

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2297 and 18-2323

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING
ASSOCIATION

v.

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,
THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
(Intervenor in District Court)

Governor of the Commonwealth of Pennsylvania,
Appellant in 18-2297

The General Assembly of The Commonwealth of Pennsylvania,
Appellant in 18-2323

Nos. 19-1057 and 19-1058

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING
ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA; THE GENERAL ASSEMBLY OF THE
COMMONWEALTH OF PENNSYLVANIA; PRESIDENT PRO TEMPORE
PENNSYLVANIA SENATE; MINORITY LEADER PENNSYLVANIA SENATE;
SPEAKER PENNSYLVANIA HOUSE OF REPRESENTATIVES; MINORITY
LEADER PENNSYLVANIA HOUSE OF REPRESENTATIVES; INSURANCE
COMMISSIONER PENNSYLVANIA

President Pro Tempore Pennsylvania Senate; Minority Leader Pennsylvania
Senate; Speaker Pennsylvania House of Representatives, Minority Leader Pennsylvania
House of Representatives,
Appellants 19-1057

Governor of Pennsylvania,
Insurance Commissioner Pennsylvania,
Appellants in 19-1058

Nos. 21-1099, 21-1112 and 19-1155

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING
ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA; GENERAL ASSEMBLY OF THE
COMMONWEALTH OF PENNSYLVANIA

General Assembly of the Commonwealth of Pennsylvania,
Appellant in 21-1099

Governor of Pennsylvania,
Appellant in 21-1112

Pennsylvania Professional Liability Joint Underwriting Association
Appellant in 21-1155

On Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Nos. 1-17-cv-2041, 1-18-cv-1308, and 1-19-cv-1121)
District Judge: Honorable Christopher C. Conner

Argued
November 9, 2022

Before: CHAGARES, *Chief Judge*, JORDAN, and RESTREPO, *Circuit Judges*

(Filed: January 19, 2023)

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PETITION FOR CERTIFICATION OF QUESTION OF STATE LAW

To the Honorable Justices of the Pennsylvania Supreme Court:

This matter came before the United States Court of Appeals for the Third Circuit on appeal from three decisions by the United States District Court for the Middle District of Pennsylvania. Having reviewed the briefs and record in the case, and having heard oral argument, the panel (Chagares, C.J., Jordan, and Restrepo, JJ.) has voted to respectfully seek guidance from the Pennsylvania Supreme Court by certifying a question pursuant to Local Appellate Rule (L.A.R.) Misc. 110.1 of the United States Court of Appeals for the Third Circuit.¹

The fundamental question before us is one of federal law: whether the plaintiff, Pennsylvania Professional Liability Joint Underwriting Association (“JUA”), is an entity that can assert federal constitutional rights against the Commonwealth. We believe, however, that this case raises an important state law issue that bears on the federal law question, namely, whether as a matter of Pennsylvania law the JUA would be considered a public or private entity. We therefore respectfully request that the Pennsylvania Supreme Court accept certification of that question, pursuant to Pa. R. App. P. 3341.

¹ L.A.R. Misc. 110.1, Certification of Questions of State Law, provides in pertinent part as follows:

When the procedures of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the procedures of that court, and will stay the case in this court to await the state court’s decision whether to accept the question certified.

I. Background

A. The JUA's History

The General Assembly of Pennsylvania established the JUA in 1975 to respond to a medical malpractice insurance coverage crisis in the state. In 2002, the General Assembly replaced the statute that created the JUA with the Medical Care Availability and Reduction of Error (“MCARE”) Act, which “established” the JUA as a “nonprofit joint underwriting association.” 40 P.S. § 1303.731(a) (2002). All insurers authorized to write liability insurance in the Commonwealth must join the JUA as members.

The JUA is required to offer medical professional liability insurance to health care providers and other entities that would not be able to obtain that insurance through ordinary methods and at non-excessive rates. The insurance offered by the JUA must do the following: be conveniently and expeditiously available to all health care providers required to be insured under state law; be subject only to the payment or provisions for payment of the premiums; provide reasonable means for the providers to transfer to the ordinary insurance market; provide sufficient coverage for providers to satisfy their insurance requirements under state law without unfairly discriminatory terms; and permit a provider to finance its premium or allow installment payments.

The MCARE Act states that the JUA is “supervised” by the Insurance Department of Pennsylvania. *Id.* By statute, the JUA is required to do four things in its interaction with that Department: (1) submit a plan of operations to the Insurance Commissioner for approval; (2) submit rates and any rate modifications for approval; (3) offer medical professional liability insurance as required by the Act; and (4) file updated rates for all

health care providers each year, which the Commissioner “shall review and may adjust” when calculating annual assessments for all health care providers in the Commonwealth. *Id.* at § 1303.731(b) (incorporating 40 P.S. §§ 1181 *et seq.*, 1303.732, 1303.712(f)).

The plan of operations, filed in conformance with the first of those obligations, states that the JUA was established according to the MCARE Act and operates pursuant to that Act. The JUA has four employees who are neither paid by the Commonwealth nor receive any benefits under its retirement system. The plan also states that the JUA may be dissolved by “an operation of law,” at which time its assets would be distributed as directed by its Board of Directors, subject to the Insurance Commissioner’s approval. (*JUA I and II App.* at 240, 320-21.)²

The JUA issues policies directly to its policyholders, who make payments directly to the JUA for those policies. (*JUA I and II App.* at 613.) It has always been funded solely by policyholder premiums and income from returns on investments made with the premiums. The JUA holds funds in its own name and accounts. Its “contingency funds” are maintained under two separate categories: first, reserves, which are the “best estimate” of the funds needed to pay claims “that have been incurred but not yet paid,” and second, surplus, which is the “capital after all liabilities have been deducted from assets.” (*JUA I and II App.* at 1162, 2363.) In the event of a deficit, the Board must

² Three District Court rulings were consolidated in the appeal before us: *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 324 F. Supp. 3d 519 (M.D. Pa. 2018) (“*JUA I*”), *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 381 F. Supp. 3d 324 (M.D. Pa. 2018) (“*JUA II*”), and *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F. Supp. 3d 212 (M.D. Pa. 2020) (“*JUA III*”). The appeals in *JUA I* and *JUA II* share an appendix (“*JUA I and II App.*”).

notify the Insurance Commissioner. 40 P.S. § 1303.733(a). If the Commissioner approves, the JUA is authorized to borrow the funds needed to satisfy the debt. *Id.* at § 1303.733(b). The statute does not require the JUA to borrow from a specific lender. *Id.* According to a previous version of its plan of operations, the JUA could fund its debt by issuing assessments to its members in proportion to each member's participation, which assessments the JUA had to refund after acquiring the necessary funds through a loan or increase in premiums. The JUA, however, has never borrowed money or assessed its members.

As of December 2016, the JUA's surplus was \$268,124,490. By 2020, it had grown to \$298,276,876. The measure of how sufficient an insurer's contingency funds are to cover the "full range of potential exposure from [its] claims" is called a Risk Based Capital ratio. (*JUA I and II App.* at 1162.) The Commonwealth's Insurance Department expects private insurers to maintain a Risk Based Capital ratio of at least 300%. In 2017, the JUA's ratio was 13,477%.

Because of that vastly inflated ratio, the Insurance Department sent the JUA a letter about "certain matters involving a lack of regulatory compliance and deviation from sound business practices in early 2017." (*JUA I and II App.* at 937.) The Department asked the JUA to "determine an efficient amount of surplus to hold in order to run its operation" and to recommend in its plan of operations how it will divest itself of the "excess capital[.]" (*JUA I and II App.* at 938.) In response, the JUA said, among other things, that it would be "inappropriate to identify an efficient surplus operating range" at that time because of a "lack of legal authority" about how the excess surplus should be

addressed. (*JUA I and II App.* at 988-89.) In short, it declined to accede to the Department's directive.

B. Procedural History

The Commonwealth enacted legislation in 2017, 2018, and 2019 in successive attempts to assert varying degrees of control over the JUA, either by mandating transfer of the JUA's surplus to the Commonwealth's General Fund or by requiring the JUA to accept state funding and legal representation. After each piece of legislation was signed into law, the JUA filed suit in the United States District Court for the Middle District of Pennsylvania, alleging that the new statute violated the United States Constitution. The following sections discuss each of the statutes and the accompanying litigation.

i. Act 44 of 2017

In 2017, Governor Tom Wolf signed Act 44 of 2017, P.L. 725 (Oct. 30, 2017) ("Act 44"), an enactment implementing the Commonwealth's 2017-2018 budget into law. Among other things, Act 44 mandated that the JUA pay \$200 million to the State Treasurer for deposit into the Commonwealth's General Fund. 72 P.S. § 203-D (2017). The legislation dictated that, if the JUA did not make this transfer within a month and a day, the MCARE Act provision creating the JUA would immediately expire and the JUA would be abolished, with its assets transferred to the Insurance Commissioner with direction to deposit the money into the Commonwealth's General Fund as soon as practicable. *Id.* at § 207-D. Act 44 included the following findings: the JUA "has money in excess of the amount reasonably required to fulfill its statutory mandate[;]"; those funds do not belong to any members of the JUA or the insureds covered by the policies

issued; the JUA is an instrumentality of the Commonwealth, and money under its control belongs to the Commonwealth; the Commonwealth is in need of revenue from all possible sources; and the JUA's payment of \$200 million to the Commonwealth is in the best interest of the Commonwealth's residents. *Id.* at § 201-D.

The JUA filed suit against the Governor, challenging the constitutionality of Act 44, seeking declaratory and injunctive relief for violations of substantive Due Process, the Takings Clause, the Contract Clause, and the doctrine of unconstitutional conditions. *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 324 F. Supp. 3d 519, 527 (M.D. Pa. 2018) (hereinafter "*JUA I*"). The General Assembly joined the litigation as an intervenor-defendant. *Id.* After briefing, an evidentiary hearing, and oral argument the District Court preliminarily enjoined enforcement of Act 44, the parties filed cross-motions for summary judgment, wherein the defendants argued that the JUA could not state a claim against the Commonwealth because it is a public entity, i.e., effectively a creature of the Commonwealth, and such suits are barred. *Id.* at 527-28, 532.

The District Court granted summary judgment, declaratory judgment, and permanent injunctive relief to the JUA, holding that sections of Act 44 relating to the JUA were "plainly violative" of the Takings Clause. *Id.* at 540. The District Court concluded that the JUA is a "private entity as a matter of law" and so was not barred from asserting federal constitutional claims against the Commonwealth. *Id.* at 535. Guided by its interpretation of cases from the United States Courts of Appeals for the First and Fifth Circuits involving similar entities, the District Court "holistically examined [the JUA's] relationship with the state" to determine whether the JUA is a public or private entity. *Id.*

The Court considered “the nature of the [JUA’s] function, the degree of control reserved in the state (or the level of autonomy granted to the [JUA]), and the statutory treatment, if any, of the [JUA], in addition to the nature of the funds implicated.” *Id.*

In conducting its analysis, the District Court found, first, that the JUA’s function is “inherently private” because it is comprised of private members, governed by a private board, funded by privately-paid premiums, and provides medical malpractice coverage to private persons; second, that the JUA is subject to *de minimis* Commonwealth supervision and its board has “nearly unfettered autonomy” in its powers and duties; third, its statutory treatment is limited to general supervision by the Insurance Commissioner, similar to the oversight the Commissioner exerts over all Commonwealth insurers; and fourth, its funds are private because the JUA has never received Commonwealth funding and the funds do not have a public end-use. *Id.* at 535-38. The District Court held that Act 44 was an unconstitutional taking of private property because the Act failed to provide any compensation for divesting the JUA of \$200 million. *Id.* at 538-39. The defendants timely appealed.

ii. Act 41 of 2018

In 2018, Governor Wolf signed Act 41 of 2018, P.L. 273 (June 22, 2018) (“Act 41”) into law. It stemmed, in part, from a review of the JUA by the Insurance Commissioner that revealed “a need to modernize the [JUA] in order to produce needed economical and administrative efficiencies.” 40 P.S. § 323.1-A(1) (2018). Act 41, according to the District Court, “endeavor[ed] to avoid the constitutional infirmities that felled Act 44.” *Pa. Prof’l Liab. Joint Underwriting Ass’n v. Wolf*, 381 F. Supp. 3d 324,

326 (M.D. Pa. 2018) (hereinafter “*JUA I*”). Among other provisions, Act 41: declared that the JUA “shall continue as an instrumentality of the Commonwealth” and “operate under the control, direction, and oversight” of the Insurance Department; replaced the member-led JUA board with a state-controlled board; installed a new executive director to be hired and paid by the Commonwealth; provided that any claims against or liabilities of the JUA would be considered a liability against the Commonwealth; and required all documents, papers, and assets of the JUA be transferred to the Insurance Department within 30 days of the Act’s effective date. 40 P.S. §§ 323.11-A, 12-A, 21-A.

The JUA promptly filed suit against the Governor, Insurance Commissioner, and four state representatives in their official capacities, seeking declaratory and injunctive relief for violations of substantive Due Process, the Takings Clause, and the Contract Clause of the Constitution. *JUA II*, 381 F. Supp. 3d at 326. The District Court again preliminarily enjoined enforcement of the Act, after which the parties filed cross-motions for summary judgment. *Id.* at 331.

The District Court granted summary judgment, declaratory judgment, and permanent injunctive relief in favor of the JUA, reiterating its holding in *JUA I* that the JUA is a “private entity, and its funds are private property that cannot be taken by the government without just compensation.” *Id.* at 335, 343. The District Court rejected the Governor’s and Insurance Commissioner’s argument that Act 41 responded to and followed the directive of *JUA I*, stating rather that those defendants had not offered any authority to support the proposition that “the state can declare public what it created as – and a court has confirmed to be – a private entity.” *Id.* at 335. The Court also rejected

the state representatives' argument that the JUA is a public entity because, unlike the entities to which those defendants pointed, the JUA has never been funded by or endowed with public property and the Commonwealth has never been alone interested in it. *Id.* at 336-37. Rather, the District Court reemphasized the more holistic test it applied in *JUA I*. *Id.* at 338. The District Court held that the Takings Clause prohibited the Commonwealth "from taking the private assets of the [JUA], either directly as in Act 44 or through the hostile takeover effected by Act 41, without just compensation." *Id.* at 341. The defendants timely appealed.

iii. Act 15 of 2019

In 2019, Governor Wolf signed Act 15 of June 28, 2019, P.L. 101, No. 15, § 7 ("Act 15") into law, which, unlike Acts 44 and 41, did not mandate transfer of the JUA's funds to the Commonwealth or attempt to wrest full control of the JUA. *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F. Supp. 3d 212, 220 (M.D. Pa. 2020) (hereinafter "*JUA III*"). Instead, Act 15 provided that the JUA shall: be funded by appropriations determined by the General Assembly; submit written budget estimates to the Commonwealth each year, about which a JUA agent will testify at a public hearing; appear before both Appropriations Committees of the General Assembly to testify about its fiscal status and make requests for appropriations; hold quarterly public meetings about its actuarial and fiscal status as required by the Commonwealth's Sunshine Act; be considered a "Commonwealth agency" for purposes of the Commonwealth Attorneys Act, Right-to-Know Law, PennWATCH Act, and Procurement Code; and transmit a list of employees to the Commonwealth, conduct its operations in Commonwealth-owned

facilities, and coordinate with the Department of Revenue to ensure that any employees with access to federal tax information have met all requirements of the Department of Revenue. 71 P.S. §§ 420.2-6 (2019).

Once more, the JUA filed suit, this time against Governor Wolf and the General Assembly, seeking declaratory and injunctive relief for violations of substantive and procedural Due Process, the Takings Clause, the Contract Clause, and the First Amendment. *JUA III*, 509 F. Supp. 3d at 221. The District Court denied the JUA's motions for a preliminary injunction, after which the parties filed cross-motions for summary judgment. *Id.*

Before addressing the specifics of Act 15, the District Court again reiterated its holding from *JUA I* that the JUA “is a private entity [whose] assets are private property[.]” *Id.* at 222. The Court then evaluated each of the challenged provisions of Act 15 individually, concluding that the act's mandatory funding of the JUA through the Commonwealth and the requirement that it submit and testify to budget estimates constituted an unconstitutional regulatory taking. *Id.* at 223-27. The Court also found that the categorization of the JUA as a Commonwealth agency for purposes of the Commonwealth Attorneys Act violated the JUA's First Amendment right to consult and hire counsel of its choice. *Id.* at 228-31. Accordingly, the Court granted the JUA's request for a permanent injunction as to those three sections of Act 15. *Id.* at 235.

The District Court granted summary judgment for the defendants on the remaining provisions of Act 15 – all of which had to do with the JUA's disclosures to the public and the Commonwealth. *Id.* at 231-34. In doing so, the District Court “cabin[ed]” its

decisions in *JUA I* and *JUA II*, stating: “In holding that the [JUA] is a private entity and its funds private property, we rejected defendants’ claims that the [JUA] is the state itself. We have never denied, however, that the [JUA] is a unique creature – a state-created private entity that furthers the General Assembly’s public-health objectives.” *Id.* at 232. The Court further stated that, though the JUA is private, “its *mission* is indisputably public.” *Id.* at 232 (emphasis in original). Both sides timely appealed. We consolidated the three appeals and heard oral argument on November 9, 2022.

II. Discussion

Ultimately, whether the JUA can assert federal constitutional claims against the Commonwealth is a question of federal law. The parties agree, however, that whether the law of the Commonwealth treats the JUA as a private or public entity is of importance in understanding the nature of the JUA. The JUA argues that, because the Commonwealth responded to the medical professional liability insurance crisis by creating a member-controlled organization with private employees and private characteristics and treated the JUA as a non-governmental entity for the purposes of taxation and disclosure requirements, it is a private nonprofit association that is “largely indistinguishable” from other private insurers in the Commonwealth. (*JUA III* JUA’s Answering Br. at 28.) (quoting *JUA II*, 381 F. Supp 3d at 333.) In response, the General Assembly and state representatives contend that the JUA is public because its existence and activities are directed and dictated by state statute, the Commonwealth alone has a legitimate interest in it, and the Commonwealth’s lack of day-to-day control is not indicative of the JUA’s status as a private or public entity. The Governor and Insurance Commissioner likewise

argue that the JUA was created by statute, which mandated membership and limited its purpose, that the Commonwealth alone is interested in it, and that it could not have been created as a separate legal entity with independent rights because, at the time of its creation, the Pennsylvania common law did not recognize unincorporated associations as legal entities.

Determining the status of the JUA as either a public or private entity is integral to the analysis of whether the JUA can assert federal constitutional rights against the Commonwealth, and the Pennsylvania Supreme Court's perspective will be of high importance in answering that question.

To date, Pennsylvania courts have not analyzed whether the JUA is a public or private entity, but have referred to it as a "statutory facility," *Hosp. & Healthsystem Ass'n of Pa. v. Ins. Comm'r*, 74 A.3d 1108, 1113 n.13 (Pa. Commw. Ct. 2013), and "statutory insurance pool," *id.* at 1122 n.3 (Brobson, J., concurring). In *JUA I*, the District Court referred to the Pennsylvania statute for nonprofit associations, the Pennsylvania Uniform Unincorporated Nonprofit Association Law ("UUNAL"), when considering the JUA's statutory treatment, stating: "As a nonprofit association, Pennsylvania law authorizes the [JUA] to acquire, hold, or transfer an interest in the funds and to use or set aside those funds for the nonprofit purposes of the [JUA]." 324 F. Supp. 3d at 538 (citing 15 PA. CONS. STAT. §§ 9114-15 (2013)) (cleaned up). Because of that, the District Court found that the nearly \$300 million surplus carried by the JUA is private property, and that conclusion contributed to its holding that the JUA is a private entity. *Id.* at 538-39.

The Governor and Insurance Commissioner have categorized the District Court’s reference to the UUNAL as a fundamental flaw in analyzing the status of the JUA, arguing that the UUNAL was not enacted until 2013 and, before its enactment, unincorporated associations could not hold property. (*JUA III* Exec. Appellant’s Opening Br. at 20-21.) (citing *Krumbine v. Lebanon Cty. Tax Claim Bur.*, 663 A.2d 158, 160 (Pa. 1995); *Campbell v. Floyd*, 25 A. 1033, 1036 (Pa. 1893)). The JUA contends that this argument is misplaced because Pennsylvania common law recognized that a nonprofit association authorized by statute, like the JUA, “could possess independent legal significance.” (*JUA III* JUA Answering Br. at 33.) (citing *Krumbine*, 663 A.2d at 160). Despite those arguments, it remains unclear whether the JUA’s public or private status is dictated by its possible treatment under other Pennsylvania statutes for example, those pertaining to nonprofit entities. *See JUA I*, 324 F. Supp. 3d at 537 (considering the JUA’s ability to be dissolved by an operation of law, like any nonprofit in the Commonwealth under 15 PA. CONS. STAT. § 9134(a)(5) (2013)).

In the acts creating the JUA, the General Assembly did not provide explicit direction regarding the status of the entity.³ Given the lack of clarity regarding that status, and given the importance of the constitutional questions at issue here, we now submit this Petition for Certification to the Pennsylvania Supreme Court.

³ *Cf. Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 61 (1st Cir. 2005) (explaining that Puerto Rico’s auto insurance JUA “is ‘private in nature, for profit, and ... subject to the provisions of the [Insurance] Code applicable to insurers.’”) (quoting Puerto Rico Insurance Regulation No. 6254 (2000)) (alterations in original); *Asociación De Suscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F. 3d 1, 20 (1st Cir. 2007) (reiterating its finding in *Arroyo-Melecio*).

III. Question for Consideration

Accordingly, the following question of law is certified to the Pennsylvania Supreme Court for disposition: *Under Pennsylvania law, is the Commonwealth's Joint Underwriting Association a public or private entity?*

We shall retain jurisdiction of the appeal pending resolution of this certification.

s/ Kent A. Jordan
Circuit Judge



A True Copy:

Patricia A. Dodszeit

Patricia S. Dodszeit, Clerk