutorily-created insurance association may bring suit against the state only if the association's members have some personal stake in the entity---and then only on behalf of those members. We simply do not read the applicable authorities as espousing such a rule. Consequently, we maintain our holding from JUA I that a holistic approach, one which thoroughly examines the association's relationship to the state through the prism of, *inter alia*, its function, autonomy, and statutory treatment as well as the nature (including the source) of its funds, best answers whether a statutorily-created nonprofit is private or public for constitutional purposes.

The Joint Underwriting Association, since its inception, has been a private institution. It has operated just like a private insurance company for decades.[8] It is privately funded and organized and has never received public funding. Until Act 41, the Commonwealth explicitly disclaimed any responsibility for the Association's debts and liabilities. The Association covers its own operating expenses and bears its own aggregate insurance risk. Its plan of operations contemplates borrowing and reimbursable member assessments, not state financial support, in the event of a deficit. In stark contrast to MMIA, the Association is subject to minimal supervision by the Commissioner, in a manner not meaningfully different from private insurers. Given all of this, we will deny the legislative defendants' request that we reconsider and abandon our analysis and holding in JUA I.

We lastly address the legislative defendants' suggestion that this court's decision in JUA I conflicts with principles of federalism and deference to state legislative action. Defendants charge that "federal courts should not wield the federal constitution like a ruler, rapping knuckles whenever they disagree with state governance." (Doc. 37 at 16). We agree, as we have at *341 each stage of these lawsuits, that the legislature has wide discretion to experiment with its police powers. The Supreme Court observed as much in Dartmouth, stating that federal courts charged with constitutional review of state legislative acts must approach their task with "cautious circumspection." Dartmouth, 17 U.S. (4 Wheat.) at 625. That deference is not without limitation, however, and federal courts also have an obligation to hear the constitutional cases properly brought before them. See id. As the Supreme Court aptly noted, "however irksome the task may be, this is a duty from which we dare not shrink." Id. Our holdings in JUA I and here today flow not from our disagreement with exercise of legislative prerogative but from what the Fifth Amendment deems to be an unconstitutional abuse thereof.

c. The Instant Takings Claim

|9| The only inquiry that remains is whether the Joint Underwriting Association is entitled to judgment as a matter of law on its Takings Clause claim. We conclude that no genuine disputes of material fact persist and that the Association is entitled to summary and declaratory judgment. Act 41 is a repackaged and more intricate version of Act 44. The new legislation endeavors to do indirectly what JUA I told the Commonwealth it could not do directly. The only difference is that Act 41 amplifies its predecessor: where Act 44 purported to take only a portion of the Association's surplus funds, see Act 44, § 1.3, Act 41 attempts to take all of the Association's assets and to extinguish it as presently—privately—constituted, see Act 41, §§ 3-5.

The executive defendants reprise their argument that Act 41 does not contravene the Fifth Amendment because it does not "take" anything from the Joint Underwriting Association. (Doc. 44 at 9 n.1). They aver that the Association will continue to exist as a statutory entity within the Department, "albeit as a new legislative manifestation," such that "the funds are not being taken by a new owner." (Id.) We rejected this argument at the preliminary injunction stage, and we reject it again now. Act 41 transfers complete control of the Association to the Commonwealth and grants ownership and authority over the Association's assets thereto. The Act dismantles a private entity as it currently exists and transfers its assets *in toto*, as well as its administration, to the Commonwealth. There is, in this court's view, no genuine dispute as to whether Act 41 impermissibly takes the private property of a private entity without just compensation.

We acknowledge that the instant constitutional question is both novel and complex. The General Assembly must be afforded a wide berth to enact and to amend legislation in furtherance of its preferred objectives. But when it chooses to create a private entity to meet those objectives, in which the state is not alone or, indeed, at all interested, and over which the state retains virtually no control, that legislative discretion is bounded by the federal Constitution. This is precisely the case with the Joint Underwriting Association. We hold that the Fifth Amendment prohibits the Commonwealth from taking the private assets of the Association, either directly as in Act 44 or through the hostile takeover effected by Act 41, without just compensation.

B. Permanent Injunctive Relief

|10| Before the court may grant permanent injunctive relief, the Joint Underwriting Association must prove: *first*, that it will suffer irreparable injury absent the requested injunction; *second*, that legal remedies are inadequate to compensate that injury; *third*, that balancing of the respective hardships between the parties *342 warrants a remedy in equity; and *fourth*, that the public interest is not disserved by an injunction's issuance. See eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citations omitted). Only the executive defendants dispute the remaining prerequisites for a permanent injunction. The legislative defendants do not address the issue and ostensibly yield the point. We find permanent injunctive relief to be both appropriate and necessary.

|11| That Act 41 works an immediate and irreparable harm upon the Association is hardly debatable. And that harm cannot be remedied by monetary damages. See JUA II, 328 F.Supp.3d at 411. As we previously observed, and as the record bears out, Act 41 redoubles the harm of Act 44, "dismantling the Association as presently constituted, ousting its board and president to be replaced by political appointees, and forcing it to transfer *all* of its assets to the Commonwealth." Id. (citing Act 41, § 3). Sovereign immunity would foreclose an award of monetary damages in this suit against the Commonwealth, see Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health &

Human Servs., 730 F.3d 291, 319 (3d Cir. 2013), such that equity alone provides the appropriate remedy, see Temple Univ. v. White, 941 F.2d 201, 214-15 (3d Cir. 1991).

[12] The public interest generally favors vindication of constitutional rights. The executive defendants counter, as they have before, that the public also has a considerable interest in legislative discretion and an unencumbered lawmaking process reflecting the public will. Defendants proffer no concrete harm (to the government or to the public) beyond this bare assertion. Their claim of abstract injury to public interest does not outweigh the actual constitutional injury to the Association. We do not doubt that the legislative and executive defendants had the public interest in mind when enacting Act 41 and continue to act in the name of that interest. We do not question that the public interest favors a balanced budget and the free and representative exercise of the legislative prerogative. But as we have stated both in this case and its predecessor, the Commonwealth cannot achieve a legitimate end through unconstitutional means. See JUA II, 328 F.Supp.3d at 412; JUA I, 324 F.Supp.3d at 540. We will grant the Association's request for permanent injunctive relief.

IV. Conclusion

The executive defendants assert, and the legislative defendants imply, that our decisions in JUA I and today are "tantamount to holding that the legislative and executive branches are barred from amending ... legislation related to the [Association]." (Doc. 57 at 29; see also Doc. 37 at 15-17). We resolutely disagree. This court does not hold, and has never held, that the General Assembly cannot repeal or amend the statute designating the Association as the state's insurer of last resort for medical professional liability coverage and assume the task of providing that coverage itself through a special fund within the Department or through a separate entity in which the state and the state alone has an interest. Counsel for the Association concedes that the General Assembly has authority to do all of these things. What happens to the Association and to its private funds at that hypothetical juncture is not before this court. We do not speculate whether the Association might, for example, continue as a private insurer and offer ordinary medical professional liability or other types of insurance. We hold only that the Commonwealth cannot take the *343 Association's private property in the manner contemplated by Act 41.

We reiterate what we observed in closing in JUA I: when it created the Joint Underwriting Association, the General Assembly chose to solve a public health problem through a private, nonprofit association, over which the Commonwealth retained limited control, in which the Commonwealth had no financial interest, and for which the Commonwealth bore no responsibility. The Commonwealth cannot legislatively recapture this private association for the purpose of accessing its assets. The provisions of Act 41 which attempt to accomplish that objective are violative of the Takings Clause of the Fifth Amendment to the United States Constitution.

We will grant summary and declaratory judgment and permanent injunctive relief to the Joint Underwriting Association. An appropriate order shall issue.

ORDER

AND NOW, this 18th day of December, 2018, upon consideration of the cross-motions (Docs. 36, 39, 43) for summary judgment pursuant to Federal Rule of Civil Procedure 56, and for the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

1. The motion (Doc. 39) for summary judgment by the Pennsylvania Professional Liability Joint Underwriting Association ("the Association") is GRANTED as to the Association's Takings Clause claim. The balance of the Association's motion (Doc. 39) is denied as moot.

2. The motion (Doc. 36) for summary judgment by Joseph B. Scarnati, President *Pro Tempore* of the Senate; Jay Costa, Minority Leader of the Senate; Michael Turzai, Speaker of the House of Representatives; and Frank Dermody, Minority Leader of the House of Representatives (together, "the legislative defendants"), is DENIED.

3. The motion (Doc. 43) for summary judgment by Tom Wolf, Governor of the Commonwealth, and Jessica K. Altman, Insurance Commissioner of Pennsylvania (together, "the executive defendants"), is DENIED.

4. It is ORDERED and DECLARED that Sections 3, 4, and 5 of Act 41 of 2018, P.L. 273, No. 41 ("Act 41"), are unconstitutional in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

5. The Clerk of Court shall enter declaratory judgment in favor of the Association and against the legislative and executive defendants as set forth in paragraph 4.

6. The Association shall address the nonappearance and failure to plead or otherwise respond of the General Assembly of the Commonwealth of Pennsylvania, (see Doc. 59 at 11 n.2), by separate filing within seven (7) days of the date of this order.

All Citations

381 F.Supp.3d 324

Footnotes

1 Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." LOCAL RULE OF COURT 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. Id. Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts. (See Docs. 33, 38, 41, 45, 52, 55, 56, 58). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

2 The amended complaint also names the General Assembly of the Commonwealth of Pennsylvania as a defendant. The General Assembly waived service, rendering its answer due by August 27, 2018. (Doc. 16). To date, counsel has not entered an appearance on behalf of the General Assembly and no answer has been filed on its behalf. All filings by the legislative defendants have been made solely under the names of the four individual elected leaders and cannot be fairly construed as having been filed on behalf of the General Assembly itself.

3 Those decisions are Mississippi Surplus Lines Ass'n v. Mississippi, 261 F. App'x 781 (5th Cir. 2008) (nonprecedential), Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007), Arroyo-Melecio v. Puerto Rican American Insurance Co., 398 F.3d 56 (1st Cir. 2005), Texas Catastrophe Property Insurance Ass'n v. Morales, 975 F.2d 1178 (5th Cir. 1992), Medical Malpractice Insurance Ass'n v. Cuomo, 74 N.Y.2d 651, 543 N.Y.S.2d 364, 541 N.E.2d 393 (1989), and Medical Malpractice Insurance Ass'n v. Superintendent of Insurance, 72 N.Y.2d 753, 537 N.Y.S.2d 1, 533 N.E.2d 1030 (1988). We reexamine several of these decisions in detail *infra*.

4 The executive defendants articulate a somewhat different formulation, quoting from the Third Circuit's decision in Gregory v. Chehi, 843 F.2d 111, 122 (3d Cir. 1988). (Doc. 57 at 3-4). The court in Gregory was applying Pennsylvania law to determine the preclusive effect of a Pennsylvania state court judgment. Id. at 116, 122. Because JUA I is a federal court decision on a federal question, we apply federal law of preclusion. See Doe v. Hesketh, 828 F.3d 159, 171 (3d Cir. 2016) (citing Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 145 (3d Cir. 1999)).

5 The General Assembly defendants also resurrect their political subdivision standing doctrine argument. Specifically, defendants challenge this court's determination in JUA I that the extension of that doctrine recognized in Pocono Mountain Charter School v. Pocono Mountain School District, 908 F.Supp.2d 597 (M.D. Pa. 2012), does not apply to an entity like the Joint Underwriting Association which has no municipal characteristics or powers. We again conclude that the relationship between the Commonwealth and the Association is not "sufficiently analogous" to that between a state and its municipalities to support invocation of the political subdivision standing doctrine. We incorporate and reaffirm our analysis in JUA I on this subject. See JUA I, 324 F.Supp.3d at 530-31.

6 Defendants note that, when MMIA was decided, the New York statute gave private insurer members an eight-seat majority on the MMIA board, reserving only seven seats for state appointees. (Doc. 37 at 27-28). Defendants intimate that the ceding of control to the insurer members blurs any meaningful distinction between the Commonwealth's Joint Underwriting Association and New York's MMIA. (Id.) Defendants misapprehend the court's prior analysis. We observed in JUA I that the New York statute creating the MMIA "dictat[ed] the composition of its board and its plan of operation." JUA I, 324 F.Supp.3d at 534, 536. We did so as part of a broader analysis contrasting the "exhaustive statutory framework" governing the MMIA with the skeletal treatment accorded the Association in the MCARE Act. See id. Our point was not about who controlled the MMIA's board at any given time, but rather that the New York legislature had dictated the board's composition by statute (expressly reserving at least some seats for state appointees), whereas the MCARE Act left the question of board composition to the Association itself.

7 We note that, even if we were to adopt the legislative defendants' construction that member interest is the lone prerequisite to suit, the record establishes that the Joint Underwriting Association's members *do* have some interest in the Association. The Association is organized as a nonprofit, and, by law, member companies do not share in profits as they did in Asociación and Morales. The Association's reserves and its surplus are its first line of financial defense in the event

it suffers a loss. (See Doc. 33 ¶¶ 72-74). But thereafter, it is the Association's member insurance companies, *not* the Commonwealth, that would be held to account: under the Association's current plan of operations, members may be assessed to make up any loss until the Association can borrow sufficient funds to satisfy its deficit, repay borrowed funds, and reimburse members for assessments. (Doc. 33-6 at 3). Although the degree of member interest is not as enduring or direct as the member interest in Asociación and Morales, it is member interest nonetheless and belies defendants' assertion that the state is "alone" interested in the Association.

8 The legislative defendants insist throughout their briefing that the public-private distinction should not be drawn based on "the commercial or charitable nature" of the entity's services. (See, e.g., Doc. 37 at 18-19). Drawing on Justice Story's concurring opinion in Dartmouth for the proposition that state-created entities can include commercial endeavors such as colleges, hospitals, and banks, the legislative defendants urge that "the 'commercial' purpose of a state-created entity does not remove it from [state] control." (Id. at 19 (citing Dartmouth, 17 U.S. (4 Wheat) at 669 (Story, J., concurring)). To be quite clear, JUA I did not hold that a commercial purpose renders an institution private rather than public. Rather, we determined that an entity's function, and particularly the manner in which it accomplishes that function in relation to the state, is but one factor to consider in assessing public-versus-private status. When we examined the Joint Underwriting Association's function, we considered not only its commercial purpose, but how it effected that purpose, including the source of the funds, where its risk was borne, and its mode of operation anent the state. Each of these elements informed our overall assessment of the Association's relationship to the Commonwealth. We neither held nor intended to imply that the Association is a private entity solely because it engaged in commercial activities.

End of Document

APPENDIX C

JUA III
(ACT 15 OF 2019)

2019 WL 3216658
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION, Plaintiff
v.
Tom WOLF, in his Official Capacity as Governor of the Commonwealth of Pennsylvania, et al., Defendants

CIVIL ACTION NO. 1:19-CV-1121
|
Signed 07/17/2019

Attorneys and Law Firms

Dennis A. Whitaker, Melissa A. Chapaska, Kevin J. McKeon, Hawke McKeon Sniscak & Kennard LLP, Harrisburg, PA, for Plaintiff.

MEMORANDUM

Christopher C. Conner, Chief Judge

*1 For the fourth time in as many years, the Pennsylvania General Assembly has passed, and Governor Tom Wolf has signed into law, legislation targeting the Pennsylvania Professional Liability Joint Underwriting Association (the "Joint Underwriting Association" or "Association"). The serial enactments have varied in form and function, but the core of each was the same: an attempt to exercise a degree of state control over the Association, its assets, or both. The latest iteration, Act 15 of 2019, compels the Association to participate in the state's annual budget and appropriations processes, to accept representation by Commonwealth attorneys, to conduct its operations from Commonwealth-owned facilities, and to comply with certain laws promoting government accountability and transparency. The Association, also for the fourth time, has commenced a lawsuit asking the court to declare the legislation unconstitutional and permanently enjoin its enforcement. Before the court is the Association's request for a preliminary injunction.

I. Background

The Joint Underwriting Association initiated this lawsuit with the filing of a verified complaint on July 1, 2019, just three days after Act 15 was signed into law. The Association asserts that Act 15 violates its rights under the Substantive Due Process Clause (Count I), the Takings Clause (Count II), the Contract Clause (Count III), and the Procedural Due Process Clause and First Amendment (Count IV). The verified complaint names two defendants: (1) Tom Wolf, in his capacity as Governor of the Commonwealth of Pennsylvania, and (2) the General Assembly of the Commonwealth of Pennsylvania.

The Association immediately moved for a temporary restraining order and preliminary injunction. We denied the request for a temporary restraining order but expedited proceedings on the request for a preliminary injunction, hearing argument on the Association's motion on July 12, 2019. The parties agreed that, for purposes of this motion, the factual records developed in two prior lawsuits —Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf, No. 1:17-CV-2041 (M.D. Pa.), and Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf, No. 1:18-CV-1308 (M.D. Pa.)—constitute part of the record of this case. Accordingly, the findings of fact that follow are largely adopted from the court's summary judgment opinions in JUA I and JUA II, with emphasis and reiteration of facts most pertinent to the nuanced claims in this case.

II. Findings of Fact

The Joint Underwriting Association is a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf ("JUA I"), 324 F. Supp. 3d 519, 523 (M.D. Pa. May 17, 2018); Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf ("JUA II"), No. 1:18-CV-1308, — F. Supp. 3d ——, 2018 WL 6617702, at *1 (M.D. Pa. Dec. 18, 2018). The Association was initially established by the Pennsylvania Health Care Services Malpractice Act, P.L. 390, No. 111 (1975), and later reestablished by the Medical Care Availability and Reduction of Error (MCARE) Act, 40 PA. STAT. AND CONS. STAT. ANN. § 1303.101 *et seq.*

A. The Joint Underwriting Association

*2 The General Assembly created the Association in response to a decline in the availability of medical malpractice insurance in the Commonwealth in the mid-1970s. JUA I, 324 F. Supp. 3d at 523; JUA II, 2018 WL 6617702, at *1. The MCARE Act tasks the Association to offer medical professional liability insurance to health care providers and

entities that "cannot conveniently obtain medical professional liability insurance" through ordinary methods at ordinary market rates. 40 PA. STAT. AND CONS. STAT. ANN § 1303.732(a). Membership in the Association is mandatory for all insurers authorized to write medical professional liability insurance in the Commonwealth. Id. § 1303.731(a).

The MCARE Act assigns four "duties" to the Association, requiring it to: (1) submit a plan of operations to the Commonwealth's Insurance Commissioner ("Commissioner"), (2) submit rates and any rate modifications for approval by the Insurance Department ("Department"), (3) offer insurance as described above, and (4) file its schedule of occurrence rates with the Commissioner. Id. § 1303.731(b)(1)-(4). The Association, like other insurers licensed to operate in the Commonwealth, is "supervised" by the Department. Id. § 1303.731(a); see JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *2. The MCARE Act otherwise provides that all "powers and duties" of the Association "shall be vested in and exercised by a board of directors." 40 PA. STAT. AND CONS. STAT. ANN § 1303.731(a). The Association's plan of operations, developed with and approved by the Department, establishes a 14-member board of directors comprised of the Association's current president, nine directors chosen by the Association's members, and four directors appointed by the Commissioner. JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *2. The plan provides that the Association may be dissolved (1) "by operation of law" or (2) at the request of its members, subject to Commissioner approval. JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *2. The plan also provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as the Board may determine subject to the approval of the Commissioner." JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *2.

Since its inception, the Association has functioned much like a private insurance company. The Association writes insurance policies directly to its insureds, who pay premiums directly to the Association. JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *3. The Association is funded exclusively by policyholder premiums and investment income, which it holds in private accounts in its own name. JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *3. The Commonwealth has never previously funded the Association, nor has it ever been responsible for the Association's debts. JUA I, 324 F. Supp. 3d at 525; JUA II, 2018 WL 6617702, at *3. Indeed, prior to recent enactments signed by Governor Wolf, the MCARE Act expressly disclaimed Commonwealth responsibility for claims against and liabilities of the Association. See JUA II, 2018 WL 6617702, at *3.

The Association hires its own employees, who are paid by the Association, are not part of the Pennsylvania State Employees' Retirement System, and do not receive any other Commonwealth employee benefits. See JUA I, No. 1:17-CV-2041, 2017 WL 5625722, at *3 (M.D. Pa. Nov. 22, 2017); (Doc. 4-1 ¶¶ 40-42). The Association leases real estate in its own name without Commonwealth involvement, see JUA I, 2017 WL 5625722, at *3; (Doc. 4-1 ¶ 43), and is presently party to a noncancellable lease for private office space in Blue Bell, Pennsylvania, through September 2022, (see Doc. 4-1 ¶ 45; Doc. 14-3). The Association has always retained private legal counsel and has never been represented by Commonwealth attorneys or their designees. See JUA I, 2017 WL 5625722, at *3; (Doc. 4-1 ¶¶ 55-56).

*3 The Association maintains two pools of assets: its "reserves," which represent funds designated for payment of anticipated claims during the calendar year, and its "surplus," which represents all funds not earmarked as reserves. JUA I, 324 F. Supp. 3d at 525-26; JUA II, 2018 WL 6617702, at *3. The surplus serves as a safety net of sorts in the event that actuaries underestimate claim maturation or other market factors. JUA I, 2017 WL 5625722, at *3; JUA I, 324 F. Supp. 3d at 526; JUA II, 2018 WL 6617702, at *3. As of December 2016, the Association had a surplus of $268,124,502. JUA I, 324 F. Supp. 3d at 526; JUA II, 2018 WL 6617702, at *3.

B. Prior Legislative Acts and Lawsuits

The legislative and litigational volley leading to the instant lawsuit began in 2016, with the General Assembly's first attempt to access some of the Association's assets. Act 85 of 2016 directed the Association to make a $200,000,000 loan to the Commonwealth from its unappropriated surplus. See Act of July 13, 2016, No. 85 ("Act 85"), § 18. Next came Act 44 of 2017, in which the General Assembly repealed Act 85, declared the Association to be "an instrumentality of the Commonwealth," and ordered the Association, under threat of abolishment, to pay $200,000,000 to the State Treasurer for deposit into the General Fund. See Act of October 30, 2017, No. 44 ("Act 44"), §§ 1.3, 13. Act 41 of 2018, enacted the following year, took the most drastic steps to date, attempting to fold the Association into the Department, shift control of the Association to a board of political appointees, oust the Association's president, and mandate transfer of all of the

Association's assets to the Department within 30 days. See Act of June 22, 2018, No. 41 ("Act 41"), § 3.

The Association answered each enactment with a lawsuit raising constitutional challenges to the legislation and seeking declaratory and injunctive relief. The first of those lawsuits, concerning Act 85, has been held in abeyance at the parties' request pending the outcome of litigation as to Act 44 and Act 41. See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright, No. 1:17-CV-886, Doc. 34 (M.D. Pa. June 14, 2018). In the second lawsuit, JUA I, we preliminarily and later permanently enjoined enforcement of Act 44 against the Association, holding that notwithstanding its statutory origin, the Association is a private entity, its surplus funds are private property, and Act 44's attempt to take those funds without just compensation violated the Takings Clause of the Fifth Amendment. See JUA I, 324 F. Supp. 3d at 532-40. In the third lawsuit, JUA II, we preliminarily and later permanently enjoined Act 41, concluding that the legislation was an attempt to do indirectly what JUA I told the General Assembly it could not do directly—take the Association's funds. See JUA II, 2018 WL 6617702, at *14-15. Both JUA I and JUA II are on appeal before the Third Circuit Court of Appeals and are calendared for oral argument on September 12, 2019.

On June 28, 2019, Governor Wolf signed into law Act 15 of 2019, Section 7 of which is the subject of this lawsuit. See Act of June 28, 2019, No. 15 ("Act 15"), § 7. Unlike its predecessors, Act 15 does not take the Association's funds directly, alter its governance structure or board composition, replace its employees, or otherwise change its manner of operating. Rather, Act 15 provides for Commonwealth appropriations to the Association and imposes what the General Assembly has characterized as "accountability" requirements. In pertinent part, Act 15:

*4 • provides that the Association shall be funded through appropriations determined by the General Assembly;

- requires the Association to submit a written budget estimate to the Secretary of the Budget as required of administrative departments, boards, and commissions under Section 615 of the Administrative Code, at least once annually and also as the Governor may request;

- requires an agent of the Association to appear at a public hearing of the Pennsylvania Senate's Banking and Insurance Committee and the Pennsylvania House of Representatives' Insurance Committee to testify concerning the estimate within 30 days after its submission;

- requires the Association to appear annually before the Appropriations Committees of both chambers of the General Assembly to testify as to the Association's fiscal status and request appropriations;

- requires the Association to hold quarterly public meetings under the state's open meetings law to discuss its actuarial and fiscal status;

- declares that the Association "shall be considered a Commonwealth agency" for purposes of the Commonwealth Attorneys Act, the Right-to-Know Law, the PennWATCH Act, and the Commonwealth Procurement Code; and

- requires the Association to (1) transmit a list of all employees to the Auditor General, State Treasurer, Secretary of the Budget, and Legislative Data Processing Center; (2) conduct its operations in Commonwealth-owned facilities; and (3) coordinate with the Department of Revenue to ensure that Association employees with access to federal tax information meet that department's requirements for access to such information.

Id. § 7. Section 7 of Act 15 took effect immediately upon signing on Friday, June 28, 2019. Id. § 13.

III. Legal Standard

The court applies a four-factor test in determining the propriety of preliminary injunctive relief. The movant must, as a threshold matter, establish the two "most critical" factors: likelihood of success on the merits and irreparable harm. Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d Cir. 2017). Under the first factor, the movant must show that "it can win on the merits." Id. This showing must be "significantly better than negligible but not necessarily more likely than not." Id. The second factor carries a slightly enhanced burden: the movant must establish that it is "more likely than not" to suffer irreparable harm absent the requested relief. Id.Only if these "gateway factors" are satisfied may the court consider the third and fourth factors: the potential for harm to others if relief is granted, and whether the public interest favors injunctive relief. Id. at 176, 179. The court must then balance all four factors to determine, in its discretion, whether the circumstances favor injunctive relief. Id. at 179.

IV. Discussion

The Association entreats the court to preliminarily enjoin enforcement of Act 15. The Association remonstrates broadly that Act 15 directly contravenes the court's holdings in JUA I and JUA II and causes it immediate and irreparable constitutional injury. As the court indicated during oral argument, our analysis in this case rises and ultimately falls on the irreparable harm prong. The required showings on likelihood of success and irreparable harm are correlative: the weaker the plaintiff's showing on the merits, the more will be required of the showing on irreparable harm, and *vice versa*. Reilly, 858 F.3d at 179 (citation omitted). Only if both factors are met will preliminary injunctive relief be appropriate. Id.

*5 The Association has arguably demonstrated a "significantly better than negligible" likelihood of success on the merits of at least some of its claims. See id. Our holdings in JUA I and JUA II stand for the threshold propositions that the Association is a private entity, its assets are private property, and the Fifth Amendment prohibits the Commonwealth from either directly or indirectly taking those assets for public use without just compensation. See JUA I, 324 F. Supp. 3d at 538; JUA II, 2018 WL 6617702, at *14. While JUA I and JUA II are not dispositive as to the new claims raised in this case, they are controlling as to these issues, and they confirm that there are limits to the Commonwealth's power over the Association.

Act 15 tests the outer bounds of our prior holdings, tasking the court to answer the difficult question that we acknowledged but did not need to resolve in JUA II: what degree of authority, if any, may the Commonwealth exercise over the Association? The answer is informed by our prior rulings. Defendants cite no decisional law that would support Act 15's attempt to require the Association to accept Commonwealth appropriations, comply with Commonwealth budgeting processes, relocate its operations to Commonwealth-owned facilities, or assent to representation by Commonwealth attorneys. These provisions of Act 15 seemingly run headlong into the court's rulings in JUA I and JUA II that the Association is a private entity with constitutional rights. Other provisions of Act 15 take a more subtle approach. For example, defendants raise the logical point that, despite its private-entity status, the Association is statutorily designated to perform a public function and ought to be subject to certain governmental transparency laws.

At this juncture, we need not determine whether all or part of Act 15 is likely to survive constitutional scrutiny, because the Association's motion fails on a more fundamental ground: it has not shown an imminent likelihood of irreparable harm. To support its request for preliminary injunctive relief, the Association must make a "clear showing" that "irreparable harm is *likely* in the absence of an injunction." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). "Likely" in this context means "more likely than not." Reilly, 858 F.3d at 179. Mere speculation about the "possibility" of injury will not suffice. Winter, 555 U.S. at 22; see also *In re* Revel AC, Inc., 802 F.3d 558, 571 (3d Cir. 2015) (citation omitted).

In each of the prior iterations of this case, the circumstances compelled the "extraordinary remedy" of a preliminary injunction. Act 44 gave the Association just one month to transfer $200,000,000 to the Commonwealth and threatened to abolish the Association if it failed to do so. Act 41 imposed a 30-day deadline for the Association to transfer *all* of its assets to the Commonwealth. Sovereign immunity would have prevented the Association from ever recouping the massive financial losses flowing from the forced transfers under Acts 44 and 41. Accordingly, in both cases, under ticking legislative clocks, we held that preliminary injunctive relief was necessary to preserve the status quo. In the context of an analysis of irreparable harm, Act 15 stands in stark contrast and bears little resemblance to its predecessors—it takes nothing directly from the Association, contains no deadline for compliance, articulates no penalties for noncompliance, and requires no immediate action by or toward the Association.

The Association avers broadly that Act 15 will eliminate its ability to maintain this series of lawsuits, force it to "immediately" relocate to Commonwealth-owned office space, and grant the Commonwealth "power to control all of JUA's funds." (Doc. 5 at 18-20). But the Association identifies nothing in Act 15 or in the instant record suggesting that the law's present effect will be as sweeping as portrayed. All of the concerns cited by the Association are phrased in hypothetical terms. The Association claims, for example, that "much mischief *could* come" from application of Act 15's budget and appropriations provisions. (Doc. 5 at 20 (emphasis added)). Similarly, during oral argument, counsel speculated that, without an injunction, the Commonwealth *could* require the Association to move tomorrow; that Governor Wolf *could* request a budget estimate this week; and that the Attorney General's Office *could* relieve current counsel for the Association of their duties instantly.

*6 The Association's language of choice exposes its own uncertainty as to what harm Act 15 may bring or when that harm will occur. This uncertainty alone fells the Association's request for preliminary injunctive relief. What is more, counsel for Governor Wolf unequivocally represented to the court that the executive branch simply does not intend to take the actions predicted by the Association. For all of these reasons, we find that the Association has failed to make a "clear showing" that irreparable harm is "more likely than not" to occur absent a preliminary injunction. See Winter, 555 U.S. at 22.

V. Conclusion

We conclude that the Association has not identified an imminent threat supporting the "extraordinary remedy" of preliminary injunctive relief, see Winter, 555 U.S. at 22, and will accordingly deny the Association's motion. Our ruling is based on the record as it now stands, crediting the representations by Governor Wolf's counsel that the executive branch will not take the actions that the Association fears. We underscore that our denial of the Association's motion is without prejudice to the Association's right—in the event of a material change in circumstances—to return to this court with a renewed motion for preliminary injunctive relief. An appropriate order shall issue.

All Citations

Slip Copy, 2019 WL 3216658

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APPENDIX D
JUA FINANCIALS

PAJUA
Assets, Liability, Surplus and Other Funds
For the Twelve Months Ending December 31, 2019

	2018 (Audited)	2019 *	Change $$$	Change %
Assets				
Long Term Bonds	$297,161,411	$303,184,563	$6,023,152	2.03%
Stock	436,696	873	(435,823)	(99.80%)
Cash	3,596,930	8,583,459	4,986,529	138.63%
Money Market Accounts		188,908	188,908	944,541,200.00%
Other Invested Assets	1,003,527	1,003,455	(73)	(0.01%)
Total Cash and Invested Assets	302,198,564	312,961,258	10,762,693	3.56%
Accrued Income	1,987,053	2,005,880	18,828	0.95%
Premium Receivable	130,495	717,665	587,170	449.95%
Miscellaneious Receivable	14,556		(14,556)	(100.00%)
Total Receivables	2,132,104	2,723,545	591,442	27.74%
Total Assets	304,330,668	315,684,803	11,354,135	3.73%
Reserve for Losses	12,202,344	10,226,413	(1,975,931)	(16.19%)
Loss Adjustment Expenses	5,901,599	4,104,884	(1,796,715)	(30.44%)
Accrued Expenses				
Administrative Fees Payable	4,391	12,420	8,029	182.83%
Investment Expense	36,821	5,072	(31,749)	(86.22%)
Overpayments and Canc/End Returns	1,635	22,308	20,673	1,264.40%
Accounting	955	498	(457)	(47.83%)
Actuarial	36,630	30,630	(6,000)	(16.38%)
401K Payable	40,187	41,696	1,508	3.75%
Other accrued Expenses	201,723	362,596	160,873	79.75%
Total Other Expenses	322,343	475,220	152,877	47.43%
Taxes, licenses and fees	3,917	31,151	27,234	695.32%
Unearned Premiums	929,543	2,044,880	1,115,337	119.99%
Advance Premiums	487,570	464,057	(23,513)	(4.82%)
Amts Withheld/Retained	24,787	61,322	36,535	147.40%
Total Liabilities	19,872,102	17,407,926	(2,464,176)	(12.40%)
Restricted Surplus	3,000,000	3,000,000		0.00%
Unappropriated Surplus	281,458,565	295,276,876	13,818,311	4.91%
Total Liabilities and Surplus	304,330,668	315,684,803	11,354,135	3.73%

Report Date: 01/31/20

Pennsylvania Professional Liability Joint Underwiting Association
Income Statement
For the Twelve Months Ending December 31, 2019
Confidential

	2018 (Audited)	2019 *	Change $$$	Change %
Net Written Premium	$2,346,458	$3,710,067	$1,363,609	58.11%
Change - Unearned Premium	450,007	(1,115,337)	(1,565,344)	(347.85%)
Premiums Earned	***2,796,465***	***2,594,730***	***(201,735)***	***(7.21%)***
Losses Incurred	1,102,811	(255,831)	(1,358,642)	(123.20%)
Loss Adjustment Expense	1,520,252	(767,024)	(2,287,276)	(150.45%)
Underwriting Expenses	1,655,735	1,482,828	(172,907)	(10.44%)
Premium Deficiency Reserve	0	0	0	0.00%
Total Losses and Expenses	***4,278,798***	***459,973***	***(3,818,825)***	***(89.25%)***
Underwriting Gain (Loss)	***(1,482,333)***	***2,134,757***	***3,617,090***	***(244.01%)***
Net Investment Income Earned	8,890,798	9,576,702	685,903	7.71%
Net Realized Capital Gain/Loss	184,873	1,859,302	1,674,429	905.72%
Net Investment Gain (Loss)	9,075,671	11,436,003	2,360,332	26.01%
Finance and Service Charges	6,605	27,197	20,592	311.76%
Net Income (Loss)	***7,599,943***	***13,597,957***	***5,998,014***	***78.92%***
Net Income	7,599,943	13,597,957	5,998,014	78.92%
Net Unrealized Gain/Loss	(305,217)	244,759	549,975	(180.19%)
Change in nonadmitted assets	0	2,829	2,829	0.00%
Cumulative effect of changes in accounting princip	0	0	0	0.00%
Change in Surplus	***7,294,726***	***13,845,545***	***6,550,818***	***89.80%***
(a) Und Expenses	70.37%	39.68%	(30.69%)	(43.61%)
(b) PDR	0.00%	0.00%	0.00%	0.00%
(c) Other Income	0.28%	0.73%	0.45%	160.42%
(a) + (b) - (c) (to WP + Fees)	70.08%	38.94%	(31.14%)	(44.43%)
Incurred	39.44%	(9.86%)	(49.30%)	(125.00%)
LAE	54.36%	(29.56%)	(83.92%)	(154.38%)
L+LAE (to Earned)	93.80%	(39.42%)	(133.22%)	(142.03%)
Combined Ratio	163.88%	(0.48%)	(164.36%)	(100.29%)
Inv Income+Real. Gain (to Earned)	324.54%	440.74%	116.20%	35.80%
Combined net of Inv Income	(160.66%)	(441.22%)	(280.56%)	174.63%
Unrealized Gain/Loss (to earned)	(10.91%)	9.43%	20.35%	(186.43%)
Net of Unrealized Gain/Loss	(149.74%)	(450.65%)	(300.91%)	200.95%

Report Date: 01/31/20

* Unaudited