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

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,	**: CIVIL ACTION NO. 1:18-CV-1308 : ("JUA v. Wolf II")**
Plaintiff,	**:(The Honorable Christopher C. :Conner)**
v.	
TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA; THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA; JOSEPH B. SCARNATI, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE SENATE; JAY COSTA, IN HIS OFFICIAL CAPACITY AS MINORITY LEADER OF THE SENATE; MICHAEL TURZAI, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES; FRANK DERMODY, IN HIS OFFICIAL CAPACITY AS MINORITY LEADER OF THE HOUSE OF REPRESENTATIVES; AND JESSICA K. ALTMAN, IN HER OFFICIAL CAPACITY AS INSURANCE COMMISSIONER OF PENNSYLVANIA,	
Defendants.	

THE AMERICAN MEDICAL ASSOCIATION AND PENNSYLVANIA MEDICAL SOCIETY *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF'S AMENDED COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

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THE AMERICAN MEDICAL ASSOCIATION AND PENNSYLVANIA MEDICAL SOCIETY *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF'S AMENDED COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

AND NOW, comes the American Medical Association ("AMA") and the Pennsylvania Medical Society ("Medical Society"), collectively *amici,* by and through their counsel, Gordon & Rees, and hereby file this *Amicus* Brief in support of Plaintiff Pennsylvania Professional Liability Joint Underwriting Association's, ("JUA" or "Association"), Amended Complaint and Motion for Summary Judgment, and set forth as follows:

I. INTRODUCTION

In its Amended Complaint, the Association asserts that Act 41 of 2018, amending the Pennsylvania Insurance Department Act of 1921, Act of May 17, 1921, P.L. 798, No. 285, to be effective July 22, 2018, (the "Act" or "Act 41"), is an unconstitutional taking violative of the Fifth Amendment to the United States Constitution; deprives Plaintiff of Due Process; unconstitutionally impairs the Association's contracts with its members; and unconstitutionally impairs the Association's contracts with its insureds. Plaintiff's Amended Complaint at Counts I-III, Doc. No. 15.

The AMA and the Medical Society, individually and on behalf of their members that include Association policyholders and Pennsylvania physicians

have a significant interest in the outcome of this litigation, and, with approval of the Court, file this *Amicus* Brief in support of Plaintiff's Amended Complaint and Motion for Summary Judgment.

II. CONCISE STATEMENT OF THE AMA AND MEDICAL SOCIETY, THEIR INTEREST IN THIS CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

The AMA is the largest association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy-making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Founded in 1848, the Medical Society is presently the largest physician organization in Pennsylvania, comprised of over 16,000 physicians and medical students, and governed by physician members, including a Board of Trustees. Among its services, and a top priority, is advocacy for physicians at the state government level on matters involving medical professional liability

("MPL") insurance and advocacy for physicians and Commonwealth residents, patients, in advancing public policy and public health measures.

Hence, the *amici* have an interest in this case because the statute at issue, Act 41 of 2018, would result in an overhaul of the Association and a transfer of its operations, administration, and governance to the Commonwealth thereby resulting in an unconstitutional taking of Association funds and vested property rights and impairing the contractual relationship between the Association and its current policyholders, for the reasons set forth by Plaintiff and herein. After two prior unsuccessful attempts by the Commonwealth, Act 41 is just the first step of the Defendants' plan to obtain the JUA's excess funds, to be used by the Defendants to meet statutory budget requirements or other uses not consistent with the originally-intended purpose of such funds.

In the two recent and unsuccessful attempts by the Commonwealth to obtain JUA funds, the Medical Society was permitted by this Court to submit *Amicus* briefs. The Middle District of Pennsylvania has inherent authority to permit the filing and consideration of this *Amicus* Brief. See Motion of *Amici* for Leave to File *Amicus* Brief, Doc. No. 46.

This Brief is filed on behalf of *amici*, on their own behalves and as representatives of the Litigation Center of the AMA and the State Medical

Societies. The Litigation Center is a coalition among the AMA and the medical societies of every state. Its purpose is to represent the viewpoint of organized medicine in the courts.

III. BACKGROUND

A. Act 41 of 2018

Act 41 is the Legislature's third attempt at an unconstitutional taking of Association funds. This time the Legislature requires the transfer of all assets of the Association, not just the alleged $200,000,000 of excess surplus. Act 41, Section 921-A(1). The Act further gives the Commonwealth operational and administrative control of the Association by removing the Association's current board and replacing the board with political appointees. Act 41, Section 912-A(A). The Act gives the new board all authority to administer the plan of operations (to be amended consistent with the Act), to decide all matters of policy, and to have all authority necessary to operate the Association. Act 41, Section 912-A(G). The day-to-day operations of the new board would be managed by an appointed Executive Director, a newly-created position to be hired by the Insurance Commissioner. Act 41, Section 912-A(F).

The Legislature unilaterally declared the following policy reasons for the enactment of Article XI-A of Act 41:

- A decrease of claim payments and a decline in the need for JUA policies was identified when the Insurance Commissioner reviewed the Association's Plan of Operation and rate filings. Act 41, Section 901-A(1).

- A need to modernize the Association for economical and administrative efficiencies. Id.

- Ensuring the future availability of and access to a full spectrum of hospital services and highly trained physicians. Act 41, Section 901-A(2).

- In order to provide such availability and access, MPL insurance policies must be affordable and reasonably cost. Act 41, Section 901-A(3).

- Placing the Association within the Department of Insurance (hereafter, "Department") will result in more oversight by the Insurance Commissioner of expenditures and will ensure better operational efficiencies of the Association. Id.

In the event of dissolution, the Act permits distribution of all Association assets as the new board may determine, with approval of the Insurance Commissioner. Act 41, Section 913-A(B). Finally, Act 41 takes away any right of an insured's claim to the funds of the Association. Act 41, Section 911-A(C)(1).

B. Contract Between the Association and Insurance Policyholder

Under Pennsylvania law, a contract is validly formed if there was an offer, an acceptance of the offer, consideration or mutual meeting of the minds. Jenkins v. County of Schuylkill, 658 A.2d 380, 383 (Pa. Super. 1995)

(citing Schreiber v. Olan Mills, 627 A.2d 806, 808 (Pa.Super. 1993)). "Contracts enable individuals to order their . . . affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). The purpose of the Contract Clause is to protect these legitimate expectations from unreasonable legislative interference. Transport Workers Union, Local 290 by and through Fabio v. SEPTA, 145 F.3d 619, 622 (3d Cir. 1998).

The MCARE Act requires every healthcare professional providing healthcare services in the Commonwealth to purchase MPL insurance from an insurer. 40 P.S. §1303.711(a). The MCARE Act further directs that the JUA will offer MPL insurance required thereunder to healthcare professionals who cannot conveniently obtain MPL insurance through ordinary methods and at rates not in excess of those similarly-situated. Id. at §1303.732(a).

In exchange for the Association's obligation to defend an insured and pay compensatory damages on their behalf, the insured pays an annual premium to the Association. The terms and conditions of their contractual arrangement are set forth in the insured's insurance policy which addresses, among other things, insurance coverage amounts, obligations of the insured

and of the Association, exclusions to coverage, and notification requirements. See Plaintiff's Motion for Summary Judgment, Doc. No. 39, at n. 23, referencing Medical Professional Liability policy, attached as Ex. 1 to the Declaration of Susan Sersha.

IV. ARGUMENTS

A. Act 41 is Unconstitutional Because it is a Taking of the Association's Private Property without Just Compensation, Depriving JUA-policyholders of the Use of any Surplus for their Benefit.

As a Pennsylvania nonprofit organization, the JUA is entitled to engage in profit-making activities; however, the profits generated from any of its activities must be used or set aside for the nonprofit purposes of the Association. 15 Pa.C.S.A. §9114(d). Instead of allowing the Association to use its surplus to further its nonprofit purpose, the Commonwealth, under Act 41, aims to transfer all of the Association's funds to the Commonwealth to be used for whatever purpose that is determined by the new government-appointed board. Act 41, Section 912-A(g)(6). Not only is Section 912-A(g)(6) unconstitutional, but it will also leave Pennsylvania's physicians and the Association's other intended beneficiaries bereft of the benefits to which they are entitled.

In JUA v. Wolf I, 2018 U.S. Dist. LEXIS 83137 (M.D.Pa. May 17, 2018), this Honorable Court held that the Association is a private entity and its surplus funds are private property. Id. at **38, 40 (attached as Exhibit A). This Court found that Act 44 was an unconstitutional taking of the Association's private property, i.e., surplus funds, in violation of the Fifth Amendment to the United States Constitution. Id. at *43. Act 44 sought to repurpose private funds for a public use. Id. at **40-41. The new law, Act 41, should not change the result just because it now directs that not only JUA surplus, but also all funds and assets of the JUA transferred to the Commonwealth. Act 41 continues to be an attempt to convert private property to a public use, albeit an expanded attempt.

Pursuant to JUA v. Wolf I, the surplus funds, and, by extension, all JUA's funds and assets are private property to be used for their originally-intended purpose. It is undisputed that the JUA's originally-intended and primary purpose, as stated in its Plan of Operations and as demonstrated by its activities, is to offer MPL insurance to Pennsylvania healthcare providers at an affordable rate. As a nonprofit organization, the JUA is obliged to use its resources in a manner that furthers its purpose and ultimately to benefit its principal beneficiaries – the Pennsylvania physicians and other healthcare providers for whom the Association was created.

Amici do not propose to determine what such specific uses of any excess JUA funds should be, but it is clear that the use should be linked to the JUA's charitable/tax-exempt purpose, and not to cover government budget shortfalls. If Act 41 is permitted to stand as is, the government-appointed board can decide to use the Association's funds in any way, without limiting it to the original intent under the contract between the JUA and the insureds. See Alliance of American Insurers v. Chu, 571 N.E.2d 672, 679 (N.Y. 1991). It could proceed to do what has already been declared unconstitutional: using JUA funds to meet statutory budget requirements.

Amici supports the JUA's position that it has a vested right in its property declared under JUA v. Wolf I, and, as it relates to the excess funds, those funds are to be used in furtherance of the JUA's non-profit purpose; these vested rights of the JUA cannot be extinguished by legislative action. Therefore, Act 41, as it permits the use of the Association funds for purposes other than originally intended, should be declared unconstitutional in violation of the Fifth Amendment to the United States Constitution.

B. Act 41 is Unconstitutional Because it is a Substantial Impairment of Express and Implied Contract Terms and does not Serve a Legitimate Purpose that is Necessary and Reasonable Under the Circumstances.

The Defendants' unilateral act of promulgating Act 41 unconstitutionally takes over the governance and administration of the Association's insurance policies with its insureds and all assets, and by its very existence creates an impairment of the contract between the Association and the policyholders. Further, Act 41 impairs express and implied contract terms of the insurance policy.

Article I, §10 of the United States Constitution states, in relevant part, that "[n]o state shall…pass any law…impairing the Obligation of Contracts." The obligation of contracts is "'the law which binds the parties to perform their agreement.'" Home Bldg. & Loan Assoc'n v. Blaisdell, 290 U.S. 398, 429 (1934) (quoting Sturges v. Crowninshield, 4 Wheat. 122, 197 (1819)). The obligations of a contract also include the contemporaneous state law addressing interpretation and enforcement of the contract. Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237, 1244 (3d Cir. 1987)(quoting United States Trust Co. of New York v. New Jersey, 431 U.S. at 19-20 n.17). "This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." Id. The laws that exist at the time and place the contract is made and where it is to be performed become a part of the contract, as if they were expressly referred to

or incorporated into the terms of the contract. Blaisdell, 290 U.S. at 429-30 (quoting Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552 (1866)).

The United States Supreme Court has set forth a three-part analysis:

(1) Does the legislation substantially impair a contractual relationship?

(2) If so, did the Defendants have a significant and legitimate public purpose for enacting the legislation?

(3) If so, is the legislation reasonable under the circumstances?

See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978); see also Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983).

1. Article XI-A of Act 41 Substantially Impairs the Contractual Relationship between the Association and its Insureds.

The threshold inquiry is whether the change has "operated as a substantial impairment of a contractual relationship." Allied Structural Steel Co., 438 U.S. at 244; see also Energy Reserves Group, Inc., 459 U.S. at 411-412). The questions to be answered are:

(1) Is there a contractual relationship?

(2) Does the change in law impair the contractual relationship?

(3) If so, is the impairment of the contractual relationship substantial?

General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). Legislation impairs obligations of a contract when it renders them invalid, releases them, or extinguishes them. Blaisdell, 290 U.S. at 431 (citing Sturges, 4 Wheat. at 197-198). The severity of the impairment will increase the level of scrutiny of the legislation. Energy Resources Group, Inc., 459 U.S. at 411(citing Allied Structural Steel, 438 U.S. at 245).

Even if a statute does not impair the express terms of a contract, it remains unconstitutional to substantially impair implied contract terms and implied contracts. Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237, 1244 (3d Cir. 1987) (quoting Mississippi *ex rel.* Robertson v. Miller, 276 U.S. 174, 179 (1928)).

Here, the insurance policy between the Association and an insured is a contract. Article XI-A of Act 41 impairs the contractual relationship between the Association and its policyholders. First and foremost, pursuant to Article XI-A, the Association will be subsumed by the Commonwealth. The Commonwealth will completely take over the role, obligations, and rights of the Association, a private entity, including a take over of JUA insurance policyholders without the consent of the policyholders.

The MCARE Act of 2002 provided that the Association's members, private insurers, have the right to govern the Association under a plan of

operations that vests power in a board of directors, subject only to the Insurance Commissioner's approval of the plan. 40 P.S. §1303.731(a),(b). The Department of Insurance would only supervise the Association. Id. The plan as approved vests the powers and duties of the Association in a member-controlled board of directors. Id.

Act 41 changes this structure, the obligations, supervision, and powers of the Association and its board of directors by, among other things:

- Dismissing current board membership and replacing it with appointments by the Governor, the president pro tempore of the senate, minority leader of the senate, speaker of the House of Representatives, and the minority leader of the House of Representatives. Act 41, Section 912-A(A). It further provides that the Governor will appoint the chairman of the board. Act 41, Section 912-A(B).

- Creating a new position, an Executive Director, to provide the day-to-day operations of the board; the Executive Director is hired by Pennsylvania's Insurance Commissioner. Act 41, Section 912-A(F).

- Providing the new board with all authority to administer the plan of operations (to be amended consistent with the Act), to decide all matters of policy, and to have all authority necessary to operate the Association. Act 41, Section 912-A(G). In furtherance of the same, the new board can adopt bylaws and guidelines, appoint committees, enter into contracts for administration of the new plan, develop rates, policy forms, and riders, invest, borrow and disburse funds, and place a portion of Association funds in a restricted receipt account in the Treasury Department. Act 41, Section 912-A(G)(1)-(6).

At the time they entered into the contractual relationship, an insured would not justifiably expect that the Legislature would eliminate the JUA and take over its functions as will result if Article XI-A is not enjoined. No provision of the regulatory scheme at the time prior to passage of Act 41 would have suggested to the private insureds that they should anticipate that their policies and all governance of them would be transferred to the Commonwealth. See similarly Tuttle v. N.H. Med'l Malpractice Joint Underwriting Assoc'n, 992 A.2d 624, 642 (N.H. 2010). The creation of the insurance policy agreement was a meeting of the minds between an insured and the Association as it was formed and governed pursuant to the MCARE Act. Act 41 at Article XI-A contravenes the Association and its contractual responsibilities to its policyholders. See Id. at 644.

It is the position of *amici* that the complete takeover of the Association by the Commonwealth is enough to conclude that a substantial impairment of contract exists. However, should the Court require specific examples of contractual impairment, *amici* present the following specific terms and conditions of the insurance policy of insureds as examples of impairment should Article XI-A be permitted as law.

From an analysis of the insurance policy:

1.	ACTION AGAINST ASSOCIATION: "Nothing contained in this policy shall give any person or organization other than the Insured any right against the Association as any third party beneficiary or otherwise."

This provision of the insurance policy substantiates an insured's right to sue the Association. In comparison, pursuant to Act 41 at Section 911-A(C)(2), should Act 41 stand, an insured loses any claim it might have against the Association, and instead, such claim becomes a liability of the Commonwealth. One might be inclined to conclude that the insured's right of suit remains. However, there is a difference to an insured as to whether they would be willing to pursue a valid legal claim against a private entity like the JUA or one against the Commonwealth.

2.	CHANGES: "The terms of this policy shall not be waived or changed, except by written endorsement issued to form a part of this policy."

This second provision does not permit the insurance policy to be changed in any way without an appropriate endorsement. Accordingly, by transferring the insureds' policies to the Commonwealth without such endorsement, it impairs the contract by substituting a new obligor. This alone should be enough to find an impairment of contract.

Further, the insureds have implied contract rights that vested at the time they purchased their insurance policies. Act 41 impairs the Association's

contracts with its insured-policyholders including at sections 911-A(C), 912-A(G)(6), and 921-A(1) by:

- Substituting the Commonwealth as the obligor on all existing contracts of insurance issued by the JUA;
- Empowering the new board to put JUA funds into a restricted receipt account to be used for any purpose directed by the board; and
- Requiring that all JUA files, including confidential information of the insured-policyholders be transferred to the Insurance Department.

See in accord Plaintiff's Amended Complaint at ¶22(a)-(c).

2. Act 41 does not have a Significant and Legitimate Public Purpose.

If the Court were to conclude that Act 41 substantially impairs the contract between the Association and its policyholders, the Court next analyzes whether the state had a significant and legitimate public purpose behind the change set forth in the legislation such as a broad and general social or economic problem. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983). This part of the analysis is designed to assure that the Legislature is using its police power rather than passing legislation to benefit a special interest. Id. at 412. However, "[i]f the Contract

Clause is to retain any meaning at all…, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

Here, while Defendants may purport that Act 41 addresses a broad, generalized economic or social problem, it does not do so. The policy reasons in the Act fall into two categories: (1) affordability and accessibility of MPL insurance policies and (2) the alleged need for better operational efficiencies of the Association. Act 41, Section 901-A(1), (2), (3).

The affordability and accessibility of MPL insurance policies to those unable to obtain the same in the standard insurance market was a primary reason for the creation of the Association in the first place. There is no indication or basis to conclude that the Association is not meeting this goal, nor is there any such policy statement.

There is likewise no indication or adequate basis to conclude that the Association is not operating efficiently. In fact, the opposite is readily apparent in the Association's financial statements and department reviews.

The legislation at issue was enacted not for the protection of a basic interest of society but rather for purpose of gaining access to Association's funds.

3. Act 41 is not Reasonable nor is it of the Character Appropriate to the Public Purpose Justifying the Legislation.

If the legislation is determined to be legitimate, the next inquiry is whether the legislation in adjusting the rights and responsibilities of the contracting parties, is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation. Energy Reserves Group, Inc., 459 U.S. at 412 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)). Deference is to be given to state laws directed to addressing broad social and economic problems, unless the state is a contracting party which then requires a stricter scrutiny. Id. at 412-413 (quoting United States Trust Co., 431 U.S. at 22-23). The Defendants bear the burden of proving that contract impairment is reasonable and necessary. Tuttle v. New Hampshire Med'l Malpractice Joint Underwriting Assoc'n, 992 A.2d 624, 643 (N.H. 2010) (citing *In re* Seltzer, 104 F.3d 234, 236 (9th Cir. 1996)).

Act 41 is not reasonable. In evaluating the reasonableness and necessity of the legislation, courts have examined: "'(1) [the legislation's]

emergency nature; (2) its purpose to protect a broad societal interest, not a favored group; (3) the tailoring of its remedial effect to its emergency cause; (4) the reasonableness of its basic features; and (5) its limited effect in temporal terms.'" Tuttle, 992 A.2d at 648 (citing and quoting Garris v. Hanover Ins. Co., 630 F.2d 1001, 1008 (4th Cir. 1980)).

As noted previously, deference is to be given to the legislation unless the state is a party to the contract; under the latter circumstance, the legislation will be subject to stricter scrutiny. The state is contending, and stated in the legislation, that the Association is an instrumentality of the state. Under that circumstance, Article XI-A of Act 41 should be subject to the stricter scrutiny/less deference standard, see Tuttle, 992 A.2d at 645, although it is the position of *amici* that even under the more deference standard, Defendants cannot satisfy this part of the analysis.

Deference does not mean complete deference. "For the Contract Clause to retain any vitality, we must be able to consider the reasonableness and necessity of the legislature's chosen action, particularly where the action's substantial impairment of contract rights inures to the State's financial benefit", as it does here. See Tuttle, 992 A.2d at 646. Of relevance is whether the state is acting in its own best interest for its own pecuniary or self-interested capacity. Mercado – Boneta v. Admnistracion del Fondo de

Compensacion al Paciente through Ins. Comm'r, 125 F.3d 9, 16 (1st Cir. 1997). Finding that the state's self-interest was at stake, the Tuttle court concluded that complete deference was not appropriate. Tuttle, 992 A.2d at 646 (quoting Opinion of the Justices (Furlough), 609 A.2d 1204, 1210 (N.H. 1992)). It noted: "'If a State could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.'" Id. at 645- 46 (citing Furlough, 609 A.2d at 1210); see also United States Trust Co. v. New Jersey, 431 U.S. at 26.

Similarly here, the state is acting in its own self-serving interest. One need only look to the recent past in its passage of Acts 85 and 44. This case should not be evaluated in a vacuum. This is not broad-based legislation of a social or economic nature. In reality, the Act targets the transfer of the Association's surplus and assets which were generated by premiums paid by a discrete class of private persons. See Tuttle, 992 A.2d at 647 (concluding that a legislative transfer of funds from the Joint Underwriting Association targeted discrete funds generated by premiums paid by a discrete class of private parties). It is the Legislature's third attempt at accessing the money without regard to the impact on JUA policyholders. Thus, the means chosen

by the Legislature to accomplish the purpose of the Act is not reasonable and necessary.

C. The Physician Community has Reasonable Grounds for Insecurity with Respect to the State's Ability to Maintain the Integrity of JUA Funds and to Honor Existing Policyholder Contracts.

As the Court is already aware, the General Assembly enacted the MCARE Act in 2002 and, simultaneously, created the MCARE Fund—a special fund administered by the Department. See Hosp'l & Health System Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 591 (Pa. 2013) (citing 40 P.S. §§1303.712(a), 1303.713(a)). The Fund provides excess MPL insurance coverage—a second layer of insurance—to health care providers paying claims that exceed their statutorily-required $500,000 primary or basic coverage amount. Id. Annual assessments paid by physicians and other healthcare personnel financially support the Fund and are in addition to the premiums they must pay for their primary coverage. The assessments were designed to reimburse the fund for payment of claims and expenses, pay principal and interest on any monies borrowed by the Fund, and to create a reserve. Id. at 592 (citing 40 P.S. §1303.712(d)).

The state's medical liability crisis intensified early in the 2000s, increasing the cost of MPL insurance premiums and accordingly the MCARE assessment for physicians. The pressure resulted in physicians limiting their

scope of practice, leaving the state, or refusing to practice in Pennsylvania. To relieve some of the costs of mandated coverage and retain qualified health care providers in the state, the Legislature implemented several strategies: First, the 2002 legislation directed motor vehicle surcharge revenues to be deposited into the MCARE Fund to create an assessment discount program. Pennsylvania Medical Society v. Dep't of Public Welfare of the Commonwealth of Pa., 614 Pa. 574, 581, 39 A.3d 267, 271-72 (2012). Second, in 2003, the Legislature established the Health Care Provider Retention Program ("Abatement Program" or "Program"). Id. at 582, 39 A.3d at 272.

The intent of the Abatement Program was to provide assessment abatements, i.e., rebates, to healthcare providers from 2003-2007. Id. (citing 40 P.S. §1303.1102(a)). The Legislature established the Health Care Provider Retention Account ("HCPR Account"), a special account within the General Fund, to hold the Program funds. Id. (citing 40 P.S. §1303.1112(a)). The account was funded by two sources: First, the Legislature increased the cigarette tax and dedicated 25 cents per pack. Second, motor vehicle violation surcharge revenue was used to partially fund the program. Id. at 582-83, 39 A.3d at 272-73 (citing 40 P.S. §1303.1112(a)). In 2004, the Legislature charged the Budget Secretary with making the monetary transfers from the

HCPR Account to the MCARE Fund. Id. at 583-84, 39 A.3d at 273 (citing 40 P.S. §1303.1112(c)).

In 2004 and 2005, despite having significant funds in the HCPR Account, the Budget Secretary only transferred a combined $330 million (of a total $946 million) to the MCARE Fund. Id. The Budget Secretary made no more transfers to the MCARE Fund after 2005, although abatements continued to be granted through 2007, and revenues continued to accumulate in the HCPR Account. Id.

Faced with an unbalanced budget in 2009, the Governor approved a bill and legislation amending the Fiscal Code, including a repeal of the Abatement Law, abolishment of the HCPR Account, a transfer of all cigarette tax revenue in the HCPR Account to the General Fund, a transfer of $708 million from the HCPR Account to the General Fund, and requiring that $100 million be transferred from the MCARE Fund to the state's General Fund. Id. at 584-85, 39 A.3d at 274 (citing Act of October 9, 2009, P.L. 537, No. 50, §7(5) and 72 P.S. §1717-K); Hosp'l & Health System Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 593 (Pa. 2013) (citing 72 P.S. §1717.1-K(1)). The legislation was challenged, with varying results, but the point here being that the Commonwealth has a history of attempting to legislate and mandate the transfer of funds into the General Fund.

Now, once again, the farmer has tapped the proverbial fox to guard the henhouse. Through Act 41, the General Assembly has placed the JUA under the control, direction and oversight of the Pennsylvania Department of Insurance. The law vests a Board, appointed by the Governor and the leaders of the General Assembly, with governance of the JUA. It also provides additional powers and duties of the Board, which includes, subject to the Commissioner's approval, the ability to place a portion of the JUA's funds in a restricted receipt account in the Treasury. Funds placed in treasury account would be appropriated for the purposes required in the MCARE Act, the Article, and as may otherwise be directed by the Board. The Act also provides for a method of dissolving the Association, and would then permit the new board to distribute the assets and funds as it would desire.

The Defendants have already showed their hand, having twice before in the last two years to legislate the transfer of JUA funds to the Commonwealth. The Defendants intend to divert the JUA's alleged "excess" funds to the state's funds. Given the history, the *amici* and physician policyholders are justified in their belief that the state cannot be trusted with the JUA funds or to carry out the duty owed to the JUA physician policyholders; for indeed, the past is prologue.

IV. CONCLUSION

Accordingly, Act 41, Article XI-V is unconstitutional because it would accomplish an unconstitutional taking of funds from the Association and impairs the obligations of contracts in contravention of Article I, § 10 of the United States Constitution. The American Medical Association and the Pennsylvania Medical Society respectfully requests that this Honorable Court issue an Order declaring Act 41, Article XI-V unconstitutional and enjoin the Commonwealth accordingly.

Respectfully Submitted,

Date: September 6, 2018

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CERTIFICATE OF WORD COUNT

I, Maggie Finkelstein, Esquire, hereby certify that the foregoing *Amicus* Brief contains 5,192 words.

Dated: September 6 2018

/s/ Maggie M. Finkelstein, Esquire
Maggie Finkelstein, Esquire

Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf

United States District Court for the Middle District of Pennsylvania

May 17, 2018, Decided; May 17, 2018, Filed

CIVIL ACTION NO. 1:17-CV-2041

Reporter
2018 U.S. Dist. LEXIS 83137 *; 2018 WL 2263549

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION, Plaintiff v. TOM WOLF, in his Official Capacity as Governor of the Commonwealth of Pennsylvania, Defendant

Prior History: Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf, 2017 U.S. Dist. LEXIS 193276 (M.D. Pa., Nov. 22, 2017)

Counsel: [*1] For Pennsylvania Professional Liability Joint Underwriting Association , Plaintiff: Dennis A Whitaker, Melissa A. Chapaska, Hawke McKeon & Sniscak LLP, Harrisburg, PA; Kevin J McKeon, Hawke McKeon Sniscak & Kennard LLP, Harrisburg, PA.

For Tom Wolf, in his official capacity as Governer of the Commonwealth of Pennsylvania, Defendant: Kenneth L. Joel, Office of the Attorney General, Civil Litigation, Harrisburg, PA; Nicole J. Boland, Office of Attorney General, Civil Litigation Section, Harrisburg, PA.

Judges: Christopher C. Conner, Chief United States District Judge.

Opinion by: Christopher C. Conner

Opinion

MEMORANDUM

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 **[*2]** the United States Constitution.

I. Factual Background & Procedural History

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" 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. § 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 **[*3]** "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 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 **[*4]** 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. § 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. § 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 **[*5]** 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 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" **[*6]** by the Department through the Insurance Commissioner ("Commissioner"). 40 Pa. Stat. § 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. §§ 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. § 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 **[*7]** 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. § 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 **[*8]** 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 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 **[*9]** 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 **[*10]** Administrative Code of 1929.

Id. § 18 (codified prior to repeal at 72 PA. STAT. § 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 **[*11]** 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 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 **[*12]** 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.

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 **[*13]** 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 **[*14]** 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 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 **[*15]** 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 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

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)) **[*16]** . 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.

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 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.

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 **[*17]** 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.

a. The Association as a "Political Subdivision"

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 **[*18]** 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 F. App'x 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). 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. **[*19]** 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 U.S. Dist. LEXIS 94491, 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 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 **[*20]** 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"

Governor Wolf's reliance on Lebron fares no better. The Supreme Court in Lebron supplied "guideposts" **[*21]** 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, 63 V.I. 1032 (3d Cir. 2015) (citing Lebron, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902). 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. 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.

The Court jettisoned Amtrak's assertion that its enabling statute—which disclaimed it as a federal agency—was dispositive. Id. at 392-93. 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). 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 **[*22]** 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.

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—is indisputably lacking *sub judice*. 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.

c. The Association as a "Public Entity"

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 **[*24]** contention that Puerto Rico's joint underwriting association, being "a state-created entity," lacked standing to challenge actions taken by its creator. See 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 **[*25]** 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 **[*26]** 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 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, 533 N.E.2d 1030, 1031, 537 N.Y.S.2d 1 (N.Y. 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 **[*27]** 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, 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. 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. 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 **[*28]** 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. at 1037. The court accordingly rejected the association's claim that the superintendent's actions were confiscatory. Id. 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, 541 N.E.2d 393, 393-94, 543 N.Y.S.2d 364 (N.Y. 1989).

The General Assembly also identifies as support the Fifth Circuit's unpublished decision in Mississippi Surplus Lines Association v. Mississippi, 261 F. App'x 781 (5th Cir. 2008), aff'g 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 **[*29]** 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 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, **[*30]** 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 **[*31]** 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 F. App'x at 784-86; MMIA, 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 **[*32]** 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 commissioner. Cf. MSLA, 261 F. App'x 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. §§ 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 **[*33]** 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 **[*34]** 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, 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 p. 6; (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. § 1303.731(b)(2) (incorporating 40 PA. STAT. §§ 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. § 1303.712(f))). This assertion is simply incorrect. The provision the legislature cites concerns the Commissioner's **[*35]** authority to determine the *MCARE assessment* levied on each health care provider in the state. 40 PA. STAT. § 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).

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 **[*36]** 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. § 21205(a); 40 PA. STAT. §§ 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, **[*37]** see 15 PA. STAT. § 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 F. App'x 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 F. App'x 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 **[*38]** 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. § 1303.731(c). The Association 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 **[*39]** 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, 533 N.E.2d at 1036-37 (citing MCKINNEY'S INSURANCE **[*40]** LAW § 5501 *et seq.*); to establish the Association as a special fund within the state's treasury, cf. 40 PA. STAT. § 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"*

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 **[*41]** 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."

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, 46 S. Ct. 253, 70 L. Ed. 585, 62 Ct. Cl. 756 (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 **[*42]** 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 **[*43]** 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

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 **[*44]** 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. See eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (citations omitted).

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 **[*45]** an irreparable injury.

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 **[*46]** 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.

/s/ CHRISTOPHER C. CONNER

Christopher C. Conner, Chief Judge

United States District Court

Middle District of Pennsylvania

Dated: May 17, 2018

ORDER

AND NOW, this 17th day of May, 2018, upon consideration of the cross-motions (Docs. 58, 61, 64) for summary judgment pursuant to Federal Rule of Civil Procedure 56 filed by the Pennsylvania Professional Liability Joint Underwriting Association ("the Association"), the General Assembly of the Commonwealth of Pennsylvania ("General Assembly"), and Tom Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania ("Governor Wolf"), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The Association's motion (Doc. 58) for summary judgment is GRANTED as to the Association's Takings Clause claim and is otherwise denied as moot.
2. The General Assembly's motion (Doc. 61) for summary judgment is DENIED.
3. Governor Wolf's motion (Doc. 64) for summary judgment is DENIED.

4. It is ORDERED and DECLARED **[*47]** that Act 44 of 2017, P.L. 725, No. 44 (Oct. 30, 2017) is unconstitutional in violation of the Fifth and the 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 General Assembly and Governor Wolf.
6. The Clerk of Court shall thereafter close this case.

/s/ CHRISTOPHER C. CONNER

Christopher C. Conner, Chief Judge

United States District Court

Middle District of Pennsylvania

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