BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
APPROPRIATIONS COMMITTEE

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

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

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

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

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

JUA's History and Status as a Private Nonprofit Entity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUA's Role in the Market Medical Professional Liability Insurance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUA's Fiscal Status

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

JUA's Budgetary Request

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

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