THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0555

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GEORGIA TUTTLE, MD, et al.

v.

NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION, et al.

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GEORGIA TUTTLE, MD, et al.

v.

THE STATE OF NEW HAMPSHIRE

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# BRIEF FOR THE NEW HAMPSHIRE MEDICAL SOCIETY AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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## INTRODUCTORY STATEMENT

Amici submitting this Brief are the New Hampshire Medical Society ("NHMS") and the American Medical Association ("AMA"), both of which are voluntary membership organizations.

The NHMS is the largest physician membership organization in the state and since 1791 has worked to promote the art and science of medicine for the betterment of public health. Through advocacy and education, the NHMS represents the concerns of all medical specialties and patient interests across the state. Approximately 2,000 practicing physicians in New Hampshire are members of the NHMS. One of the NHMS's primary missions is to "bring together physicians to advocate for the well-being of our patients, for our profession and for the betterment of the public health."

*Amicus* the AMA, an Illinois non-profit corporation, is an association of approximately 240,000 physicians and medical residents and students. It is the largest medical society in the United States. Its members practice in every state, including New Hampshire, and in every field of medical specialization. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes.[1]

The NHMS and the AMA are in this Court because the State of New Hampshire's attempted appropriation of $110 million from the surplus of the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") presents a significant danger to patient welfare and public health. The JUA was formed to assure patient access to

[1] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

medical providers. The attempted appropriation puts at risk the finances of the medical providers who serve the state's citizenry, which would have the likely affect of creating a disincentive for medical providers to remain or locate in New Hampshire.

Moreover, as the State acknowledged in its brief, the last time the JUA had financial difficulties, the entire medical community of New Hampshire was required to bail out the JUA through assessments on medical malpractice liability insurance policies. *See* Brief for the State Respondents, August 26, 2009 ("State's Brief"), at 8-9. Nothing in the State's attempted appropriation would lift from medical providers the burden of bailing out the JUA should it fail again.

The Superior Court's decision to prohibit the State from taking those funds from the JUA was correct and should be affirmed. From the perspective of the NHMS and the AMA, the State's obligations to the JUA's policy holders, expressed in regulation and in contract, may not be ignored. The NHMS and the AMA believe that allowing the State to proceed would upset the settled expectations of the entire medical community and, in the long run, put public health at risk by impairing access to medical providers.

## QUESTIONS PRESENTED

The NHMS and the AMA will not be addressing all of the questions presented in the State's Brief. This brief will discuss the following questions:

1. Do the petitioners have a vested interest in the JUA's surplus under the duly enacted rules that govern the JUA's operations?

2. Does the requirement of Section 1 of 2009 New Hampshire Laws Ch. 144 (the "Act") that the JUA transfer $110 million to the State's general fund over three years violate the "contracts clause" provisions of Part I, Article 23, of the New Hampshire Constitution or Article I, Section 10, Clause 1, of the United States Constitution?

3. Does the Act's requirement that the JUA transfer $110 million to the State's general fund violate the "takings" provisions of Part I, Article 12, of the New Hampshire Constitution or the Fifth and Fourteenth Amendments to the United States Constitution?

## STATUTES AND CONSTITUTIONAL PROVISIONS

Most of the statutes, rules, and constitutional provisions relevant to this matter are in the Addendum to the State's Brief. Among those rules is the current Plan of Operation of the JUA, codified in N.H. Admin. Rules, Ins 1700. In addition, this Brief relies on language in the version of the JUA's Plan of Operation that immediately preceded the current version. The preceding version expired in December 2008. From the preceding version, the following sections are relevant:

> PART Ins 1701 NEW HAMPSHIRE MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION PLAN
>
> Ins 1701.01 Purpose. The purpose of this chapter is to provide the continued plan of operation for the New Hampshire Medical Malpractice Joint Underwriting Association, which was established to make available medical malpractice insurance for eligible risks.
>
> * * *
>
> Ins 1703.07 Assessment of Members for Deficits Incurred as a Result of Policies Issued on or After January 1, 1986.
>
> * * *
>
> (d) If premiums written on association business exceed the amount necessary to pay losses and expenses, and to reimburse members for all assessments pursuant to Ins 1703.07(c), the board shall authorize the application of such excess, in one of the following ways:
>
> (1) Against and reduce future assessments of the association; or
>
> (2) Distribute such excess to those health care providers covered by the association, in such a manner as is just and equitable.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

The full factual history of the JUA and a statement of the case are contained in the briefs filed by the parties. The NHMS and the AMA adopt the Statement of the Case from the parties' briefs and focus herein on a few additional facts.

Bailout requirements. As the Court is aware from the record, this case is about what the State says is a surplus in the post-1985 JUA, which the Commissioner established following the failure of the previous version of the JUA. As noted in the State's Brief, all medical providers were required to pay a 15% surcharge on the malpractice premiums for several years to create a "stabilization reserve fund." State's Brief at 8-9. The law and regulations governing how to deal with the failure of the JUA have not changed. If the post-1985 JUA fails, the medical community will again be called upon to provide funds for the bailout.

Changes to the JUA Plan of Operation. As explained in the State's Brief, the JUA's Plan of Operation is contained in N.H. Admin. Rules, Ins 1700. The rules as they currently exist have only been in effect since January 2009. Those rules are in the State's Addendum at 48 - 63.

The 2009 version of the rules made two significant changes to the Plan of Operation. The first was in section 1701.01, where the new rules added provisions about the purpose of the JUA using language that is mirrored in the Act. The second change was in section 1703.07(d), the provision governing what the JUA must do when "premiums written on association business exceed the amount necessary to pay losses and expenses." In both the old and current versions of the rule, the JUA must either apply such excess "[a]gainst and reduce future assessments of the association," or

"[d]istribute such excess to those health care providers covered by the association, in such a manner as is just and equitable." The current rule added a clause requiring the Commissioner's review and approval of the JUA's decision and requiring the decision to be consistent with the newly revised purpose clause of the rules.

The prior version of the Plan, without the new language about the JUA's purpose and without the Commissioner's review requirement, was in effect for most of the existence of the post-1985 JUA, at least from 1993 until December 2008, and possibly back as far as 1987.

The State's analysis of the need to retain the excess premiums the JUA collected. The State's Brief cites actuarial studies to explain why the JUA does not "need" the $110 million the State would appropriate if the Act were to go into effect. *See* State's Brief at 9-10. The NHMS and the AMA note that the State's actuarial analysis has not been tested. However, if proved correct, the analysis demonstrates that it will not be necessary for the JUA to hold the excess premiums it has collected from its policy holders to prevent – or at least reduce – the need for future assessments of the JUA's members or for any other reason.

The State's prior conduct. The JUA surplus has never been listed as an asset on the State's books. The website of the State's Department of Administrative Services, Division of Accounting Services, Bureau of Financial Reporting, contains links to all of the State's financial reports going back more than ten years. The reports can be found at http://admin.state.nh.us/accounting/reports.asp#PAFR. There is no mention in any of these reports about the JUA funds.

## SUMMARY OF ARGUMENT

The JUA's surplus, specifically the excess premiums it has collected from policy holders over the years, does not belong to the State and may not be taken by the State as contemplated by the Act. Not only would doing so represent an unconstitutional taking, it would also undermine the original purpose of the JUA, which was to assure access to medical providers by stabilizing the market for medical malpractice insurance.

New Hampshire law unambiguously confers rights on the JUA's policy holders. Those rights include the right to a return of excess premium if the JUA determines that it collected too much from those policy holders, and that the JUA does not need to hold the excess against future claims. Those rights are contractual and vested property rights belonging to the policy holders and may not be taken by the State without the State paying just compensation.

Since the founding of the State of New Hampshire and of the United States, such contract rights have been protected by both the State and Federal Constitutions. Those protections prohibit the State from impairing the policy holders' rights unless the change is reasonable and necessary to serve an important public policy. In this case, it is beyond question that balancing the State's budget by impairing contract rights is unreasonable and unnecessary.

It matters little whether the JUA is considered a State entity or whether it fulfills an important role in government. The State is capable of creating rights in its citizens that it then may not take away. It created such rights here, through the JUA's Plan of Operation, and it may not now take away those rights by appropriating excess premiums paid by the policy holders.

Ultimately, if the State is allowed to take $110 million from the JUA and the JUA fails, the consequences for providers, for patients, and for the entire State, would be disastrous. Providers would not be able to obtain insurance, except at non-market rates, making it more difficult to offer their services to the citizens who need healthcare. Practitioners would, as they have in the past, leave the State, or even leave the profession, and they would be difficult to replace. The State was there in the 1970s and should not want to return.

## ARGUMENT

### I. THE POLICY HOLDERS HAVE A PROTECTED PROPERTY INTEREST THAT THE STATE MAY NOT IMPAIR.

Part I, Article 23, of the New Hampshire constitution provides in relevant part that "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made ... for the decision of civil causes ...." The United States Constitution's Contracts Clause provides that, "No State shall ... pass ... any Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10, Cl. 1.

#### A. Both Federal and State Law Govern These Claims.

When it is alleged that a law violates Part I, Article 23, because it is a retrospective law, the New Hampshire Courts generally analyze the claim under the New Hampshire constitution, relying on the Federal constitution only as an aid, because the New Hampshire constitution affords more protection than the Federal constitution. *See Lower Village Hydroelectric Assoc., L.P. v. City of Claremont*, 147 N.H. 73, 76 (2001); *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630 (1992). When, as here, it is alleged that a law violates Part I, Article 23, because it also impairs a contract, the New

Hampshire Courts generally analyze the claim under the Federal constitution because it affords the same protection as the New Hampshire constitution. *See id.* at 630.

### B. Legal Standard for Constitutional Challenge.

The courts use the following test to determine whether a law violates the contract protection of Part I, Article 23: (1) was there a contractual relationship; (2) if so, does a change in the law impair that contractual relationship; and (3) if there would be an impairment, would it be substantial. *Lower Village Hydroelectric Assoc.*, 147 N.H. at 77; *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 627 (1819). If there would be a substantial impairment of a contractual relationship, a reviewing court will then evaluate whether the law is reasonable and necessary to serve an important public policy. However, "when the State attempts to abrogate its own contractual responsibilities, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.'" *Lower Village Hydroelectric Assoc.*, 147 N.H. at 78 (citing *Opinion of the Justices (Furlough)*, 135 N.H. at 635).

#### 1. A Contractual Relationship Exists Between the State and JUA Policy Holders.

##### a. The contract is embodied in the JUA's Plan of Organization set forth in the N.H. Admin. Rules, Ins 1700 rules adopted by the Commissioner.[2]

The Insurance Department has duly adopted the N.H. Admin. Rules, Ins 1700 rules, which constitute the JUA's Plan of Operation. "Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and

[2] The Medical Society and the AMA agree with the policy holders and the Superior Court that the specific insurance policies issued by the JUA also grant the policy holders contractual rights against the JUA's surplus. Amici herein have nothing to add to the arguments made by the parties on that point.

effect of laws." *Opinion of the Justices*, 121 N.H. 552, 559 (1981). Through the end of 2008, the rules stated that if the JUA collected excess premiums from its policy holders and had made no assessments on its members or other liability insurance companies, then the JUA must decide whether to hold the excess to reduce or eliminate the need for future assessments. If holding the excess is not necessary, then the JUA must determine a fair way to distribute the excess back to the policy holders. *See* N.H. Admin. Rules, Ins 1703.07(d) prior to the 2009 amendments, *supra* at 4. The current rules are similar in this regard, although they contain the additional requirement that the Commissioner approve the plan and that it be consistent with the JUA's purpose. It is the pre-2009 version of the Plan, however, that should govern the policy holders' rights here, as that is the language that was in effect when virtually all excess premiums were paid.

A contractual obligation on the part of the State arises from a law only if the law unambiguously expresses an intention to create the obligation. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n. 14 (1977). Where a law sets forth certain restrictions, but also confers discretion upon an entity to implement the law within those restrictions, such law does not rise to the level of an unambiguous intention to contractually bind the State. *See Eckles v. State*, 760 P.2d 846, 853 (Or. 1988) (hypothesizing that if a law stated that a fund was "to be used for purposes stated in [other State law]," such law would not contractually bind the State); *Methodist Hospital of Brooklyn v. State Insurance Fund,* 476 N.E.2d 304, 309-10 (N.Y. 1985) (holding that a law that stated "there may be credited or paid to each individual member" did not contractually bind the State); *Fun 'N Sun RV, Inc. v. Accident Fund of Michigan*, 527 N.W.2d 468, 476-77 (Mich. 1994) (holding that a law that stated "The revolving fund

shall be used exclusively for the following [nine] purposes ... refunds of premiums or applicant's funds ... dividends and similar payments to policy holders" did not contractually bind the State); *Wisconsin Medical Society, Inc., et al. v. Morgan*, 07-CV-4035, *3, *20 (Cir. Ct. Branch 13, December 18, 2008) (holding that a law that stated that funds were "held in trust for the benefit of insureds and other proper claimants" and could "not be used for purposes other than those of this chapter" did not contractually bind the State).

However, a law that creates a mandatory obligation, rather than conferring discretion, constitutes an unambiguous expression of an intention to contractually bind the State. *See United States Trust Co. of New York*, 431 U.S. at 17 n.14 ("a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State"); *Eckles*, 760 P.2d at 855 (holding that a law's express waiver of the State's proprietary interest in a fund contractually bound the State not to transfer money out of the fund); *Fun 'N Sun RV, Inc.*, 527 N.W.2d at 476 (hypothesizing that if a law vested policy holders with a right to a reduced premium or dividends, that such law would contractually bind the State); *Wisconsin Medical Society, Inc.*, 07-CV-4035 at *20, *21-*22, n. 8 (contrasting the law before that Court with the language of a different law which did contractually bind the state; the binding language was: "If the plan accumulates funds in excess of the surplus required under [§] 619.01(1)(c)2 ... the board of governors shall return those excess funds to the insureds by means of refunds or prospective rate decreases").

In this case, the State law contained in section 1703.07(d) created a mandatory obligation, rather than conferring discretion. As no assessments have been levied against the JUA's members and the State has determined that it need not hold the excess against the need for future assessments, the excess premiums "shall" be distributed to policy holders. *See* N.H. Admin. Rules, Ins 1703.07(d). This is precisely the kind of unambiguous expression that contractually binds the State.

Moreover, like the case of *Trustees of Dartmouth College*, the JUA policy holders have paid their private funds into the JUA for the non-governmental purpose of obtaining insurance coverage, in reliance on the prospect of excess funds being distributed to them. *See Trustees of Dartmouth College*, 17 U.S. at 635; *see also Eckles*, 760 P.2d at 848, 855 (describing policy holders as paying their private capital into a fund for the non-governmental purpose of obtaining workers' compensation insurance, in reliance of the State's disclaimer of any interest in the fund).

b. The JUA's and the State's prior conduct underscores the existence of a contractual obligation and the State's lack of interest in the funds.

An agency's prior, consistent interpretation of its own obligations under statutes or rules, without interference from the legislature, is evidence that the agency's interpretation conforms to legislative intent. *See, e.g., State Retirement System v. Sununu*, 126 N.H. 104, 109-10 (1985); *Hamby v. State*, 117 N.H. 606, 609 (1977).

Ten years ago, when the JUA determined that it had collected excess premiums, the JUA paid a "dividend" to the JUA's policy holders. Contrary to the State's suggestion that the dividend was paid as an adjustment to the policy holders' then-current premiums, *see* State's Brief at 9, the dividend was determined to be 20% of the *prior*

year's premiums. The JUA paid a similar "dividend" in 2000. *See* State's Brief App. at 397, 400.

With respect to the State's prior conduct, as noted above, it does not appear that the State ever considered the JUA fund as a State asset because it did not include it in the "State of New Hampshire's Annual Citizens Report For Fiscal Year Ended June 30, 2008" or similar previous reports.

Thus, under the first part of the constitutional test, a contractual relationship exists between the State and the JUA policy holders.

### 2. The Proposed Transfer Would Impair the State's Contractual Obligation and That Impairment Would Be Substantial.

The second part of the test is whether the proposed law would impair the contract, and the third prong is whether such impairment would be substantial. Here, both issues can be addressed together.

Under the current law, each of the approximately 1,000 policy holders is entitled to a share of the excess funds because no assessments have been levied. The proposed transfer would eliminate nearly the entire excess by transferring it into the General Fund. As a result, the policy holders would receive nothing, rather than receiving their share of the excess as promised by the law. Such a result would indeed substantially impair the contractual rights of the policy holders.

### 3. The Substantial Impairment of the State's Contractual Obligations Would be Unreasonable and Unnecessary.

Because the proposed transfer would substantially impair a contractual relationship between the JUA and its policy holders, the Court must consider whether the proposed law would be reasonable and necessary to serve an important public policy.

The State asserts that its purpose is more than just financial. The State claims it is taking the JUA surplus to "promot[e] access to needed health care." State's Brief at 33.[3] Normally, the State's determination of what is reasonable and necessary is entitled to some deference. However, no deference is due here and, even if deference were appropriate, the purported justifications fail.

First, under the State's view, the JUA is part of the State and the State would thus be attempting to abrogate its own contractual responsibilities. If the State is correct, then deference is not appropriate. "When a State itself enters into a contract, it cannot simply walk away from its contractual obligations." *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 412 n.14 (1983); *see United States Trust Co. of New York*, 431 U.S. at 26. The State over-reaching to cure financial crisis is not novel. In response to prior attempts, the Court has stated that "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Opinion of the Justices (Furlough)*, 135 N.H. at 635.

Second, and consistent with the Petitioners' position and that of the Superior Court, the JUA is a separate entity. Despite the existence of distinct entities, the State's obvious reason for taking the money is to cover the State's obligations, not any obligations of the JUA. "[F]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." *See Lower Village*

[3] The State also asserts that relief not ordered by the Superior Court – a return of a portion of the surplus to the policy holders – would interfere with the private market for medical malpractice insurance in violation of RSA 404-C:2, II. State's Brief at 33. That hypothetical affect is neither relevant to the Court's review now, nor the inevitable result of a proper return of premiums, should one occur. There are any number of ways excess premiums could be returned to policy holders that would not interfere with the private insurance market.

*Hydroelectric Assoc.*, 147 N.H. at 78 (internal citations and quotations omitted). Again, the Court has had occasion to previously respond to prior attempts to abrogate contracts to cure financial woes and has stated that "[t]he legislature has policy alternatives for raising revenue." *Id.*

Thus, the State's justifications fail to show that the attempted appropriation is either reasonable or necessary. Accordingly, the proposed transfer would violate Part 1, Article 23, of the New Hampshire constitution and the Contracts Clause of the United States constitution, because it would substantially, unreasonably, and unnecessarily impair the contractual relationship established in the law between the JUA and its policy holders.

## II. THE PROPOSED TRANSFER WOULD REPRESENT AN UNCONSTITUTIONAL TAKING BECAUSE IT WOULD DEPRIVE POLICY HOLDERS OF THEIR CONTRACTUAL ENTITLEMENT TO EXCESS JUA FUNDS.

Part I, Article 12, of the New Hampshire constitution and the fifth and ninth amendments to the Federal constitution prohibit the government taking of property without just compensation. Contract rights can constitute property. *See Hughes v. N.H. Division of Aeronautics*, 152 N.H. 30, 37 (2005). "The hallmark of property is an individual entitlement grounded in State law, which cannot be removed except for cause." *Id.* (internal quotation omitted).

The foregoing analysis concludes that policy holders enjoy contractual rights in the excess funds of the JUA. Thus, each policy holder possesses an entitlement that is grounded in State law. Consequently, as of the time when the JUA determined that it had collected excess premiums, the policy holders had a vested right to them. It follows that,

unless the State compensated the policy holders for the value of their share of the excess, the proposed transfer would amount to an unconstitutional taking.

## III. EVEN UNDER THE STATE'S VIEW OF THE STATUS OF THE JUA, THE STATE MAY NOT TAKE THE EXCESS PREMIUMS THAT HAVE BUILT UP THE JUA SURPLUS.

The parties below, and the State in its Brief, have argued about whether the JUA is part of the State or a separate entity. While the NHMS and the AMA believe the Superior Court's decision on this point is correct, the injunction is proper even if the JUA is considered to be a state entity because the Plan of Operation contains the kind of language that establishes contractual relationships between states and private parties.

### A. The *Eckles* Case is the Out-of-State Precedent Most Closely on Point.

*Eckles*, 760 P.2d at 853, appears to be the only case with facts analogous to the current circumstances. It involved a law containing an unambiguous declaration that the State had no proprietary interest in certain funds, but did not identify who could make a claim against any excess.

The *Eckles* case involved an industrial accident fund ("IAF") that had built up an excess of over $168 million at a time when the State was in an economic crisis. *Eckles*, 760 P.2d at 848. As a result, the legislature enacted a law that transferred $81 million out of the IAF and into the State's general fund (the "Oregon Transfer Law"). *Id.* Prior to the Oregon Transfer Law, the law governing the IAF stated that: "The State of Oregon declares that it has no proprietary interest in the Industrial Accident Fund .... The state ... waives any right of reclamation it may have had in that fund." *Id.* at 852. Significantly, and consistent with the State's view of the JUA excess, Oregon law did not specify who, if anyone, could make a claim against the fund.

In response to the Oregon Transfer Law, an employer insured through the IAF brought an action against the State seeking declaratory, injunctive, and other relief. *Id.* at 848. In a comprehensive opinion, the Supreme Court of Oregon held that the Oregon Transfer Law breached a contract of the State, for which the State may have been liable in a breach of contract action, and that the law violated the State's constitutional prohibition against the retrospective application of laws. *Id.* The Court also reasoned that the only way to avoid the constitutional violation would be to compensate any party bringing a breach of contract action resulting from the Oregon Transfer Law. *Id.* at 859-60.

The *Eckles* reasoning is persuasive and its facts closely parallel the facts here. The JUA has built up a substantial surplus at a time when the State is in an economic crisis and the legislature has passed a law that would transfer substantial portions of the JUA surplus into the General Fund. The State is doing so despite state law with an unambiguous mandate about what can and cannot be done with excess JUA funds but no specific identification of who could make a claim against such funds.

### B. The Other Out-of-State Cases Support the Petitioners' Analysis Even Though Their Holdings were in Favor of the States.

The State's Brief relies on several of the cases cited in the foregoing analysis. However, its reliance appears to be based only on the fact that some of the various State Courts involved upheld the legality of laws that required transfers of monies held in funds that were created through earlier laws. Importantly, the State's application of those cases completely ignores critical distinctions between those cases and the current issue.

First, current New Hampshire law mandates that the excess funds go to policy holders if it is not held against the possibility of future assessments, whereas the laws in

the cases that the State relies upon conferred only the discretionary option of distributing excess funds to policy holders. *See Methodist Hospital of Brooklyn, et al.*, 476 N.E.2d at 309 (characterizing dividends to policy holders as discretionary, not mandatory, where the law states "there may be credited or paid to each individual member"); *Fun 'N Sun RV, Inc., et al.*, 527 N.W.2d at 476-77 ("the executive director may ... prescribe when and in what manner the premiums and assessments shall be paid, may change the amount thereof ... the executive director shall maintain a revolving fund derived from premiums collected from members of the fund. The revolving fund shall be used exclusively for the following [nine] purposes ... refunds of premiums or applicant's funds ... dividends and similar payments to policyholders").

Second, in some of the cases on which the State relies, the laws establishing the funds did not deal at all with the disposition of excess funds. *See In the Matter of Medical Malpractice Insurance Association v. Superintendent of Insurance of the State of New York*, 72 N.Y.2d 753, 761 (1988) (enabling law at issue: "All [premium] rates shall be on an actuarially sound basis, be calculated to be self-supporting, be based on reasonable standards .... The premiums shall be fixed at the lowest possible rates consistent with the maintenance of solvency of the association and of reasonable reserves and surplus therefore"); *Wisconsin Medical Society, Inc.*, 07-CV-4035, *3 ("money in the Fund was 'for the benefit of insureds and other proper claimants' and furthermore the Fund could 'not be used for purposes other than those of this chapter'") (quoting state law at issue); *Mississippi Surplus Lines Ass'n v. State of Mississippi*, 442 F. Supp. 2d 335, 336 (S.D. Miss. 2006) ("not more than one percent (1%) of premiums charged under this chapter for the operation of the association to the extent that such operation relieves

the commissioner of duties otherwise required of the Commissioner of Insurance under this chapter"); *D. Corso Excavating, Inc. v. Poulin*, 747 A.2d 994, 996 (R.I. 2000) (holding that a new law that prospectively eliminated a second injury workers' compensation fund did not violate any contractual obligation to a claimant to that fund whose claim had not been adjudicated when the new law became effective).

Lastly, it is worth noting that the Michigan Court in the *Fun 'N Sun* case specifically distinguished *Eckles* on the ground that the Michigan law left open the question of what would happen with any surplus in the fund.

In sum, each of the decisions relied on by the State and by the Petitioners here supports the Petitioners' position that the excess of premiums collected by the JUA belong to the Petitioners, not to the State. Accordingly, any transfer of those funds into the General Fund would be unconstitutional.

## IV. ALLOWING THE STATE TO TAKE $110 MILLION FROM THE JUA COULD THROW THE MEDICAL MALPRACTICE MARKET AND, AS A RESULT, THE STATE'S MEDICAL SYSTEM INTO DISARRAY.

The foregoing analysis demonstrates that the Petitioners should prevail because the attempted appropriation would represent an unconstitutional taking. Moreover, the likely consequence of the attempted appropriation would be an overall decrease in access to medical providers.

The precedent and law are quite clear: if the JUA fails again, the entire medical community will be expected to bail it out. The effects on the JUA could be devastating. Knowing that their investments in the JUA are freely available to the State, providers will be reluctant to purchase coverage from the JUA. The NHMS and the AMA are concerned that such an outcome would precipitate a return to the original problem the

JUA was meant to solve: a lack of access to providers because of the high cost and the lack of choice of medical malpractice insurance.

## CONCLUSION

As explained above and in the brief filed by the Petitioners, the State should not be allowed to appropriate any funds from the JUA and the decision of the Superior Court should be affirmed.

Respectfully submitted,

NEW HAMPSHIRE MEDICAL SOCIETY
And
THE AMERICAN MEDICAL ASSOCIATION
By Its Attorneys,
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Dated: September 25, 2009

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## CERTIFICATE OF SERVICE

I hereby certify that on this date two copies of the foregoing Brief were mailed, first class, postage prepaid, to Anne M. Edwards, Assistant Attorney General, NH Office of the Attorney General, 33 Capitol Street, Concord, NH 03301-6397; Kevin M. Fitzgerald, Nixon Peabody, LLP, 900 Elm Street, Manchester, NH 03101; and Michael F. Aylward, Morrison, Mahoney, LLP, 250 Summer Street, Boston, MA 02210-1181.

Dated: September 25, 2009

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