

# Bill as Introduced

SB 170 - AS INTRODUCED

2011 SESSION

11-0967  
01/10

SENATE BILL           **170**

AN ACT               relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

SPONSORS:           Sen. Carson, Dist 14; Sen. Bradley, Dist 3; Sen. Bragdon, Dist 11; Sen. Groen, Dist 6; Sen. White, Dist 9; Sen. Lambert, Dist 13; Sen. Luther, Dist 12; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Rep. B. Patten, Carr 4; Rep. Bettencourt, Rock 4; Rep. Kidder, Merr 1; Rep. Renzullo, Hills 27

COMMITTEE:       Executive Departments and Administration

---

ANALYSIS

This bill declares that the state shall not take or transfer, through taxation or otherwise, any funds now held by the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). This bill also requires the NHMMJUA, the insurance commissioner, and a representative of NHMMJUA policyholders to jointly approach the Internal Revenue Service to resolve any federal tax liability arising from excess surplus funds.

-----

Explanation:       Matter added to current law appears in *bold italics*.  
Matter removed from current law appears [~~in brackets and struck through~~].  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Eleven*

AN ACT           relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1           1 Statement of Purpose. The general court finds that the New Hampshire Medical Malpractice  
2 Joint Underwriting Association (NHMMJUA) conducts business through a board of directors which  
3 is vested with all necessary powers relating to the operation of the association, including the  
4 authority to retain counsel of its choosing. The general court further finds that the board owes  
5 fiduciary duties to NHMMJUA members and policyholders. The general court hereby determines  
6 that no member of the executive branch has authority to act on behalf of the NHMMJUA.

7           2 New Section; New Hampshire Medical Malpractice Joint Underwriting Association  
8 (NHMMJUA). Amend RSA 404-C by inserting after section 13 the following new section:

9           404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

10           I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall  
11 take or transfer, through taxation or otherwise, any funds now held by the NHMMJU.

12           II. All funds held as of the effective date of this section by the NHMMJUA in excess of the  
13 amount required for the fund to remain actuarially sound, as determined by a qualified actuary shall  
14 constitute excess surplus funds. All excess surplus funds have resulted from premiums paid under  
15 assessable and participating medical malpractice insurance policies, belong to the policyholders who  
16 paid these premiums, and shall be returned as directed under this section.

17           III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance  
18 commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the  
19 president of the New Hampshire Medical Society shall jointly approach the United States Internal  
20 Revenue Service to obtain a closing agreement, or its equivalent, determining whether the  
21 NHMMJUA has any federal tax liability arising from the excess surplus funds.

22           IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the  
23 NHMMJUA shall determine the amount of excess surplus funds remaining after satisfaction of any  
24 federal tax liability, if any, as described in this section. Within 90 days after receipt of the closing  
25 agreement or its equivalent, the NHMMJUA shall determine the allocation of these remaining  
26 excess surplus funds among all NHMMJUA policyholders during the period from 1986 through 2010.  
27 Within 30 days after such allocation determination, the NHMMJUA shall distribute such funds to  
28 policyholders or their designated agents. Funds that cannot be distributed to a policyholder due to  
29 the inability to locate the policyholder after reasonable efforts, shall revert to the NHMMJUA.

**SB 170 - AS INTRODUCED**

**- Page 2 -**

1           V. Undistributed funds that revert to the NHMMJUA as provided in this section shall be  
2 used to provide grants in aid to health care providers servicing medically underserved populations to  
3 assist in the NHMMJUA coverage.

4           3 Effective Date. This act shall take effect 60 days after its passage.

SB 170 – AS AMENDED BY THE SENATE

03/30/11 1193s

2011 SESSION

11-0967  
01/10

SENATE BILL **170**

AN ACT relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

SPONSORS: Sen. Carson, Dist 14; Sen. Bradley, Dist 3; Sen. Bragdon, Dist 11; Sen. Groen, Dist 6; Sen. White, Dist 9; Sen. Lambert, Dist 13; Sen. Luther, Dist 12; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Rep. B. Patten, Carr 4; Rep. Bettencourt, Rock 4; Rep. Kidder, Merr 1; Rep. Renzullo, Hills 27

COMMITTEE: Executive Departments and Administration

---

ANALYSIS

This bill declares that the state shall not take or transfer, through taxation or otherwise, any funds now held by the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). This bill also requires the NHMMJUA, the insurance commissioner, and a representative of NHMMJUA policyholders to jointly approach the Internal Revenue Service to resolve any federal tax liability arising from excess surplus funds.

.....

Explanation: Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struck through~~].  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Eleven*

AN ACT relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 Statement of Purpose. The general court finds that the New Hampshire Medical Malpractice  
2 Joint Underwriting Association (NHMMJUA) is a mutual form of insurance plan funded in the first  
3 instance by premiums paid by policyholders. Since 1986, the NHMMJUA has amassed more funds  
4 through premium payments than is necessary to sustain operations. Return premiums should be  
5 issued to all policyholders who have contributed to the current surplus of funds.

6 2 New Section; New Hampshire Medical Malpractice Joint Underwriting Association  
7 (NHMMJUA). Amend RSA 404-C by inserting after section 13 the following new section:

8 404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

9 I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall  
10 take or transfer, through taxation or otherwise, any funds now held by the NHMMJUA in a manner  
11 inconsistent with this section.

12 II. All funds held as of the effective date of this section by the NHMMJUA in excess of the  
13 amount required for the fund to remain actuarially sound, as determined by a qualified actuary,  
14 shall constitute excess surplus funds and shall not be less than \$110,000,000 in accordance with  
15 2009, 144:1. Such determination shall be completed under the direction of the NHMMJUA board of  
16 directors not more than 45 days from the effective date of this section. All such excess surplus funds  
17 have resulted from premiums paid under assessable and participating medical malpractice  
18 insurance policies, belong to the policyholders who paid these premiums, and shall be returned as  
19 directed under this section. Within 60 days from the effective date of this section, all excess surplus  
20 funds, except for a reserve of \$25,000,000 for the payment of any federal tax liability, shall be  
21 interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the  
22 propose of adjudicating all policyholders' claims to excess surplus funds. All distributions made to  
23 policyholders shall be subject to a claim from the NHMMJUA to reclaim a pro rata portion of the  
24 distribution to satisfy any federal tax liabilities in excess of the \$25,000,000 reserved for such claims.

25 III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance  
26 commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the  
27 president of the New Hampshire Medical Society, shall jointly approach the United States Internal  
28 Revenue Service to obtain a closing agreement, or its equivalent, determining whether the  
29 NHMMJUA has any federal tax liability arising from the excess premiums paid and that shall be

**SB 170 – AS AMENDED BY THE SENATE**

**- Page 2 -**

1 returned to policyholders.

2 IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the  
3 NHMMJUA shall interplead into the Merrimack County Superior Court docket no. 217-2010-CV-  
4 00414 for the purpose of adjudicating all policyholders' claims to these remaining excess surplus  
5 funds the remaining amount of the tax reserve after satisfaction of any taxes owed.

6 V. Funds that cannot be distributed to a policyholder in the court proceedings referenced in  
7 this section due to the inability to locate the policyholder after reasonable efforts, shall revert to the  
8 NHMMJUA. Undistributed funds that revert to the NHMMJUA as provided in this section shall be  
9 used to provide grants in aid to health care providers servicing medically underserved populations to  
10 assist in the NHMMJUA coverage.

11 VI. The approval of the commissioner of insurance shall not be required for any action  
12 contemplated under this section.

13 3 Effective Date. This act shall take effect upon its passage.

CHAPTER 201  
SB 170 – FINAL VERSION

03/30/11 1193s  
4May2011... 1544h  
1June2011... 2133h

2011 SESSION

11-0967  
01/10

SENATE BILL **170**

AN ACT relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

SPONSORS: Sen. Carson, Dist 14; Sen. Bradley, Dist 3; Sen. Bragdon, Dist 11; Sen. Groen, Dist 6; Sen. White, Dist 9; Sen. Lambert, Dist 13; Sen. Luther, Dist 12; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Rep. B. Patten, Carr 4; Rep. Bettencourt, Rock 4; Rep. Kidder, Merr 1; Rep. Renzullo, Hills 27

COMMITTEE: Executive Departments and Administration

---

AMENDED ANALYSIS

This bill:

I. Declares that the state shall not take or transfer, through taxation or otherwise, any funds now held by the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

II. Requires the NHMMJUA, the insurance commissioner, and a representative of NHMMJUA policyholders to jointly approach the Internal Revenue Service to resolve any federal tax liability arising from excess surplus funds.

III. Establishes a commission to study the future of the NHMMJUA.

---

Explanation: Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struck through~~].  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.



CHAPTER 201  
SB 170 - FINAL VERSION

03/30/11 1193s  
4May2011... 1544h  
1June2011... 2133h

11-0967  
01/10

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Eleven*

AN ACT           relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1       201:1 Statement of Purpose. The general court finds that the New Hampshire Medical  
2 Malpractice Joint Underwriting Association (NHMMJUA) is an insurance plan funded in the first  
3 instance by premiums paid by policyholders. Since 1986, the NHMMJUA has amassed more funds  
4 through premium payments than is necessary to sustain operations. Return premiums should be  
5 issued to all policyholders who have contributed to the current surplus of funds.

6       201:2 New Section; New Hampshire Medical Malpractice Joint Underwriting Association  
7 (NHMMJUA). Amend RSA 404-C by inserting after section 13 the following new section:

8       404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

9       I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall  
10 take or transfer, through taxation of the New Hampshire Medical Malpractice Joint Underwriting  
11 Association (NHMMJUA) or otherwise, any funds held by the NHMMJUA on the effective date of  
12 this section in a manner inconsistent with this section. Nothing in this section shall preclude the  
13 collection of applicable state taxes, if any, owed by policyholders as a result of the return of funds  
14 referenced in this section.

15       II. All funds held as of the effective date of this section by the NHMMJUA in excess of the  
16 amount required for the fund to remain actuarially sound, as determined by a qualified actuary,  
17 shall constitute excess surplus funds and shall not be less than \$110,000,000 in accordance with  
18 2009, 144:1. Such determination shall be completed under the direction of the NHMMJUA board of  
19 directors not more than 45 days from the effective date of this section. All such excess surplus funds  
20 have resulted from premiums paid under assessable and participating medical malpractice  
21 insurance policies, belong to the policyholders who paid these premiums, and shall be returned as  
22 directed under this section. Within 60 days from the effective date of this section, all excess surplus  
23 funds, except for a reserve of \$25,000,000 for the payment of any federal tax liability, shall be  
24 interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the  
25 purpose of adjudicating all policyholders' claims to excess surplus funds. All distributions made to  
26 policyholders shall be subject to a claim from the NHMMJUA to reclaim a pro rata portion of the  
27 distribution to satisfy any federal tax liabilities in excess of the \$25,000,000 reserved for such claims.

**CHAPTER 201**  
**SB 170 – FINAL VERSION**  
**- Page 2 -**

1 Notwithstanding any other provision of law to the contrary, in no event shall any insurer which is a  
2 member of the NHMMJUA, as defined in Ins 1703.01(i), be assessed nor shall there be a surcharge,  
3 as provided in Ins 1703.07(f)(2), with respect to any deficit arising from the distribution of excess  
4 surplus funds described in this paragraph.

5 III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance  
6 commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the  
7 president of the New Hampshire Medical Society, shall jointly approach the United States Internal  
8 Revenue Service to obtain a closing agreement, or its equivalent, determining whether the  
9 NHMMJUA has any federal tax liability arising from the excess premiums paid and that shall be  
10 returned to policyholders.

11 IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the  
12 NHMMJUA shall interplead into the Merrimack County Superior Court docket no. 217-2010-CV-  
13 00414 for the purpose of adjudicating all policyholders' claims to these remaining excess surplus  
14 funds the remaining amount of the tax reserve after satisfaction of any taxes owed.

15 V. Funds that cannot be distributed to a policyholder in the court proceedings referenced in  
16 this section due to the inability to locate the policyholder after reasonable efforts, shall revert to the  
17 NHMMJUA. Undistributed funds that revert to the NHMMJUA as provided in this section shall be  
18 used to provide grants in aid to health care providers servicing medically underserved populations to  
19 assist in the NHMMJUA coverage.

20 VI. The approval of the commissioner of insurance shall not be required for any action  
21 contemplated under this section.

22 VII.(a) Independent of the mandates of paragraphs I through VI, inclusive, which are  
23 intended to resolve historical matters, there is also established a commission to study the future of  
24 the NHMMJUA.

25 (b) The members of the commission shall be as follows:

26 (1) Two members of the senate, appointed by the president of the senate.

27 (2) Three members of the house of representatives, appointed by the speaker of the  
28 house of representatives.

29 (3) One representative of the New Hampshire Medical Society who is or has been a  
30 policyholder of the NHMMJUA, appointed by the society.

31 (4) One representative of the New Hampshire Association of Domestic Insurance  
32 Companies, appointed by the association.

33 (5) One member of the current NHMMJUA board of directors, appointed by the  
34 board.

35 (6) The insurance commissioner, or designee.

36 (c) Legislative members of the commission shall receive mileage at the legislative rate

**CHAPTER 201**  
**SB 170 – FINAL VERSION**  
**- Page 3 -**

1 when attending to the duties of the commission.

2 (d) The commission shall study the NHMMJUA for the purpose of making  
3 recommendations for proposed legislation concerning its future, form, and function. The commission  
4 may solicit information from any person the commission deems relevant to its study.

5 (e) The members of the commission shall elect a chairperson from among the members  
6 at the first meeting. The first meeting of the commission shall be called by the first-named senate  
7 member. The first meeting of the commission shall be held within 45 days of the effective date of  
8 this section. A majority of the members of the commission shall constitute a quorum.

9 (f) The commission shall report its findings and any recommendations for proposed  
10 legislation to the president of the senate and the speaker of the house of representatives on or before  
11 December 1, 2011.

12 201:3 Repeal. RSA 404-C:14, VII, relative to commission to study the future of the NHMMJUA,  
13 is repealed.

14 201:4 Effective Date.

15 I. Section 3 of this act shall take effect December 31, 2011.

16 II. The remainder of this act shall take effect upon its passage.

17

18 Approved: Enacted in accordance with Article 44, Part II, of N.H. Constitution, without signature of  
19 governor, June 16, 2011.

20 Effective Date: I. Section 3 shall take effect December 31, 2011.

21 II. Remainder shall take effect June 16, 2011.

# Amendments

Amendment to SB 170

1 Amend the bill by replacing all after the enacting clause with the following:

2

3 1 Statement of Purpose. The general court finds that the New Hampshire Medical Malpractice  
4 Joint Underwriting Association (NHMMJUA) is a mutual form of insurance plan funded in the first  
5 instance by premiums paid by policyholders. Since 1986, the NHMMJUA has amassed more funds  
6 through premium payments than is necessary to sustain operations. Return premiums should be  
7 issued to all policyholders who have contributed to the current surplus of funds.

8 2 New Section; New Hampshire Medical Malpractice Joint Underwriting Association  
9 (NHMMJUA). Amend RSA 404-C by inserting after section 13 the following new section:

10 404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

11 I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall  
12 take or transfer, through taxation or otherwise, any funds now held by the NHMMJUA in a manner  
13 inconsistent with this section.

14 II. All funds held as of the effective date of this section by the NHMMJUA in excess of the  
15 amount required for the fund to remain actuarially sound, as determined by a qualified actuary,  
16 shall constitute excess surplus funds and shall not be less than \$110,000,000 in accordance with  
17 2009, 144:1. Such determination shall be completed under the direction of the NHMMJUA board of  
18 directors not more than 45 days from the effective date of this section. All such excess surplus funds  
19 have resulted from premiums paid under assessable and participating medical malpractice  
20 insurance policies, belong to the policyholders who paid these premiums, and shall be returned as  
21 directed under this section. Within 60 days from the effective date of this section, all excess surplus  
22 funds, except for a reserve of \$25,000,000 for the payment of any federal tax liability, shall be  
23 interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the  
24 propose of adjudicating all policyholders' claims to excess surplus funds. All distributions made to  
25 policyholders shall be subject to a claim from the NHMMJUA to reclaim a pro rata portion of the  
26 distribution to satisfy any federal tax liabilities in excess of the \$25,000,000 reserved for such claims.

27 III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance  
28 commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the  
29 president of the New Hampshire Medical Society, shall jointly approach the United States Internal  
30 Revenue Service to obtain a closing agreement, or its equivalent, determining whether the  
31 NHMMJUA has any federal tax liability arising from the excess premiums paid and that shall be  
32 returned to policyholders.

Amendment to SB 170

- Page 2 -

1 IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the  
2 NHMMJUA shall interplead into the Merrimack County Superior Court docket no. 217-2010-CV-  
3 00414 for the purpose of adjudicating all policyholders' claims to these remaining excess surplus  
4 funds the remaining amount of the tax reserve after satisfaction of any taxes owed.

5 V. Funds that cannot be distributed to a policyholder in the court proceedings referenced in  
6 this section due to the inability to locate the policyholder after reasonable efforts, shall revert to the  
7 NHMMJUA. Undistributed funds that revert to the NHMMJUA as provided in this section shall be  
8 used to provide grants in aid to health care providers servicing medically underserved populations to  
9 assist in the NHMMJUA coverage.

10 VI. The approval of the commissioner of insurance shall not be required for any action  
11 contemplated under this section.

12 3 Effective Date. This act shall take effect upon its passage.

Amendment to SB 170

1 Amend the bill by replacing all after the enacting clause with the following:

2  
3 1 Statement of Purpose. The general court finds that the New Hampshire Medical Malpractice  
4 Joint Underwriting Association (NHMMJUA) is a mutual form of insurance plan funded in the first  
5 instance by premiums paid by policyholders. Since 1986, the NHMMJUA has amassed more funds  
6 through premium payments than is necessary to sustain operations. Return premiums should be  
7 issued to all policyholders who have contributed to the current surplus of funds.

8 2 New Section; New Hampshire Medical Malpractice Joint Underwriting Association  
9 (NHMMJUA). Amend RSA 404-C by inserting after section 13 the following new section:

10 404-C:14 New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA).

11 I. Notwithstanding any provision of law to the contrary, no officer or agent of the state shall  
12 take or transfer, through taxation or otherwise, any funds now held by the NHMMJUA in a manner  
13 inconsistent with this section.

14 II. All funds held as of the effective date of this section by the NHMMJUA in excess of the  
15 amount required for the fund to remain actuarially sound, as determined by a qualified actuary,  
16 shall constitute excess surplus funds and shall not be less than \$110,000,000 in accordance with  
17 2009, 144:1. Such determination shall be completed under the direction of the NHMMJUA board of  
18 directors not more than 45 days from the effective date of this section. All such excess surplus funds  
19 have resulted from premiums paid under assessable and participating medical malpractice  
20 insurance policies, belong to the policyholders who paid these premiums, and shall be returned as  
21 directed under this section. Within 60 days from the effective date of this section, all excess surplus  
22 funds, except for a reserve of \$25,000,000 for the payment of any federal tax liability, shall be  
23 interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the  
24 propose of adjudicating all policyholders' claims to excess surplus funds. All distributions made to  
25 policyholders shall be subject to a claim from the NHMMJUA to reclaim a pro rata portion of the  
26 distribution to satisfy any federal tax liabilities in excess of the \$25,000,000 reserved for such claims.

27 III. Within 30 days of the effective date of this section, the NHMMJUA, the insurance  
28 commissioner, or designee, and a representative of NHMMJUA policyholders, designated by the  
29 president of the New Hampshire Medical Society, shall jointly approach the United States Internal  
30 Revenue Service to obtain a closing agreement, or its equivalent, determining whether the  
31 NHMMJUA has any federal tax liability arising from the excess premiums paid and that shall be  
32 returned to policyholders.

Amendment to SB 170

- Page 2 -

1 IV. No later than 30 days after receipt of the closing agreement, or its equivalent, the  
2 NHMMJUA shall interplead into the Merrimack County Superior Court docket no. 217-2010-CV-  
3 00414 for the purpose of adjudicating all policyholders' claims to these remaining excess surplus  
4 funds the remaining amount of the tax reserve after satisfaction of any taxes owed.

5 V. Funds that cannot be distributed to a policyholder in the court proceedings referenced in  
6 this section due to the inability to locate the policyholder after reasonable efforts, shall revert to the  
7 NHMMJUA. Undistributed funds that revert to the NHMMJUA as provided in this section shall be  
8 used to provide grants in aid to health care providers servicing medically underserved populations to  
9 assist in the NHMMJUA coverage.

10 VI. The approval of the commissioner of insurance shall not be required for any action  
11 contemplated under this section.

12 3 Effective Date. This act shall take effect upon its passage.



# Committee Minutes

**SENATE CALENDAR NOTICE  
EXECUTIVE DEPARTMENTS AND ADMINISTRATION**

Senator Sharon Carson Chairman  
 Senator Fenton Groen V Chairman  
 Senator Sylvia Larsen  
 Senator Jim Luther  
 Senator Raymond White

10:37A  
11:30A

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/> Bill Status

**Date: February 3, 2011**

**HEARINGS**

**Thursday**

**2/10/2011**

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

SH 100

9:00 AM

(Name of Committee)

(Place)

(Time)

**EXECUTIVE SESSION MAY FOLLOW**

9:00 AM	SB177	relative to training of directors and officers of nonprofit corporations.
9:20 AM	SB153-FN	relative to the regulation of real estate appraisers by the New Hampshire real estate appraiser board.
9:50 AM	SB170	relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

**Sponsors:**

**SB177**

Sen. Bob Odell

Rep. Russell Day

Sen. Sharon Carson

**SB153-FN**

Sen. John Gallus

Rep. John Tholl

**SB170**

Sen. Sharon Carson

Sen. Jeb Bradley

Sen. Peter Bragdon

Sen. Fenton Groen

Rep. Betsey Patten

Rep. David Bettencourt

Rep. David Kidder

Rep. Andrew Renzullo

Sen. Raymond White

Sen. Gary Lambert

Sen. Jim Luther

Sen. Jim Rausch

Sen. Nancy Stiles

# Executive Dept. and Administration Committee

## Hearing Report

**TO:** Members of the Senate

**FROM:** Deb Chroniak, Legislative Aide

**RE:** Hearing report on SB 170 – relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

**HEARING DATE:** February 10, 2011

**MEMBERS OF THE COMMITTEE PRESENT:** Senator Sharon Carson (Senate District 14), Senator Fenton Groen (Senate District 6), Senator Raymond White (Senate District 9), Senator Sylvia Larsen (Senate District 15) and Senator Jim Luther (Senate District 12)

**MEMBERS OF THE COMMITTEE ABSENT:** No one

**Sponsor(s):** Sen. Carson, Dist 14; Sen. Bradley, Dist 3; Sen. Bragdon, Dist 11; Sen. Groen, Dist 6; Sen. White, Dist 9; Sen. Lambert, Dist 13; Sen. Luther, Dist 12; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Rep. B. Patten, Carr 4; Rep. Bettencourt, Rock 4; Rep. Kidder, Merr 1; Rep. Renzullo, Hills 27s

**What the bill does:** This bill declares that the state shall not take or transfer, through taxation or otherwise, any funds now held by the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). This bill also requires the NHMMJUA, the insurance commissioner, and a representative of NHMMJUA policyholders to jointly approach the Internal Revenue Service to resolve any federal tax liability arising from excess surplus funds.

**Who supports the bill:** Senator Jim Rausch, D.19, Nancy Johnson, NH Podiatrists; Representative Betsy Patten, Senator Peter Bragdon, D. 11, Senator Jeb Bradley, D. 3, Senator Gary Lambert, D. 13, Senator Fenton Groen, D. 6, Scott O'Connell, JUA Policyholders representative.

**Who opposes the bill:** No one.

**Who is Neutral:** Roger Sevigny, Insurance Commissioner.

**Summary of testimony received:** The public hearing on SB 170 was opened at 10:37 a.m. The Chair, Senator Sharon Carson, prime sponsor of SB 170 provided testimony.

- Senator Sharon Carson, Senate District 14, indicated that this bill and its subject is an issue that has been here for at least two years. This began when the Governor gave an address indicating the taking over of \$100 million from the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). There have been lawsuits that have been filed and adjudicated since then; and an attempt was made to gain access of these funds through the rulemaking process. This bill is a result of everything that has gone on for the last two years.

What this bill tried to do is to basically state that the NHMMJUAF is not state property and that the state has no right to take these funds, whatsoever.

Provisions begin in Section III, Line 17, which designates that stakeholder's approach the IRS to determine if there is a federal tax liability arising from the excess surplus funds of the JUA.

Section IV indicates that once a closing agreement has been reached that there will be a disbursement/allocation of excess funds to policyholders for the period from 1986 through 2010.

- Senator White, one of the ED & A Committee members publicly stated, for the record, that he was a licensed insurance agent.
- Mr. Scott O'Connell, (in support) representing the JUA policyholders then spoke.

Together with his partners, Kevin Fitzgerald and Gordon McDonald, they represent more than 300 health care providers across the state in this class of policyholders of the JUA, since 1986 through today, who all had coverage with the JUA.

The provisions of health care in our state are an essential element of the reliable care in the system statewide, and that is accessible and affordable medical negligence coverage. The JUA has provided that this reliable source of insurance coverage is a non-competitive market. The Insurance Commissioner, Roger Sevigny has determined that the market is not competitive.

The problem we have with health care today is that it would not be affordable and it would be worse without the JUA. Clients value the JUA and they want a strong JUA. The belief is that this bill does not dilute the strength of

the JUA; the policyholders' rights are protected, at the same time that the JUA is left to remain strong.

Facts for consideration are that, from 1985 until today, policyholders that our firm represents have paid in excess of \$230 million to the JUA in premiums; the State of New Hampshire has not contributed any monies. This is part of the record which is well recorded.

There are policies and regulations in our constitution which support the private contracts of parties. The policies and regulations state that when there are excess funds, the money belongs to the policyholders.

Mr. Sevigny, New Hampshire Insurance Commissioner, found that the JUA only needed \$55 million for a risk-base capital analysis, which leaves \$200 million. That leaves \$145 million in excess surplus funds which were paid in over the last 26 years by our clients.

An important consideration; the State does not want the JUA to become the prime market maker in the state through this analysis. Fifty-five million dollars is what it takes to operate the JUA. The JUA only needed \$55 million for a risk-base capital. The policyholders paid fair rates at the time that medical negligence coverage was provided. That was an important consideration. The State does not want the JUA to supplant competition. This fund created that concept. Makers of the plan reaffirmed that the excess funds belong to the policyholders.

This concept began in 1976 and was reaffirmed at that time. The actuary analysis was that money in excess of \$55 million should be returned to the true owners. The courts have spoken on this issue also. It is clear that the vested rights belong to the policyholders. It is time to be done with this. We do not think that this legislation is necessary and our hope is that it is not signed into law. Most of the issues have been resolved and we will work with the administration to complete this.

One remaining issue is whether or not, because of the failure to pay back excess monies in real time, are there possibly unintended tax consequences, which is the real issue. We have nothing but the utmost respect for the tax lawyers who worked on this and we understand the analysis. We similarly have associated with first rate people, i.e., Price Waterhouse, who have in the past worked directly with the IRS. With this collection of talent, this issue can be solved. We are ready to work with those representatives of the state to approach the IRS and resolve this. This bill contemplates just that.

We need to create a stakeholders productive discussion, then the orderly return of the JUA funds. There may be some policyholders not found and we are assuming some part of this money cannot be returned to these people who are entitled to it. What your bill does is take this money and put it into the

parts of the state, disadvantaged parts of the state, which need assistance. This is a win, win, win situation. So again, we support the bill.

- Commissioner Sevigny (neutral position) submitted written testimony, and indicated that there are observations to consider. He quickly recapped his written testimony. As a regulator of the JUA, he is not to favor or oppose the bill. What the Legislature wants to do with the JUA excess money is to preserve the integrity of the JUA with sufficient assets to protect consumers and reserves to pay claims, and whatever surplus in addition to that which is necessary for future contingencies. Beyond that, it is not my job to direct this money. It is my job to protect the integrity of the JUA and to provide a source of viable coverage as long as necessary.

Commissioner Sevigny outlined concerns. Under RSA 404c covers the role of the Insurance Department. Some of the consequences with SB 170, and what you might think about are: federal tax liability, market disruption, and any inconsistent and administrable provisions.

The Insurance Department is actively working to resolve, and working with the plaintiff's counsel and does believe this matter will be resolved as well.

In closing, things to consider and to do are to continue to protect the JUA; to determine the tax status of the JUA, and to do our very best to pay as little to the federal government, if any; and to respect the Tuttle Decision and protect the rights of the policyholders.

- Janet Monahan (supports and submitted testimony) from the New Hampshire Medical Society and indicated that they are not a JUA policyholder, but are in support of the policyholder's efforts to maintain their contractual rights.

The Medical Society is hopeful that the JUA federal tax issue can be resolved in the near future to allow for the reimbursement to the JUA policyholders.

The Medical Society does stress that they firmly believe that the policyholders are entitled to the historic surpluses as guaranteed in their coverage policies.

- Henry Lipman (supports) of LRG Healthcare and the Executive Vice Chairman for Franklin Hospital indicated that they have 50 employed providers, that they are a healthcare charitable trust. He is in firm agreement that if a return of excess premiums are paid, that they continue to go to the good work that LRG Healthcare provides and is known for.

I give an enormous thank you to all the sponsors of this bill. I do hope that it helps facilitate a long overdue issue.

He also understands that this issue has personally taken a toll on a lot of people who have had to fight for their vested contractual rights.

- Comment was made regarding the expiration of a contract being every year.
- Henry Lipman indicated that he was not an attorney, but that each contractual year stands on its own and goes back to the time that you bought the policy. He also indicated that he was not sure that this issue is that open an issue as one may believe it to be.

The hearing closed at 11:00 a.m.

Senator Carson read into record the following: Senator James Rausch, D. 19, Nancy Johnson, NH Podiatrists, Representative Betsey Patten, Senator Peter Bragdon, D. 11, Senator Jeb Bradley, D. 3, Senator Gary Lambert, D. 13, Debra Vanderbeek, Senator Jim Luther, D. 12, Senator Fenton Groen, D. 6, are all in support of the bill, but not speaking.

**Funding:** None

**Future Action:** PENDING

DAC

[file: SB170 report]

Date: February 14, 2011

# Speakers



# Senate Executive Departments and Administration Committee: Sign-In Sheet

Date: February 10, 2011    Time: 9:50 a.m.    Public Hearing on SB 170

**SB 170** relative to the New Hampshire Medical Malpractice Joint Underwriting Association.

Name	Representing	Support	Oppose	Speaking?	Yes	No
Senator Sharon Carson	SD 14	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen Jim Rausch	District 19	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
NANCY JOHNSON	NH PODIATRIST S	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
BETSEY PATTEN	Carroll, Dist 4	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
SENATOR Shles	SD 24	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Scott O'Connell	JOA Policyholders	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Janet Monahan	NH Medical Society	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Bradford	District 11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Sen. Bradley	District 3	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Sen Lambert	Dist 9	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input type="checkbox"/>
Debra Vanderbeek	NH Assoc. for Justice	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Henry Lipman	LRG Healthcare	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Roger Lemigny	NH Dept Insur.	<input type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jim Lother	District 12	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Sen. Susan M. Brann	District 6	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Leslie Melby	NH Hospital Assoc	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>	Speaking?	<input type="checkbox"/>	<input type="checkbox"/>

# Testimony

**New Hampshire Insurance Department**

Comments on SB 170

Hearing Before the Senate Executive Departments and Administration Committee

February 10, 2011

#1  
*Commissioner  
Serrano*

**1. Introduction**

This document provides the preliminary comments of the New Hampshire Insurance Department on SB 170. We appreciate the opportunity to provide input as the Committee considers this legislation.

Under current law, RSA Chapter 404-C, the Legislature has instructed the Insurance Department to create and oversee the operation of mandatory risk sharing plans. Under this long-standing legislative authority, the Department is directed to promulgate administrative rules to create programs to provide insurance coverage for risks in this State when such coverage may not be available in the commercial marketplace and the public interest to make that coverage available.

The JUA is one of these risk sharing plans. The JUA was established by the Department in 1975, with the authorization of the legislature, for the purpose of providing medical malpractice coverage to healthcare providers in New Hampshire because such coverage was not sufficiently available in the commercial market. The JUA has existed and has been operated exclusively under administrative rules issued by the Department, and these rules have governed the management and operation of the JUA during this entire time. The Commissioner has acted on behalf of the JUA to readopt and amend these administrative rules approximately 20 times since 1975; with the review and approval of the Joint Legislative Committee on Administrative Rules. The most recent proposed amendment of Ins 1700 was withdrawn from consideration last month.

**2. Role of the Department**

As a preliminary matter, it is important to state clearly the role of the Insurance Department when commenting on proposed legislation. The Insurance Department is obligated to implement programs and regulations in accordance with statutes adopted by the Legislature; and we will do so. The Department respects that it is the legislature's role to direct policy decisions in this regard and therefore takes no position on the proposed legislation. Our objective is simply to provide the Legislature with information regarding the potential consequences of legislation, including questions with respect to implementation.

As a preliminary matter, we note that the actual provisions of SB 170 have only been available for seven days, and we have not yet had a full opportunity to review all of the issues raised by this bill. However, we can address today the major issues that we have identified so far.

### 3. Summary of SB 170

SB 170 establishes new provisions in RSA Chapter 404-C that would do several things:

- (a) It would declare the intent of the Legislature that no member of the executive branch has authority to act on behalf of the JUA.
- (b) It would prevent any officer or agent of the state from taking or transferring JUA funds, through taxation or otherwise.
- (c) It would declare that all JUA funds are the property of policyholders.
- (d) It would require a group of persons including the Commissioner, and a representative of the JUA policyholders, within 30 days after the effective date of the bill, to collectively approach the IRS to obtain a "closing agreement."
- (e) It would require the JUA to allocate all excess funds, after paying any federal taxes, among current and former JUA policyholders from 1986 to 2010, and to distribute the funds to the policyholders, all within 120 days after receiving an IRS "closing agreement."
- (f) It would require an unspecified government agency, perhaps the JUA, to use undistributed funds to provide grants to healthcare providers servicing medically underserved populations.

### 4. Consequences of SB 170

Our comments on SB 170 fall within three general categories: (1) adverse impact on the JUA's federal income tax liability; (2) adverse impact on the medical malpractice insurance market; and (3) inconsistent and/or un-administrable provisions.

#### (a) Potential Federal Tax Liability.

(i) Background on the JUA's Tax-Exempt Status. As we publicly announced last summer, the Department is conducting an examination of the financial status of the JUA. Our principal concern has been to determine if the JUA may be subject to an unexpected federal and state income tax liability as the result of a lower court ruling that the JUA was not a part of state government. Fortunately, the New Hampshire Supreme Court in the Tuttle case declined to adopt this lower court ruling. Nonetheless, the lower court ruling has cast a shadow over the JUA's tax status. We have retained tax experts in NH and DC to help us determine the tax status of the JUA. Our experts agree that we should seek an affirmative answer from the IRS to resolve any question concerning the federal tax.

From the JUA's creation in 1975 until today, the State has consistently treated the JUA as an integral program of State government. The IRS does not require state government programs to file tax returns or pay tax. In 1975 when the JUA was created, the Department wrote to the IRS to ask the IRS rule that the JUA is a part of NH state government and exempt from federal tax. This request letter made representations to the IRS that the JUA "is an agency or instrumentality of the State of New Hampshire," that "the Association, which is neither corporation, partnership nor trust, makes no profit"

and that "Control of the operations of the Association rests directly with the State Insurance Department, and the power to terminate the Association or to expand its operation rests exclusively with the Insurance Department." The IRS granted the State's request for a tax-exemption, concluding that "the association is an integral part of the state government." Copies of both of these letters are attached to these comments.

Since 1975, the State has relied on that IRS ruling in all respects. Our experts believe that the facts concerning how the JUA has been managed and operated since 1975 give us a strong case supporting the JUA's tax-exempt status as an integral part of state government, consistent with our 1975 representations to the federal government. Our experts believe that the best chance to avoid payment of a big tax bill to the IRS is to approach the IRS and make our strongest case that the JUA is and always has been a tax-exempt state program, that the State has lived up to its representations to the IRS in 1975 and has fully complied with the State's obligations under federal tax laws. These experts are reviewing the extent to which a limited amount of premium refunds could be made to policyholders consistent with the JUA's longstanding tax-exempt status. Any such payments, or even agreements to make payments, would need to be disclosed to the IRS, in detail.

(ii) SB 170 Includes Provisions that Are Inconsistent with the JUA's Longstanding Tax-Exempt Status. SB 170 would take positions that are inconsistent with the tax-exempt status of the JUA. In order to be a tax-exempt state program, the program must:

- Be created and governed by the State.
- Be established for a public purpose and not to provide funds to private parties.

SB 170 would violate both of these requirements. It declares that "no member of the executive branch has authority to act on behalf of the" JUA. It also requires payment to private parties of all surplus earnings, which have been accumulated without paying any tax. In our view, and the views of our tax experts, both of these provisions in SB 170 would kill the tax-exempt status of the JUA.

In essence, SB 170 would prevent the Executive Branch, the JUA and anyone else from approaching the IRS with the assurance that the State had lived up to its representations in the 1975 letter. It would be impossible while SB 170 is under consideration, and certainly after its enactment as written, to assert before the IRS in good faith that the JUA owes no federal income tax because it is a governmental entity. The provisions of SB 170 and any mandated payments to private parties, or even agreements to make such payments, must be disclosed to the IRS. As the Department has said many times publicly, our goal is to defend the State's position and avoid unnecessarily paying taxes to the federal government. However, we believe that SB 170 as written would make it nearly impossible to avoid federal tax liability.

(iii) Possible Tax Costs. If the JUA cannot assert it is a part of state government, then it will lose its tax exemption. If the State did not comply with the representations in its 1975 letter, then the JUA could be subject to taxes for all years that it did not file tax returns. The costs of losing the tax exemption that the State obtained for the JUA in 1976 is expected to be very large. Our experts have advised us that there is a risk that the IRS could seek taxes for all "open" years (years for which no returns have been filed). The total tax and interest for all these years would be in excess of \$100 million. Even if the IRS only went back 6 years, which is possible, the cost would be in excess of \$40 million. Even just three years of back taxes and interest would be over \$20 million. To the extent that legal

counsel to the policyholders or anyone else makes a contrary assertion, we recommend that the Committee seek direct testimony from their experts.

(b) **Market Disruption.**

(i) **Need for JUA.** The medical community continues to rely upon the medical malpractice insurance made available in New Hampshire through the JUA. This has been a very successful program. The Department monitors this market very carefully, and this market remains uncompetitive in New Hampshire. We recommend that the legislature seek testimony from current medical providers as to the need for such insurance.

(ii) **Adverse Impacts on Voluntary Market.** A very legitimate concern with respect to any state created risk sharing plan not be given attributes or advantages that have the effect of unfairly squeezing out competition in the commercial market. For this reason, the administrative rules have always contained a provision that the JUA's insurance rates could not be substantially below those of the voluntary market. The Department is concerned that the distribution of millions of dollars to JUA policyholders will disrupt the market for medical malpractice insurance in the State, and it will be inconsistent with longstanding authority in RSA 404-C and accompanying regulations that "any plan shall...create minimum interference with the voluntary market." Based upon our experience, it is simply not commercially reasonable to pay all excess surplus to current and former policyholders in the manner set out in SB 170, and such a substantial distribution is unprecedented. It will mean that JUA policyholders will have paid dramatically less (and perhaps nothing) for their medical malpractice insurance coverage. And, this "competitive advantage" will have been derived in essence by the fact that the State obtained a federal tax exemption for the program from the IRS in 1975 as an "integral part of the State."

The distribution contemplated in SB 170 cannot be justified as a distribution that is required by the Supreme Court's decision in *Tuttle* because the Supreme Court did not compel the Board to make any distribution. Instead, the transfer required by SB 170 would be a volitional act of the legislature to confer an extraordinary benefit-- derived from a successful State-created and administered program-- on relatively few persons and their legal counsel.

(c) **Inconsistent and Un-administrable Provisions.**

While we have not yet completed a thorough review of the terms of SB 170, we can raise several other issues of concern.

(i) Section 1 declares that "no member of the executive branch has authority to act on behalf of the NHMMJUA" but Section 2 of the bill would enact a new section of RSA Chapter 404-C that would have the commissioner, or designee, approach the IRS to ~~obtain a closing agreement~~. These two instructions are inconsistent. In addition, because Section 1 prohibits the Commissioner from acting on behalf of the JUA, it would appear to void the Commissioner's authority to promulgate regulations to create and maintain the JUA. This in turn would void the very Department regulations that are needed for the JUA to even exist and which provide the framework for the establishment and authority of the Board, the operation of the JUA and assessment of private insurers.

(ii) Section 2 directs that certain actions take place in accordance with precise time frames that may be impossible to meet. For example, if a policyholder were to disagree with the amount of his allocated share of JUA excess surplus, that disgruntled policyholder might sue the Board, in which case a final distribution could not lawfully occur within the mandated deadline.

(iii) Section 2 appears to confer a special, retroactive state tax exemption for the JUA program. If SB 170 were to result in the JUA becoming taxable under federal income tax law, the JUA would also become taxable under the State BPT and BET for all of those same periods. We note that the bill does not have a fiscal note that reflects this potential state tax exemption issue.

(iv) Section 2 fails to recognize that certain of the policyholders have sued the JUA board of directors seeking just such a distribution provided in SB 170. SB 170 compels the Board to act in regard to the issues underlying that suit, but fails to provide protection for the Board of Directors in the face of the pending litigation. As just one example, the legislation does not provide that the Board shall be released from liability as a condition of this legislative settlement.

(v) Section 2 also directs the JUA to allocate excess surplus funds to "all JUA policyholders", whereas the Supreme Court has found in favor of the rights of only "current" policyholders. Section 2 also is inconsistent with the distribution provisions that have existed in the governing regulation since the inception of the JUA in 1975. The legislation provides no guidance as to an allocation methodology (e.g. by premiums paid, losses incurred, etc.) or for resolution of disputes raised by such allocations. These uncertainties will likely give rise to future litigation among policyholders.

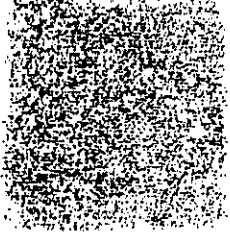
(vi) Section 2 also sets up a system for undistributed funds to "revert" to the JUA. This appears inconsistent with applicable escheat laws.

Thank you for the opportunity to provide our preliminary comments on this legislation.



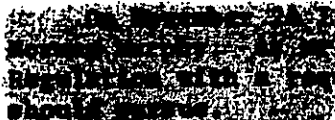
December 2, 1975

Mr. Russell E. Mersereau  
Chief, Review Staff  
Internal Revenue Service  
Department of the Treasury  
P. O. Box 720  
Portsmouth, New Hampshire 03801



Dear Mr. Mersereau:

It is my opinion, after reviewing Publication 557 and Application for Exemption Package 1024, that the New Hampshire Medical Malpractice Joint Underwriting Association is an agency or instrumentality of the State of New Hampshire. Among my reasons is the fact that the Association was created by regulation promulgated by the State of New Hampshire Insurance Department under power granted to the Department by law. The Association, which is neither corporation, partnership nor trust, makes no profit. Control of the operations of the Association rests directly with the State Insurance Department, and the power to terminate the Association or to expand its operation rests exclusively with the Insurance Department.

 telephoned you and discussed this matter with Mr. Murphy suggested, I am sending a copy of the Regulation with a request for an opinion as to what action the Association should take.

I appreciate your time and Mr. Murphy's time. Should you have further questions, please call me at 271-2261.

Sincerely yours,

George W. Rousseau

GWR/slr  
Enc.



Address any reply to: JFK Federal Bldg., Boston, Mass. 02203

**Department of the Treasury**

P.O. BOX 9081  
J.F.K. POST OFFICE BOSTON, MA. 02203  
**District Director**

**Internal Revenue Service**

Date: \_\_\_\_\_ In reply refer to:

January 14, 1976 | EP:EO:TE:BRENNAN  
TEL: 617-223-4507



Mr. George W. Rousseau  
The State of New Hampshire  
Insurance Department  
Concord, New Hampshire 03301

Re: New Hampshire Medical  
Malpractice Joint  
Underwriting Association

Dear Mr. Rousseau:

This is in reply to your letter of December 11, 1975 which was addressed to Mr. Charles E. Mersereau of the Portsmouth, New Hampshire Office. Mr. Mersereau asked that this office reply to your letter.

Since the association activity is conducted under the Insurance Department of the State of New Hampshire which is an integral part of the State of New Hampshire, it follows that the association is an integral part of the state government and is exempt from taxation under Section 115 of the Internal Revenue Code.

I trust the above information will be of assistance to you.

Sincerely,

*H. B. Mosher*

H.B. MOSHER  
District Director

# NEW HAMPSHIRE MEDICAL SOCIETY

#2



*For the betterment of public health since 1791*

7 N. State Street  
Concord, New Hampshire 03301  
(603) 224-1909  
Toll Free (800) 564-1909  
FAX (603) 226-2432  
[www.nhms.org](http://www.nhms.org)

February 10, 2011

SB170, relative to the NH Medical Malpractice Joint Underwriters Association

The New Hampshire Medical Society is not a JUA policyholder, but has been in support of the policy holders' efforts to maintain their contractual rights for the past two years. The Medical Society believes SB170 will provide the policyholders the protection they have been seeking and we support passage of this important legislation.

We appreciate and applaud the efforts of the state senators and state representatives who have supported the rights of the JUA policyholders throughout the House Bill 2 debate in 2009 and the during the proposed Department of Insurance rules hearings before the Joint Legislative Committee on Administrative Rules last year.

Lastly, the Medical Society is hopeful that the JUA federal tax issue can be resolved in the near future to allow, at a minimum, for the JUA policyholders to be reimbursed for their legal costs that were required to defend their rights in the NH Superior Court case, the NH Supreme Court case and before JLCAR. We must stress however, that we firmly believe the policyholders are entitled to the historic surpluses which are due them pursuant to the rights to such surpluses as guaranteed in their coverage policies.

Thank you for introducing this important bill and thank you for again your support.

Janet Monahan  
Deputy EVP

#3

Good morning, my name is Thomas DeRosa and I come before you today on behalf of the 159 employees of the Derry Medical Center to say thank you. Thank you for the courage and commitment to protecting private property that you have displayed in Senate Bill 170.

Two years ago, the Governor and primarily Democrat legislators attempted an unconstitutional seizure of private property in an effort to fill a gaping hole in New Hampshire's state budget. Senate Bill 170 will guarantee that such an attempt can never again occur.

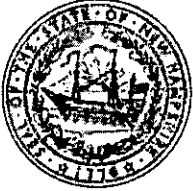
No longer will the state have the ability to void contracts whenever lawmakers desire money.

In October of 2009, Senator Carson wrote regarding the attempted theft of JUA funds that "True leaders understand that they are stewards of the people's money and that the people expect them to lead by example."

With the introduction of Senate Bill 170, you have proven that you are, in fact, true leaders who are to be commended for the fortitude with which you have fought to protect the private property of the New Hampshire Medical Malpractice Joint Underwriting Association.

Indeed, the doctors, staff and patients of the Derry Medical Center as well as the policyholders of the New Hampshire Medical Malpractice Joint Underwriting Association, both past and present, owe you a debt of gratitude for defending our right to private property as residents of New Hampshire.

Thank you.



JAN 4 RECD  
2012

## The Senate of the State of New Hampshire

107 North Main Street, Room 302, Concord, N.H. 03301-4951

SHARON M. CARSON  
District 14

Office 271-2674

TTY/TDD  
1-800-735-2964

November 30, 2011

Senate President Peter Bragdon  
New Hampshire State Senate  
107 North State Street  
State House Room 302  
Concord, New Hampshire 03301

Speaker William L. O'Brien  
Speaker of the House  
107 North State Street  
State House Room 312  
Concord, New Hampshire 03301

Dear Senate President Bragdon and Speaker O'Brien,

As required by SB 170, Chapter 201:2, Laws of 2011, Commission to Study the Future of the New Hampshire Medical Malpractice Joint Underwriting Association (relative to the New Hampshire Medical Malpractice Joint Underwriting Association), please find attached the Commission's findings and recommendations in the "FINAL REPORT" attached hereto.

If you should have any questions or comments please feel free to contact me.

Sincerely,

Senator Sharon Carson, Chair  
SB 170 Study Commission  
Senate District 14  
New Hampshire State Senate

SC/dac  
Attachment/SB 170 Final Report 11-30-11.doc

## **SB 170**

### **Chapter 201:2, Laws of 2011**

*An Act relative to the New Hampshire Medical Malpractice Joint Underwriting Association.*

## **FINAL REPORT**

**The above-named Study Commission was charged with the task to study the NHMMJUA for the purpose of making recommendations for proposed legislation concerning its future, form and function:**

### **Informational Background**

In the legislative session of 2011, SB 170 was filed as an attempt to clarify the status of the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). Since 2009, the NHMMJUA has been a source of controversy since it had accumulated a large surplus in funds. The bill was passed by both bodies of the Legislature and became law. SB 170 set three objectives. First to declare that the state shall not take or transfer, through taxation or otherwise, any funds now held by the NHMMJUA and provide for the distribution of excess premiums to policyholders. Second, it required the NHMMJUA, the insurance commissioner, and a representative of the NHMMJUA policyholders to jointly approach the Internal Revenue Service to resolve any federal tax liability arising from excess surplus funds, and third, to establish a commission to study the future of the NHMMJUA.

The commission was charged with the task to study the NHMMJUA for the purpose of making recommendations for proposed legislation concerning its future, form and function. The commission was also given the ability to solicit information from any persons deemed relevant to its study. The members of the commission represented entities involved with the NHMMJUA and were named:

- (1) Two members of the senate, appointed by the president of the senate.
- (2) Three members of the House of Representatives, appointed by the speaker of the House of Representatives.
- (3) One representative of the New Hampshire Medical Society who is or has been a policyholder of the NHMMJUA, appointed by the society.
- (4) One representative of the New Hampshire Association of Domestic Insurance Companies, appointed by the Association.
- (5) One member of the current NHMMJUA Board of Directors, appointed by the Board.
- (6) The insurance commissioner or designee.

## **FINDINGS**

### September 22, 2011

The Commission held its first meeting on September 22, 2011, at 11:00 a.m.

Members appointed to the Commission were, from the Senate, Senator Sharon Carson and Senator Gary Lambert; from the House, Representative Stephen Stepanek, Representative Mary E. Griffin, and Representative Peter Hansen; from the New Hampshire Medical Society, Peter Forssell, MD; from Domestic Insurance, Robert Solitro; from the New Hampshire Insurance Department, Chiara Dolcino and David Withers; and representing the NHMMJUA was Merwyn Bagan, M.D. Members absent were Senator Gary Lambert, Representative Steven Stepanek and Dr. Peter Forssell.

The members elected Senator Sharon Carson as Chair and Representative Peter Hansen as Clerk.

Senator Carson proposed and the Commission accepted a timeline of four additional meetings to determine the Commission's recommendations for further legislation if deemed appropriate and the future of the NHMMJUA and its status as a supplier of malpractice insurance. Mr. Robert Solitro from the Domestic Insurance Association and members from the New Hampshire Insurance Department, Mr. David Withers and Ms. Chiara Dolcino, provided an outline from which they proposed the Commission proceed, and which was accepted by the Commission as a guideline for their efforts.

The next meeting was scheduled for October 14, 2011, at 10:00 a.m. and the meeting was adjourned at 11:30 a.m.

#### October 14, 2011

On October 14, 2011, at 10:00 a.m. the second meeting convened. Members absent were Senator Gary Lambert and Representative Stephen Stepanek. Representing the NHMMJUA in place of Merwyn Bagan was James Vaccarino, Administrator.

A history of the JUA was provided and its role within the industry in New Hampshire was explained to the Commission. A primary question the Commission felt to be paramount was whether the JUA was a private or public entity. Consensus of the testimony is that it is a public entity absolved from federal and state taxes. Attorney Scott O'Connell, representing some of the JUA policyholders, testified that he and his clients believe the JUA is a legislatively-created entity serving a public purpose much like the New Hampshire Retirement System and suggests the SB 170 Commission clearly define the public purpose to ensure access to healthcare by fixing a non-competitive insurance market.

The Commission learned the JUA insures not only medical doctors, but also other healthcare professionals such as EMTs, nurses, hospitals and healthcare facilities, with approximately 500 policyholders.

The next meeting was scheduled for October 26, 2011, at 10:00 a.m. and the meeting was adjourned at 11:30 a.m.

#### October 26, 2011

On October 26, 2011, at 10:10 am the third meeting was convened. Members absent were Senator Gary Lambert, Representative Stephen Stepanek, and Mr. Robert Solitro, Domestic Insurance Association. Representing the NHMMJUA in place of Merwyn Bagan was James Vaccarino. Corrections to the October 14<sup>th</sup> meeting minutes were discussed and put off until the next meeting as Mr. Solitro and Attorney O'Connell were not present.

A discussion followed on residual insurance markets, their function and operation. These markets serve those who cannot obtain insurance from the marketplace and may use assigned risk, joint underwriting, and/or reinsurance as a method through which the needed/required insurance is written. It was pointed out that the NHMMJUA does not require their policyholders to have been denied insurance in order to participate in the JUA program. This fact elicited comment that then the JUA might well be competing with the general market. However, it was noted that while the commercial insurance companies have the advantage of selecting their clientele (referred to as cherry picking) selecting only the most or more desirable clients, the JUA does not, and yet the JUA performance is not significantly worse than the commercial carriers.

New Hampshire RSA Chapter 404-C states that entities/plans created under this Chapter must create minimum interference with the voluntary market. The consensus of the Commission members present at this meeting was that further defining, and or amended legislation will be needed to clarify intent and assist in resolution of the outstanding issues/problems within the current plan. Particular emphasis is recognized as being needed with respect to establishing for the future the private/public status of the JUA.

The next meeting was scheduled for November 16, 2011, at 1:00 p.m. and the meeting adjourned at 11:30 a.m.

#### November 16, 2011

On November 16, 2011, the meeting was called to order at 1:00 p.m. by Senator Sharon Carson, Chair.

Members of the Commission absent were Senator Gary Lambert, Representative Stephen Stepanek, and Robert Solitro, Domestic Insurance Association.

The issues surrounding the wording in the October 14, 2011 minutes were discussed and reconciled by votes of the Commission members. Following this action the Commission heard testimony and discussion from the medical community with respect to the need and value of the JUA. Those present from the medical community agreed that the JUA was necessary, performed a service critical to the delivery of healthcare, and supports its continuance.

The medical malpractice insurance providers (voluntary insurance providers) present while acknowledging the need for a NHMMJUA, expressed their position that it may be that the JUA (depending on definition) is competing with the private marketplace and therefore not in compliance with the RSAs as they are read/understood by those within the voluntary market.

Following a discussion of the future, form and function of the JUA, a motion was made by the Chair and seconded by Commission member Merwyn Bagan that



this Commission recommends further study by a "Blue Ribbon Commission" established by the Governor and consisting of members from each and every interested and affected party. The motion was adopted by unanimous vote of the Commission.

The minutes of the October 26, 2011 meeting were accepted and adopted by the Commission members.

Senator Carson and Representative Hansen will develop a report for discussion at the next meeting which is scheduled for November 29, 2011 at 9:00 a.m.

The meeting adjourned at 1:55 p.m.

#### November 29, 2011

The November 29, 2011 meeting was called to order at 9:00 a.m. by Senator Sharon Carson.

The Commission discussed their draft final report's content and specific language. Upon completion of these discussions it was moved by Dr. Peter Forsell and seconded by Representative Mary Griffin to accept the report as amended during the meeting. The motion carried unanimously.

The meeting closed at 10:25 a.m.

### **Final Recommendations**

After holding a series of meetings and taking testimony from the public, the members of the Commission agreed that there is a role for the NHMMJUA as a provider of malpractice insurance. The voluntary market for malpractice coverage is small in material respects and is still not competitive. Voluntary market participants are able to select the practices they wish to cover and can charge rates which vary substantially from year to year. By contrast, the JUA as the insurer of last resort, within the confines of the limited extent of coverage it provides, must take all interested practices, and endeavor to provide reasonable stability in rates while avoiding to the extent possible adverse (as opposed to helpful, competitive) impacts on the private market.

There are many issues that need to be resolved and it is the will of the Commission to, with this final report, make a formal request to the Governor of the State of New Hampshire, to form a Blue Ribbon Commission by executive order, to provide guidance to the Legislature as to the role the NHMMJUA will

play in the future. The last Blue Ribbon Commission concerning the NHMMJUA was in 1985 and provided a blueprint for its successful operation. There have been many changes within the insurance industry regarding the practice of medicine and the Commission believes it is the best interest of the State of New Hampshire, the Insurance Industry and the NHMMJUA to study risk management and JUA/Private Insurance Coverage. The Commission suggests at least the following members to comprise the Blue Ribbon Commission:

1. Legislative members from the House and the Senate
2. Representative from the Governors Office
3. Insurance Commissioner, State of New Hampshire or designee
4. Representative from the New Hampshire Medical Society
5. Representative from the New Hampshire Hospital Association
6. Health and Human Services Commissioner, State of New Hampshire or designee
7. Representative from the Domestic Insurance Association
8. A Board Member representing the NHMMJUA
9. A representative from an insurance agent's association
10. A representative of health care consumers
11. A representative from the NHMMJUA policyholders
12. A representative from the non-physician/non-hospital healthcare providers.
13. A representative from the voluntary medical liability insurance industry licensed in New Hampshire

The Commission also recommends the following topics to be considered by the Blue Ribbon Commission.

## **Organizational Issues**

### **In the Future:**

- Should the JUA be a public or private entity?
- What role should the state have in creation, amendment, operation and termination of the plan?

- If the state is to have an operational role, do some state laws which limit the role of the state with regard to insurers need, to be amended, modified or repealed?
- Should the state be in the business of providing insurance and, if so, what measures are necessary to protect the state from financial exposure from its activity?
- Because of the longevity of the program and its need to address market challenges, should it be made permanent?
- Should the administrative rules governing the JUA be replaced with a statutory scheme like the NH Retirement System rendering it a "body corporate and politic?"
- Should the JUA be progressively privatized like similar entities in other states?
- Does the JUA need the power of assessments against the insurance industry to be financially secure?
- What is the preferred tax status of the JUA and how does that control how the plan is organized and managed?
- Should the design of the JUA be changed so the state might be entitled to any surplus generated by the JUA? How might such changes carry with them financial risk to the state?
- What constituencies should be represented on the Board?
- Who should have the authority to appoint and/or remove board members?
- Should the Board have plenary authority over the plan?
- What is the public purpose served by the JUA and how is that articulated in its enabling authority?

- What duties are owed to policyholders?
- Should the Commissioner of Insurance and DOI have any role other than regulator?
- Who should control changes to organizational and operational issues (Legislature, DOI, Board of Directors, etc).
- Should the state provide that the JUA and those acting on its behalf enjoy a right of state provided defense and indemnity, e.g., under RSA 99-D?

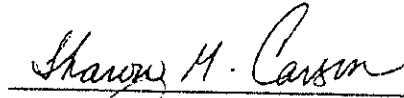
## **Operational Issues**

### **In the Future:**

- What type of coverage should the JUA offer?
- Should the JUA continue to offer assessable and participating policies?
- Who should be responsible for capital needs?
- Who should be entitled to surpluses?
- Should the JUA be operated as a mutual form of insurance?
- How should the JUA determine its capital needs?
- What actions should be required in the event of capital shortfall, or conversely, capital surplus?
- Should the JUA be more broadly empowered to underwrite and reinsure its insurance risks?

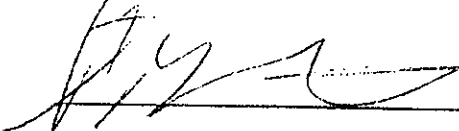
The SB 170 Commission also recommends that the Blue Ribbon Commission advise the Legislature on any statutory changes in its final report.

Respectfully submitted,

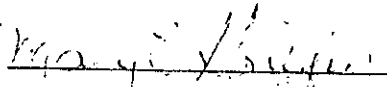


Senator Sharon Carson, Chair

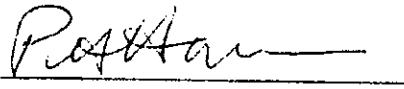
\_\_\_\_\_  
Senator Gary Lambert



Representative Stephen Stepanek



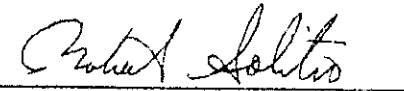
Representative Mary E. Griffin



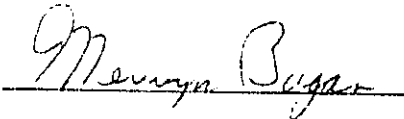
Representative Peter Hansen, Clerk



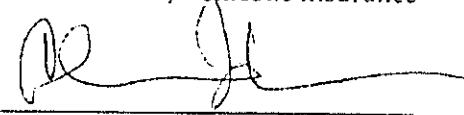
Peter Forssell, M.D., NH Medical Society



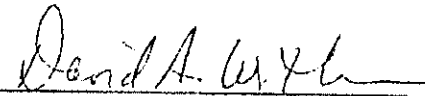
Robert Solitro, Domestic Insurance



Merwyn Bagan, M.D., NHMMJUA



Chiara Dolcino, NH Insurance Dept.



David Withers, NH Insurance Dept.

SC/dac

File: SB170FinalReport.doc (11-30-11)

# Committee Report

\*  
**STATE OF NEW HAMPSHIRE**  
**SENATE**  
**REPORT OF THE COMMITTEE**  
\*

Date: March 24, 2011

**THE COMMITTEE ON Executive Departments and Administration**  
to which was referred Senate Bill 170  
\*

**AN ACT**                      relative to the New Hampshire Medical Malpractice Joint  
Underwriting Association.

Having considered the same, the committee recommends that the Bill:

**SHOULD BE PASSED WITH AMENDMENT**  
\*

**BY A VOTE OF: 5-0**

**AMENDMENT # 1193s**

Senator Sharon M. Carson  
For the Committee

Deb Chroniak 271-1403  
\*



## New Hampshire General Court - Bill Status System

**Docket of SB170**

Docket Abbreviations

**Bill Title:** relative to the New Hampshire Medical Malpractice Joint Underwriting Association.*Official Docket of SB170:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
1/19/2011	S	Introduced and Referred to Executive Departments and Administration, <b>SJ 3</b> , Pg.38
2/4/2011	S	Hearing: 2/10/11, Room 100 State House, 9:50 a.m.; <b>SC10</b>
3/24/2011	S	Committee Report: Ought to Pass with Amendment #2011-1193s, 3/30/11; <b>SC17</b>
3/30/2011	S	Committee Amendment 1193s, AA, VV; <b>SJ 11</b> , Pg.215
3/30/2011	S	Ought to Pass with Amendment 1193s, <b>RC 23Y-1N</b> , MA; OT3rdg; <b>SJ 11</b> , Pg.216
3/30/2011	S	Passed by Third Reading Resolution; <b>SJ 11</b> , Pg.240
3/31/2011	H	Introduced and Referred to Executive Departments and Administration; <b>HJ 35</b> , PG.1241
4/5/2011	H	Public Hearing: 4/19/2011 11:30 AM LOB 306
4/5/2011	H	==CANCELLED== Executive Session: 4/19/2011 1:15 PM LOB 306
4/20/2011	H	Continued Public Hearing: 4/26/2011 11:00 AM LOB 307
4/20/2011	H	Executive Session: 4/26/2011 1:15 PM LOB 307
4/27/2011	H	Committee Report: Ought to Pass with Amendment #1544h for May 4 (Vote 14-3; RC); <b>HC 36</b> , PG.1249
4/27/2011	H	Proposed Committee Amendment #2011-1544h; <b>HC 36</b> , PG.1282-1283
5/4/2011	H	Amendment #1544h Adopted, VV; <b>HJ 42</b> , PG.1476-1477
5/4/2011	H	Ought to Pass with Amendment #1544h: MA DIV 252-63; <b>HJ 42</b> , PG.1476-1478
5/4/2011	H	Referred to Ways and Means; <b>HJ 42</b> , PG.1478
5/10/2011	H	Public Hearing: 5/17/2011 11:00 AM LOB 202
5/17/2011	H	Executive Session: 5/24/2011 10:00 AM LOB 202
5/24/2011	H	Committee Report: Ought to Pass with Amendment #2133h for June 1 (Vote 20-0; CC); <b>HC 43</b> , PG.1497
5/24/2011	H	Proposed Committee Amendment #2011-2133h; <b>HC 43</b> , PG.1521
6/1/2011	H	Amendment #2133h Adopted, VV; <b>HJ 48</b> , PG.1631-1632
6/1/2011	H	Ought to Pass with Amendment #2133h: MA VV; <b>HJ 48</b> , PG.1631-1632
6/8/2011	S	Sen. Carson Concurs with House Amendment #1544h, 2133h, MA, VV; <b>SJ 20</b> , Pg.550
6/8/2011	H	Enrolled; <b>HJ 51</b> , PG.1726
6/8/2011	S	Enrolled
6/16/2011	S	Law Without Signature 6/16/11; Chapter 0201; Art 44, Pt II, NH Constitution I. Section 3 Effective 12/31/11 II. Remainder Effective 06/16/11

NH House

NH Senate

# Other Referrals

# COMMITTEE REPORT FILE INVENTORY

SB 170 ORIGINAL REFERRAL

\_\_\_\_\_ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

- DOCKET (Submit only the latest docket found in Bill Status)
- COMMITTEE REPORT
- CALENDAR NOTICE
- HEARING REPORT
- PREPARED TESTIMONY AND OTHER SUBMISSIONS HANDED IN AT THE PUBLIC HEARING  
#1-3

\_\_\_\_\_ SIGN-UP SHEET(S)

**ALL AMENDMENTS (passed, or not) CONSIDERED BY COMMITTEE:**

- AMENDMENT # 11435 \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_
- AMENDMENT # 11935 \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_

**ALL AVAILABLE VERSIONS OF THE BILL:**

- AS INTRODUCED \_\_\_\_\_ AS AMENDED BY THE HOUSE
- FINAL VERSION \_\_\_\_\_ AS AMENDED BY THE SENATE

\_\_\_\_\_ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

\_\_\_\_\_

DATE DELIVERED TO SENATE CLERK

7-27-11

BY:

*N. M. A. Christ*  
COMMITTEE AIDE