OPINION NO. 80-097

Syllabus:

The Superintendent of Insurance lacks authority to transfer the assets and liabilities of the Joint Underwriting Association to one or more private insurance companies pursuant to an assumption agreement.

To: Robert L. Ratchford, Jr., Superintendent, Department of Insurance, Columbus, Ohio
By: William J. Brown, Attorney General, December 30, 1980

I have before me your request for an opinion regarding the Ohio Medical Professional Liability Underwriting Association (hereinafter Joint Underwriting Association or "JUA"), which was created by the General Assembly to provide Ohio's medical community with malpractice insurance during the late-1970's crisis involving the availability of medical malpractice insurance. Your request concerns the termination of the JUA, a termination justified, according to your letter, by the availability of malpractice insurance in the commercial market. The specific questions you pose all relate to a proposed "assumption" of JUA's assets and liabilities by a private insurance company or companies. This proposed transaction is to be governed by the Department's recently promulgated administrative rule, [1980-1981 Monthly Record] Ohio Admin. Code 3901-1-38 at 17 ("rule 3901-1-38"). You ask whether such private insurance company or companies would be entitled to

retain any surplus of assets which may exist after all of the JUA's obligations are satisfied.[1] Your questions seem to assume that the Department has the power to terminate the operations of the JUA by transferring its assets and liabilities to one or more private insurance companies. Because it is my opinion that the Department lacks such authority, it is neither necessary nor appropriate to elaborate upon your specific questions at this time. Rather, I am constrained to express my opinion that the adoption of the rule exceeded the regulatory authority granted to the Superintendent of Insurance.

It is axiomatic that before a state agency can promulgate an administrative rule, it must have been granted the power by the General Assembly to do what the rule purports to do. As stated by the Ohio Supreme Court: "[An administrative agency of Ohio] has only such authority, either express or implied, as conferred upon it by the General Assembly. Such authority that is conferred upon an administrative agency by the General Assembly cannot be extended by the agency." Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 379, 329 N.E.2d 693, 695 (1975) (citing Davis v. State ex rel. Kennedy, 127 Ohio St. 261, 187 N.E.2d 867 (1933)). See also State ex rel. Kahler-Ellis Co. v. Cline, 69 Ohio L. Abs. 305, 308, 125 N.E.2d 222, 224 (C.P. Lucas County 1954) ("[a]n administrative body may not, by rules, add to its delegated powers no matter how wise such rules may be or how laudable are the ends so sought to be accomplished" (citations omitted)).

In attempting to determine whether rule 3901-1-38 should be viewed as properly promulgated or as an unauthorized addition to the Department's powers, the following "findings," which were incorporated into the rule, are of primary interest:

> The superintendent. . .finds that he has authority under his general responsibility for the supervision and good conduct of the business of insurance in the state of Ohio to provide for the termination of the insurance activities of the association. The superintendent further finds that he has authority to amend the plan of operation of the association pursuant to division (C)(3) of Section 3929.72 of the Revised Code.

Rule 3901-1-38(C).

Turning first to the latter "finding," I note that R.C. 3929.72(C)(3) provides that:

> Amendments to the plan of operation may be made by the board of governors of the association, subject to the approval of the superintendent. The superintendent may also make amendments to the plan of operation. The superintendent shall then amend the rule establishing the plan of operation pursuant to Chapter 119. of the Revised Code.

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[1]The amount of this potential surplus of assets over liabilities cannot be presently defined because of what you describe as "the long tail of potential medical malpractice liability." This "long tail" may result despite the fact that policies issued by the JUA are on a "claims made" basis, which, according to R.C. 3929.73(B)(1)(a), specifically limits coverage to claims brought against the insured during the period the policy is in effect. R.C. 3929.73(B)(1)(b) grants a policyholder the option of purchasing additional "tail coverage" to extend the period of coverage to include claims reported after the initial policy period has expired. It states, in part, that "the insured. . .has the right on payment of appropriate additional premiums to extend coverage to include claims covered by such policy and discovered and reported after the policy period and for which written claim is made against the insured."

This statute, when read in context, refers to a formal "plan of operation" which the JUA's Board of Governors had the option of submitting to the Superintendent within forty-five days following the creation of the JUA pursuant to R.C. 3929.72(C)(1). Neither the statute nor the plan of operation, which has apparently found life as 3 Ohio Admin. Code 3901-1-19, speaks of the termination of JUA's operations pursuant to an assumption of its assets and liabilities by one or more private insurance companies.[2] Consequently, it is impossible to view R.C. 3929.72(C)(3) as constituting an express statutory authority for the Department to promulgate an administrative rule providing for the assumption of the assets and liabilities of the JUA by one or more private insurance companies.

As to whether R.C. 3929.72(C)(3) or the many other statutory provisions defining the scope of the Department's regulation of the insurance business can constitute a general or implied grant of power to adopt the rule in question, the Ohio Supreme Court has stated that where there is in place a broad scheme of statutory regulation and the General Assembly has legislatively manifested its intention for an administrative agency to have implied powers in addition to those expressly granted, whether a specific statute expressly authorizing a particular regulation can be located is not determinative. Burger Brewing Co. v. Thomas, supra, at 380, 329 N.E.2d at 695-96. However, the Burger Brewing court cautioned that:

> Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant. In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it. It is one of the reserved powers that the legislative body no doubt had, but failed to delegate to the administrative board or body in question.

Burger Brewing, supra, at 383, 329 N.E.2d at 697 (quoting State ex rel. A. Bentley and Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917)) (emphasis added).

In essence, the Burger Brewing case stands for the proposition that, while an administrative agency has such authority as is granted either expressly or by necessary implication, the only authority which may be found to be granted by implication is that which is essential to the carrying out of the express power. A grant of power to an administrative agency, whether express or implied, must be clear. If there is doubt as to whether a particular power has been granted, that doubt must be resolved against the grant.

The General Assembly, by means of R.C. 3929.72(C)(1), has expressly directed the Superintendent of Insurance to adopt a "plan of operation" for the JUA which is consistent with R.C. Chapter 3929, and, by means of R.C. 3929.72(C)(3), has expressly authorized the Superintendent to amend that plan. With respect to the plan, R.C. 3929.72(C)(2) provides:

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[2]Pursuant to Section 4 (uncodified) of Am. Sub. H.B. 682, 111th Gen. A. (1975) (eff. July 28, 1975), as amended in Am. S.B. 299, 112th Gen. A. (1977) (eff. Nov. 24, 1977), and further amended in Am. S.B. 271, 113th Gen. A. (1979) (eff. Dec. 27, 1979), which prohibits the JUA from issuing any policy extending coverage beyond December 31, 1981, the operations of the JUA will terminate when all claims against persons insured by the JUA have been resolved. No provision has yet been made by the General Assembly for the distribution of any assets which may remain at that time.

> (2) The plan of operation shall provide for economic, fair and nondiscriminatory administration and for the prompt and efficient providing of medical malpractice insurance, and shall contain other provisions including, but not limited to preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the association, assessment of members to defray losses and expenses, administrative expenses, reasonable and objective underwriting standards, acceptance and cession of reinsurance and the appointment of servicing carriers or the direct issuance of syndicate policies.

Thus, R.C. 3929.72 clearly authorizes the Superintendent to adopt a plan for the establishment of facilities and programs needed by the JUA, for management of the JUA, and for administration of its programs. The statutory scheme contemplates a "plan of operation," which will govern the provision of medical malpractice insurance as provided in R.C. Chapter 3929. See R.C. 3929.73. No statutory provision expressly authorizes the Superintendent to terminate the JUA's operations by transferring its assets and liabilities to one or more private insurance companies pursuant to an assumption agreement, nor does any statutory provision contain a general grant of power which incidentally includes the power to bring about such termination. See generally 1970 Op. Att'y Gen. No. 70-056 (the authority to dissolve or abolish a regional airport authority may not be implied from the power to create such an authority).

In light of the fact that R.C. Chapter 3929 repeatedly speaks of a "plan of operation" and contemplates the continued activity of the JUA, I am unable to conclude that the authority to terminate the operations of the JUA by the proposed assumption agreement is granted by implication. Indeed, were the Superintendent to proceed to terminate the operations of the JUA by transferring its assets and liabilities to one or more private insurance companies pursuant to an assumption agreement, he would, in essence, be changing the scheme established by the General Assembly whereby the JUA itself is responsible for resolution of claims against its insureds. I know of no provision of law which would permit the Superintendent, by administrative fiat, to delegate or transfer this statutory responsibility to a non-governmental entity (i.e., private insurers). It is a basic principle of law that only the legislative branch of government is vested with the authority to amend laws. See Weber v. Board of Health, 148 Ohio St. 389, 74 N.E.2d 331 (1947); Matz v. J. L. Curtis Cartage Co., 132 Ohio St. 271, 7 N.E.2d 200 (1937). If the Superintendent of Insurance were to authorize the contemplated assumption, he would, in essence, be amending an enactment of the General Assembly.

Given the foregoing, I am constrained to conclude that a distinction between the authority to operate the JUA and the authority to terminate the JUA's operations by transferring its assets and liabilities to one or more private insurance companies pursuant to an assumption agreement is proper—and that when such a distinction is applied, the Superintendent is without either express or implied authority to promulgate rule 3901-1-38.

This conclusion of law is bolstered by several observations, all of which further suggest that the General Assembly never "intended" to authorize the sale of the JUA to a private insurance company: (1) the JUA will terminate its operations when all claims against its insureds have been resolved;[3] (2) it would have been a simple matter for the General Assembly to have spelled out the Department's authority to promulgate an administrative rule such as rule 3901-1-38 when adopting or amending those provisions of law relating to the JUA; and (3) the General

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[3]The JUA will take this action pursuant to Section 4 (uncodified) of Am. Sub. H.B. 682, 111th Gen. A. (1975) (eff. July 28, 1975), as amended in Am. S.B. 299, 112th Gen. A. (1977) (eff. Nov. 24, 1977), and further amended in Am. S.B. 271, 113th Gen. A. (1979) (eff. Dec. 27, 1979).

Assembly, whenever faced with a surplus of either JUA or Stabilization Reserve Fund[4] moneys, has consistently returned those funds to those persons or entities responsible for their payment in the first place, see, e.g., Section 4 of Am. S.B. 271; R.C. 3929.74(G).

Let me note, moreover, that, were those statutes relating to the JUA or, for that matter, those relating to the Department of Insurance generally, construed to constitute either an express or implied grant of power regarding the commercial acquisition of the JUA, such construction would raise questions concerning the validity of the statutes, since there may be substantial doubt as to whether such authorization would constitute a proper delegation to the Department of the General Assembly's inherent power to control the JUA. However, as stated in the second paragraph of the syllabus of Brotherhoods v. P.U.C., 177 Ohio St. 101, 202 N.E.2d 699 (1964): "Where reasonably possible, a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality." See also R.C. 1.47 ("In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the State and United States is intended"). While I do not consider it appropriate to pronounce upon the constitutionality of state statutes, I feel compelled to note that a challenge to the validity of these statutes as a delegation of legislative discretion to the Department of Insurance might, if instituted, be based on the lack of "standards" in the laws to guide the Department through the task of providing for the assumption of the JUA.[5] See Blue Cross of Northwest Ohio v. Jump, 61 Ohio St. 2d 246, 400 N.E.2d 892 (1980) (paragraph four of the syllabus).

For the reasons set forth above, I conclude that the Superintendent of Insurance lacks authority to adopt a rule providing for the assumption of the JUA by one or more private insurance companies, and, thus, that the adoption of rule 3901:1-30 exceeded his statutory authority. That this conclusion necessitates the need for further action by the General Assembly with respect to the termination of the JUA is consistent with my belief that the General Assembly is the proper entity to reallocate any surplus arising from the operation of the statutorily-created JUA.

Therefore, it is my opinion, and you are so advised, that the Superintendent of Insurance lacks authority to transfer the assets and liabilities of the Joint Underwriting Association to one or more private insurance companies pursuant to an assumption agreement.

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[4]The Stabilization Reserve Fund is a fund created by statute for the purpose of reimbursing the JUA for any deficit that arises out of the JUA's operation and any other purposes approved by the fund's director. R.C. 3929.74.

[5]Such an argument is of particular concern in light of the fact that rule 3901-1-38 permits the "delivery" of some seventy policyholders to a single insurance company when, without the rule, those policyholders would be forced onto the open market within the next year.