PALMER, J., dissenting in part. Although the state constitutional takings claim raised by the plaintiff, Ronald Gold,[1] is factually complex, the theory underlying the claim is straightforward: the plaintiff alleges that he and others similarly situated are entitled to the 1,645,773 shares of Anthem, Inc., stock that represent the proceeds of the demutualization of Anthem Insurance Companies, Inc. (Anthem Insurance) and, therefore, the state's receipt, retention and disposition of that stock—worth nearly $100,000,000—constitutes a taking without just compensation in violation of article first, § 11, of the state constitution.[2] In summarily rejecting the extremely thorough and thoughtful decision of the trial court denying the state's motion to dismiss the plaintiff's claim on the ground of sovereign immunity, the majority relies on the facts, first, that the plaintiff has not alleged that Anthem Insurance delivered the Anthem, Inc., stock to the state in its capacity as agent for the plaintiff and, second, the plaintiff cannot prove that Anthem Insurance delivered the stock to the state believing that the state was the plaintiff's agent. Neither fact, however, provides any support for the majority's conclusion: contrary to the majority's conclusion, for purposes of a motion to dismiss, it is irrelevant that the complaint does not allege a principal-agent relationship, and there is ample evidence to support a finding that the state received the stock as agent for the plaintiff notwithstanding Anthem Insurance's subjective understanding to the contrary. Finally, the majority turns our law on its head in concluding that the trial court was required to treat the state's motion to dismiss as a motion to strike even though the trial court was never asked to do so. I therefore dissent.[3]

I

I begin with a brief summary of the relevant portion of the trial court's memorandum of decision. In denying the state's motion to dismiss the plaintiff's state constitutional takings claim, the trial court explained that "the state's sale of the disputed stock and continuing retention of all proceeds from its sale for its own use would clearly constitute a taking, in the constitutional sense," if, at trial, the plaintiff can prove, first, that the plaintiff class of insureds, or " 'group as a whole,' " received collective membership rights in Anthem Insurance pursuant to the insurance policy covering the group, including the right to receive a single joint distribution of stock or cash from Anthem, Inc., upon the demutualization of Anthem Insurance, and second, that the relationship between the state and the group as a whole was, in light of the governing insurance policies and other relevant evidence, that of principal and agent.[4] The majority does not contend that this determination

of the trial court necessarily is unsound, either factually or legally.

The trial court also identified evidence in the record from which the trier of fact reasonably could find that the state was the agent for the group as a whole. This evidence includes language in the Anthem Insurance plan of conversion that, as the trial court explained, "expressly acknowledges what the plaintiff has argued all along under his . . . theory of entitlement, to wit: that the [group or association of insureds, defined as] grandfathered groups . . . not their common employers, had membership rights in [Anthem Blue Cross and Blue Shield of Connecticut] prior to its merger into Anthem Insurance. . . . [That plan] clearly states, as the plaintiff has also argued, that Anthem Insurance agreed to continue those very membership rights in itself following the merger, and thus that the grandfathered groups became new members of Anthem Insurance, *not their common employers*." (Emphasis added.) The trial court also relied on language in one of the insurance policies providing that "[t]he Anthem [Insurance] [m]ember is the fiduciary agent of the [c]overed [p]ersons hereunder," as well as language in another policy stating that, "[f]or the purposes of this [a]greement, *the* [*e*]*mployer is the agent of the subscribers and not the agent of the* [*health maintenance organization*]." (Emphasis added.) The court further observed that, pursuant to article II of the corporate by-laws of Anthem Insurance's Connecticut subsidiary, " '[i]n the case of a group insurance policy, the group as a whole shall be considered one policyholder, and such policyholder's rights as a [v]oting [m]ember shall be exercised by the individual designated in, or pursuant to, such policy to act for the group for voting purposes.' " Finally, the court noted that, consistent with the plaintiff's claims, "two Anthem [Insurance] vice presidents, David Frick and Cynthia Miller, both stated in their testimony at the demutalization hearing before the Indiana commissioner of insurance on October 2, 2001, that under the by-laws and articles of incorporation of Anthem Insurance, it has always been understood that, in the case of group insurance policies, the members of the company for all purposes are not the employers who procure or pay for their policies, but the individual employees who hold certificates of coverage thereunder, and thus any distribution in the event of a demutualization goes only to them."

This evidence—which the majority ignores—clearly is sufficient to permit a finding that the state received the stock proceeds from the demutualization as agent for the group as a whole and not as the owner of those proceeds. In other words, as the trial court expressly found, "there is at least a genuine issue of material fact as to whether the plaintiff can establish that his and his fellow class members' group as a whole had a collective right under the plan of conversion to receive stock or

cash upon the demutualization of Anthem Insurance."[5] (Internal quotation marks omitted.)

Notwithstanding the evidence tending to establish that the state was the agent of the group as a whole, the majority concludes that the trial court improperly denied the state's motion to dismiss for lack of subject matter jurisdiction because "[t]he plaintiff neither alleged in his complaint nor presented any evidence to the trial court that Anthem Insurance in fact delivered the stock to the state in its capacity as the agent for the group as a whole." In support of this assertion, the majority states: "Rather, the plaintiff's complaint more reasonably is read as alleging that Anthem Insurance *failed* to deliver the stock to the state in its capacity as the agent for the group as a whole, in violation of Anthem Insurance's obligations under the plan of conversion." (Emphasis in original.) With respect to this assertion, the majority relies on the allegation of the plaintiff's complaint that "[t]he stock which should have been issued to [the plaintiff] and the members of the class . . . was issued by Anthem [Insurance] to [the state] . . . ."

The majority further explains that the plaintiff does not dispute either that Anthem Insurance determined that the state, and not the plaintiff and others similarly situated, was the rightful owner of the Anthem, Inc., stock, or that Anthem Insurance delivered that stock to the state in its capacity as the owner of the stock. Although the majority acknowledges the plaintiff's claim that "these actions violated the plan of conversion"—that is, in the plaintiff's view, Anthem Insurance was *wrong* in its determination that the state was the rightful owner of the stock proceeds—the majority nevertheless asserts that, "in the absence of any allegation that Anthem Insurance in fact delivered the stock to the state in its capacity as the agent for the plaintiff and others similarly situated, we must conclude that the trial court improperly determined that the plaintiff could prove this fact at trial."[6] As I explain hereinafter, the majority's analysis cannot withstand scrutiny, first, because it improperly treats the state's motion to dismiss as a motion to strike, and second, because it relies on a consideration that is entirely irrelevant to the issue of whether the trial court should have dismissed the plaintiff's claim, namely, the plaintiff's failure to allege or prove facts establishing that Anthem Insurance delivered the stock to the state in the belief that the state was receiving the stock as agent for the plaintiff and others similarly situated. The majority's faulty analysis leads to its erroneous conclusion that the trial court improperly refused to dismiss the plaintiff's constitutional taking claim.

Before commencing a review of the majority opinion, however, it is necessary first to set forth certain legal principles relevant to the issue raised by this appeal.

It is well established that the doctrine of sovereign immunity generally bars suits against the state without its consent. See, e.g., *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 252, 963 A.2d 1 (2009). Because sovereign immunity implicates subject matter jurisdiction; id.; that is, "the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong"; (internal quotation marks omitted) *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 389, 926 A.2d 1035 (2007); that doctrine is a basis for granting a motion to dismiss. See, e.g., *Kelly* v. *University of Connecticut Health Center*, supra, 252. "Although it is a critical prerequisite to any court's involvement in a case, we repeatedly have held that, when a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *In re Judicial Inquiry No. 2005-02*, 293 Conn. 247, 253, 977 A.2d 166 (2009). Moreover, "in reviewing a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Kelly* v. *University of Connecticut Health Center*, supra, 252. The doctrine of sovereign immunity, however, "is not available to the state as a defense to claims for just compensation arising under article first, § 11, of the Connecticut constitution. . . . When possession has been taken from the owner, he is constitutionally entitled to any damages which he may have suffered . . . . To survive a motion to dismiss on the ground of sovereign immunity, [however] a complaint must allege sufficient facts to support a finding of a taking of [property] in a constitutional sense." (Citation omitted; internal quotation marks omitted.) *184 Windsor Avenue, LLC* v. *State*, 274 Conn. 302, 319, 875 A.2d 498 (2005). With these principles in mind, I now turn to the majority opinion.

The majority concludes that the trial court should have granted the state's motion to dismiss for lack of subject matter jurisdiction because, even though the plaintiff's constitutional takings claim ordinarily would surmount the defense of sovereign immunity, "the plaintiff neither alleged nor presented evidence that the state had received the Anthem, Inc., stock in its capacity as agent for the plaintiff and others similarly situated." As discussed hereinafter, these reasons provide no basis whatsoever for dismissing the plaintiff's constitutional claim.

With respect to the first reason proffered by the majority—that is, the complaint contains no allegation asserting that the state is the agent of the plaintiff and others similarly situated with respect to the stock to which the plaintiff claims that he and those other similarly situated state employees are entitled—a motion to dismiss is not the proper vehicle to challenge that

alleged pleading defect. As this court explained in *Gurliacci* v. *Mayer*, 218 Conn. 531, 544, 590 A.2d 914 (1991), a motion to dismiss "properly attacks the jurisdiction of the court, essentially asserting that the plaintiff *cannot as a matter of law and fact* state a cause of action that should be heard by the court." (Emphasis added; internal quotation marks omitted.) In the present case, the plaintiff's failure to allege the existence of a principal-agent relationship does not mean that he cannot establish such a relationship as a matter of fact. At most, the complaint is deficient because it fails to state a legally sufficient cause of action;[7] if so, the proper remedy is granting a motion to strike, for as this court also stated in *Gurliacci*, "if a pleading . . . on its face is legally insufficient, although facts may indeed exist which, if properly pleaded, would establish a cause of action upon which relief could be granted, a motion to strike is required." (Internal quotation marks omitted.) Id.

The Appellate Court recently elaborated upon the distinction between a motion to dismiss and a motion to strike in *Egri* v. *Foisie*, 83 Conn. App. 243, 247–50, 848 A.2d 1266, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004), explaining as follows: "This case causes us to consider the function of two motions that are basic to our civil procedure, the motion to dismiss and the motion to strike. The motion to dismiss is governed by Practice Book §§ 10-30 through 10-34. Properly granted on jurisdictional grounds, it essentially asserts that, as a matter of law and fact, a plaintiff cannot state a cause of action that is properly before the court. . . . By contrast, the motion to strike attacks the sufficiency of the pleadings. Practice Book § 10-39; see also 1 E. Stephenson, Connecticut Civil Procedure (3d Ed. 1997) § 72 (a), pp. 216–17. . . .

"There is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike. . . .

"A motion to dismiss does not test the sufficiency of a cause of action and should not be granted on other than jurisdictional grounds. . . . [When a motion to dismiss is] used to perform . . . the function of a [motion to strike] . . . the court should [deny] the motion. . . .

"The distinction between the motion to dismiss and the motion to strike is not merely semantic. If a motion to dismiss is granted, the case is terminated, save for an appeal from that ruling. . . . The granting of a motion to strike, however, ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings. See Practice Book § 10-44.

"That critical distinction implicates a fundamental policy consideration in this state. Connecticut law repeatedly has expressed a policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his or her day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . For that reason, [a] trial court should make every effort to adjudicate the substantive controversy before it, and, where practicable, should decide a procedural issue so as not to preclude hearing the merits of an appeal." (Citations omitted; emphasis in original; internal quotation marks omitted.)

As a consequence of its failure to recognize the distinction between a motion to dismiss and a motion to strike, the majority wrongly concludes that the state was entitled to dismissal of the plaintiff's constitutional takings claim. The fact that the majority's decision was predicated on the sufficiency of the pleadings is reflected in the concluding sentence of the majority's analysis: "[I]n the absence of any *allegation* that Anthem Insurance in fact delivered the stock to the state in its capacity as the agent for the plaintiff and others similarly situated, we must conclude that the trial court improperly determined that the plaintiff could prove this fact at trial." (Emphasis added.) As this assertion by the majority demonstrates, in the majority's view, the plaintiff's failure to *plead* the existence of a principal-agent relationship is fatal to his constitutional takings claim and requires dismissal of that claim. The majority simply is incorrect: the plaintiff's claim may be subject to a motion to strike, but clearly is not subject to a motion to dismiss.

In addition to its misplaced reliance on the fact that the plaintiff *failed* to allege a principal-agent relationship in his complaint, the majority also relies on certain allegations that the plaintiff *does* make in his complaint to support its conclusion that the plaintiff's takings claim must be dismissed. In particular, the majority points to the allegation in the complaint that "[t]he stock which should have been issued to [the plaintiff] and the members of the class pursuant to the [p]lan of [c]onversion . . . was issued by Anthem [Insurance] to [the state] . . . ." The majority asserts that this statement does not allege a principal-agent relationship but, rather, "more reasonably is read as alleging that Anthem Insurance *failed* to deliver the stock to the state in its capacity as the agent for the group as a whole, in violation of Anthem Insurance's obligations under the plan of conversion." (Emphasis in original.) This assertion by the majority again exemplifies its erroneous preoccupation with the manner in which the plaintiff has *pleaded* his claim—a matter properly addressed in the

context of a motion to strike rather than via a motion to dismiss—and not whether the claim is sufficient to survive a motion to dismiss for lack of subject matter jurisdiction. As previously explained, a complaint will survive a motion to dismiss if the plaintiff can demonstrate facts which, if credited, would be sufficient to support a particular cause of action. If not, the motion must be granted; otherwise, the motion must be denied despite the fact that the allegations of the complaint are legally inadequate.[8] In the present case, the trial court properly relied on evidence in the record to support its conclusion that there exists a genuine issue of material fact with respect to whether the state is, in fact, the agent of the group as a whole, thereby saving the plaintiff's claim from the state's jurisdictional challenge. See, e.g., *Conboy* v. *State*, 292 Conn. 642, 649–55, 974 A.2d 669 (2009) (trial court properly considered allegations of complaint *and* facts contained in record in denying motion to dismiss for lack of subject matter jurisdiction).

The majority does not dispute that it does, in fact, treat the state's motion to dismiss as a motion to strike. Rather, the majority seeks to justify its treatment of the state's motion in that manner on the ground that "[t]his court previously has held . . . that, when a complaint properly would have been subject to a motion to strike, and the plaintiff has made no showing that he could amend the complaint to avoid the deficiencies of the original complaint, the granting of a motion to dismiss instead of a motion to strike is harmless error." The majority further states: "Similarly, when a complaint properly would have been subject to a motion to strike and the plaintiff cannot cure the deficiencies in the complaint, we properly may reverse the trial court's denial of a motion to dismiss rather than remand the case to the trial court so that the defendant may file a motion to strike that the trial court would be required to grant." Applying these principles to the present case, the majority asserts that, because "the complaint . . . properly would have been subject to a motion to strike[9] and . . . because the plaintiff has not pointed to any evidence that Anthem Insurance transferred the stock to the state in its capacity as the agent for the plaintiff and others similarly situated, we must conclude that he cannot amend the complaint to cure its deficiencies. Accordingly, we properly may reverse the ruling denying the motion to dismiss."

I respectfully submit that the majority's reasoning is wholly unpersuasive. First, even if the trial court in the present case properly would have granted a motion to strike, in those cases in which we have treated a motion to dismiss as a motion to strike, this court has *granted* the motion to dismiss and we have concluded that, although it was *error* for the court to have granted the motion, the error was harmless. See, e.g., *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 501, 815

A.2d 1188 (2003). In the present case, the trial court *denied* the state's motion to strike, a ruling that reasonably cannot be characterized as improper or incorrect as a matter of law because the trial court was under no obligation to grant what the majority itself concedes was the *wrong* motion. Nevertheless, the majority, with the benefit of hindsight not available to the trial court, concludes that that court abused its discretion in failing to treat the motion to dismiss as a motion to strike. I disagree with this conclusion because it is one thing to *affirm* as harmless error a trial court's judgment *granting* the wrong motion, but it is something else entirely to *reverse* a trial court's judgment *denying* the wrong motion.

The majority's impropriety is compounded by the fact that the state has never even asked *this court* to treat its motion to dismiss as a motion to strike. Rather, the majority takes this approach on its own, without notice to the parties. Of course, we may *affirm* a trial court's judgment on such an alternate ground, but even then, we generally will not do so unless that ground has been raised by the prevailing party. In the present case, however, the majority elects not only to *reverse* the judgment of the trial court on an alternate ground, it does so on the basis of a claim that never has been raised by the state or briefed by the parties. In my view, this is unacceptable, first, because it results in an ambuscade of the trial judge, who never had an opportunity to consider the alternate claim that the majority now decides in the state's favor, and second, because it is unfair to the plaintiff, who has never had the opportunity to address that alternate claim for reversal in this court.

More importantly, however, even if the plaintiff's constitutional claim would be subject to a motion to strike for failing to allege a principal-agent relationship, the majority simply is incorrect in concluding that the plaintiff would not be able to amend his complaint to allege that the state is holding the stock proceeds as agent for the plaintiff and those similarly situated.[10] In support of its contention, the majority asserts that, because the plaintiff "does not dispute [either] that Anthem Insurance determined that the state was entitled to the stock as a statutory member in its own right and that the plaintiff and others similarly situated were *not* statutory members and were *not* entitled to the stock . . . [or] that Anthem Insurance delivered the stock to the state in its capacity as a statutory member in its own right"; (emphasis in original); the plaintiff therefore cannot establish, as a matter of fact, that the state received the stock in its capacity as agent for the plaintiff and others similarly situated. Thus, although the majority acknowledges "the evidence supporting an inference that the state was the agent for the plaintiff and others similarly situated," the majority nevertheless contends that the plaintiff cannot amend his complaint to state

a legally cognizable cause of action because he "has pointed to no evidence . . . that [Anthem Insurance] transferred the stock to the state in its capacity as an agent [for the plaintiff and others similarly situated] and not in its capacity as [the owner of the stock]." Put differently, under the majority's reasoning, unless the plaintiff can demonstrate that Anthem Insurance delivered the stock to the state *believing* that the state was the plaintiff's agent, he cannot prevail on his claim.

Simply put, the rationale underlying the majority's conclusion that the plaintiff cannot state a cognizable claim lacks any support in the law. The fact that Anthem Insurance delivered the stock to the state in the *belief* that the state was entitled to the stock proceeds of the demutualization has little or no relevance with respect to the plaintiff's contention that the state did, in fact, receive the stock as the agent of the plaintiff and those similarly situated, and it certainly is not determinative of that issue. The success of the plaintiff's takings claim hinges on whether he can prove, on the basis of the totality of the evidence, that the state accepted and retained the stock that was delivered to it by Anthem Insurance in its capacity as agent for the plaintiff and others similarly situated, not on Anthem Insurance's subjective intent when it delivered the stock to the state. In other words, as the trial court explained, Anthem Insurance's subjective understanding concerning the nature of the state's relationship to the plaintiff with respect to the stock when Anthem Insurance delivered that stock to the state is not a bar to the plaintiff's claim of a constitutional taking; the issue, rather, is the nature of that relationship as reflected, inter alia, in the various relevant insurance policies and other pertinent documents in existence *prior* to the demutualization and *prior* to Anthem Insurance's subsequent transfer of the stock to the state.[11] Put differently, the plaintiff has every right to attempt to prove that the state received the Anthem, Inc., stock as agent for the plaintiff and that Anthem Insurance's contrary belief simply was mistaken. Indeed, there is absolutely no basis in law or in fact for the majority's assertion that the plaintiff cannot state a cognizable takings claim merely because of Anthem Insurance's subjective understanding that it was delivering the stock to the state in the state's capacity as owner. It therefore is not surprising that the majority has provided no authority to support its bald assertion that the plaintiff's claim founders on Anthem Insurance's belief as to the ownership of the stock at the time it delivered the stock to the state.

Indeed, even the state itself has never maintained that the plaintiff cannot prevail on his claim that the state now holds the stock proceeds as agent for the plaintiff and those similarly situated merely because Anthem Insurance purported to deliver the stock to the state in its capacity as owner rather than as agent for the plaintiff and others similarly situated. In fact, the

majority injects that issue into the case entirely on its own, without any explanation as to *why* Anthem Insurance's subjective understanding that it was delivering the stock to the state as owner is relevant—let alone critical—to the determination of who *actually* owns the stock. As I have explained, merely because the plaintiff does not dispute Anthem Insurance's assertion that it delivered the stock to the state in the belief that the state was the rightful owner of the stock is not determinative of whether the state is, indeed, the owner of the stock or, instead, was required, as agent of the plaintiff, to deliver the stock to the plaintiff as its principal.[12]

It is apparent, therefore, that the court has subject matter jurisdiction over the plaintiff's takings claim despite the absence of an express allegation in the complaint that the state is the agent of the plaintiff and others similarly situated with respect to the stock proceeds of the Anthem Insurance demutualization. Consequently, the trial court properly denied the state's motion to dismiss insofar as that motion was predicated on the contention that the plaintiff's failure to plead a principal-agent relationship deprived the court of subject matter jurisdiction over the plaintiff's claim.

II

The state also raises several additional claims in support of its contention that the trial court improperly denied its motion to dismiss the plaintiff's constitutional takings claim.[13] The state first contends that the property interest the plaintiff claims to have been deprived of "is not coextensive with his claimed entitlement under the demutualization." The state asserts, rather, that "[i]f [Anthem, Inc.] had been distributing shares of stock to the [s]tate as agent for the plaintiff, a quantifiably different amount of stock would have been allocated and delivered." As a result, the state maintains, the plaintiff cannot establish a discrete property interest in the specific shares of stock received by the state. The trial court rejected this claim, concluding, in essence, that the claim was unsupported by the record. On appeal, the state identifies no evidence or facts to support its claim; rather, the state relies solely on a statement of defense counsel, made in the trial court during oral argument on the motion to dismiss, asserting merely that the amount of stock distributed "could be higher or lower" depending upon whether the state received the stock as owner or as agent for the group as a whole. This statement provides an inadequate basis for disturbing the court's ruling. Furthermore, even if the state is correct that it may have received more or less stock as the putative owner of the stock than it would have received as the agent for the group as a whole, the state has failed to demonstrate why that fact alone would defeat the plaintiff's takings claim. Absent any factual or legal basis for the state's claim, it

must fail.

In reliance on *184 Windsor Avenue, LLC* v. *State*, supra, 274 Conn. 302, the state also contends that, before the plaintiff properly can allege facts necessary to maintain a takings claim, he first must "convert his inchoate claim" of entitlement to the demutualization proceeds into a property right. The state claims that until the plaintiff proves that the group as a whole, and not the state, is the statutory member entitled to the stock proceeds, the plaintiff cannot demonstrate an identifiable property interest in those proceeds and, therefore, his claim must be dismissed. Neither *184 Windsor Avenue, LLC* nor any other precedent of which I am aware supports the state's contention.

In *184 Windsor Avenue, LLC*, the plaintiff, 184 Windsor Avenue, LLC, alleged that the state had failed to pay additional rent due under two lease agreements. Id., 305. The leases contained tax escalation clauses pursuant to which the state had agreed to pay, as additional rent, any increases in real estate property taxes levied on the leased properties over the lease term. Id. When the state failed to pay the taxes, the plaintiff filed a claim with the claims commissioner, alleging, inter alia, an unconstitutional taking of the plaintiff's property. The claims commissioner determined that the plaintiff was not entitled to the additional rent because the tax escalation clauses were invalid as a matter of law. Id., 306–307. The plaintiff thereupon commenced a civil action against the state in which it again alleged an unconstitutional taking. Id., 307. The trial court concluded that the takings claim was barred by sovereign immunity because the tax escalation clauses were unlawful and, therefore, unenforceable. Id. This court affirmed the judgment of the trial court, stating that, "[i]n the present case, the trial court properly concluded that the tax escalation clause was an invalid lease term because it had not been approved by the [state properties] review board pursuant to [General Statutes] § 4b-23 (e). . . . The facts in the complaint, even when construed broadly in a manner most favorable to the plaintiff, simply fail to support a finding that the tax escalation clause was valid as a matter of law. The complaint mentions nothing about [state properties] review board approval, which is a necessary component of a valid contract at law pursuant to § 4b-23 (e). . . . The plaintiff, therefore, does not have an enforceable property interest in the income that would be generated by the tax escalation clause. Accordingly, the claim was properly dismissed by the trial court." (Citations omitted.) Id., 319–20.

As the foregoing summary of *184 Windsor Avenue, LLC*, reveals, that case is wholly inapposite to the present case. Here, the record discloses facts which, if proven, would establish the plaintiff's property interest in the demutualization proceeds. Consequently, the

plaintiff's complaint, by contrast to the complaint in *184 Windsor Avenue, LLC*, alleges an enforceable and identifiable property interest in the proceeds received by the state sufficient to withstand a motion to dismiss.[14] Whether the plaintiff can prove that interest is the crux of the matter, and he is entitled to the opportunity to do so as part of his unconstitutional takings claim.

III

As the trial court stated in concluding that an immediate appeal was warranted with respect to the issues resolved by its partial grant of the state's motion to dismiss for lack of subject matter jurisdiction; see Practice Book § 61-4; "[t]his is a massive, complex case in which vital financial interests of the state, the plaintiff, a putative class of several thousand state employees, and the [insurance company] defendants are at stake." *Gold* v. *Rowland*, Superior Court, judicial district of Hartford, Docket No. CV-02-0813759-S (January 18, 2007). Under today's ruling, however, the plaintiff will be denied his day in court with respect to those significant financial interests, at least insofar as the state is concerned, due to the majority's erroneous conclusion that the state is entitled to dismissal of the plaintiff's constitutional takings claim. I therefore respectfully dissent from that portion of the majority opinion that reverses the judgment of the trial court denying the state's motion to dismiss the takings claim.

[1] At all times relevant to the present case, the plaintiff was an employee of the state of Connecticut.

[2] In essence, the plaintiff claimed that he and others similarly situated, and not the state, were the eligible "statutory members" of Anthem Insurance and, therefore, the rightful owners of the Anthem, Inc., stock.

[3] I therefore would affirm the trial court with respect to its denial of the state's motion to dismiss counts one, two, ten, eleven, twelve and thirteen of the second amended complaint. Counts one and two allege claims in the nature of interpleader under General Statutes § 52-484; counts ten and eleven allege a taking of his property in violation of article first, § 11, of the state constitution; counts twelve and thirteen allege a violation of due process under article first, § 8, of the state constitution arising out of the alleged improper taking of his property. Although I otherwise generally agree with the judgment of the majority, I do not agree that Anthem, Inc., Anthem Health Care Plans, Inc., doing business as Anthem Blue Cross and Blue Shield of Connecticut, Anthem East, Inc., and Anthem Insurance, collectively referred to as the insurance company defendants, lack standing to bring their cross appeal. As the majority acknowledges, "as a practical matter, permitting the plaintiff to pursue his claims against the state could reduce the insurance company defendants' risk of exposure to multiple recoveries" and, further, those companies' "interest in avoiding multiple recoveries against them probably would be sufficient to confer standing on them to bring a claim against the state, which are the claims at issue in the insurance company defendants' cross appeal." Moreover, we do not know whether the insurance company defendants would be able to raise any such claims against the state. In such circumstances, I believe that the insurance company defendants' interest in the state's continued participation in the case—the subject of this appeal—is sufficient to afford them standing for purposes of maintaining their cross appeal. See, e.g., *Nanni* v. *Dino Corp.*, 117 Conn. App. 61, 70, 978 A.2d 531 (2009) ("Aggrievement, in essence, is appellate standing. . . . In the appellate context, [a]ggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." [Internal quotation marks omitted.]).

[4] The trial court rejected the plaintiff's alternative theory of entitlement under article first, § 11, of the state constitution, pursuant to which the

plaintiff and others similarly situated would be individually entitled to the stock proceeds. The plaintiff has not appealed from that portion of the trial court's judgment.

[5] I note that, to the extent that the existence of a principal-agent relationship may be deemed to be a jurisdictional fact, the state has made no effort to demonstrate that the plaintiff cannot establish such a relationship as a matter of law. Thus, the existence of a principal-agent relationship remains in dispute, the resolution of which must await a trial on the merits. See, e.g., *Conboy* v. *State*, 292 Conn. 642, 651–56, 974 A.2d 669 (2009).

[6] In reaching this conclusion, the majority also observes that "the trial court may have been correct that the plaintiff has made a colorable claim that the group as a whole was entitled to the stock, and that the plaintiff had a reasonable expectation under the plan of conversion that Anthem Insurance would deliver a single, joint distribution of the stock to the group and that the state was the logical representative of the group for the purpose of receiving the stock . . . ."

[7] I need not address the question of whether the complaint is, in fact, legally deficient because it fails to allege the existence of a principal-agent relationship. That is, I need not decide whether the plaintiff was required to allege the existence of such a relationship in order to have set forth a cognizable takings claim. Because a motion to dismiss is not the proper vehicle for challenging the legal sufficiency of a pleading, that question is not before this court.

[8] I note, moreover, that there is nothing in the plaintiff's complaint that is inconsistent with the requirement of a principal-agent relationship. Indeed, as I previously have noted, it is axiomatic that the allegations of a complaint must be considered in the light most favorable to the pleader; see, e.g., *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009); and every presumption is to be indulged in favor of jurisdiction. See, e.g., *State* v. *Velky*, 263 Conn. 602, 605–606, 821 A.2d 752 (2003). Moreover, even if the allegations in the complaint were inconsistent with such a relationship, that fact alone would not deprive the court of subject matter jurisdiction over the plaintiff's takings claim because, for purposes of a motion to dismiss, the seminal question is whether the plaintiff can prove a principal-agent relationship, not whether he has alleged it.

[9] The majority incorrectly asserts that I do not dispute that the trial court would have granted the motion to strike for failure to allege a principal-agent relationship. In fact, I do not know whether the trial court would have granted such a motion in the present case. See footnote 7 of this opinion. For the reasons set forth hereinafter, however, even if a motion to strike would have been granted, it is improper for the majority to reverse the judgment of the trial court on that ground.

[10] For this same reason, the majority's conclusion reversing the judgment of the trial court would be incorrect even if a motion to dismiss were the proper procedural vehicle for challenging the plaintiff's takings claim.

[11] The trial court explained this point as follows: "Under [the plaintiff's] analysis, by the time the plan of conversion became effective, the plaintiff's group's membership rights in Anthem Insurance, including their right to receive stock or cash or other consideration in exchange for the extinguishment of such rights in the event of a demutualization, were already fully established, notwithstanding any claim or suggestion to the contrary that might later be made by Anthem Insurance, either . . . in drafting or implementing the plan of conversion [or otherwise]. Accordingly, although Anthem Insurance admittedly assumed that the state was entitled to become the statutory member of [Anthem, Inc.] pursuant to [a group health insurance policy known as] the care plus policy, based perhaps on the mistaken threshold assumption that the state, not the 'group as a whole,' was the one true policyholder and voting member of [Anthem Health Care Plans, Inc., a subsidiary of Anthem Insurance] in relation to that policy before the merger, it had no power to alter, by acting on that allegedly mistaken assumption or otherwise, the established rights of the plaintiff's group vis-a-vis the state with respect to the ultimate ownership and right to benefit from the sale of membership rights in [Anthem, Inc.]."

[12] Of course, to the extent that Anthem Insurance's understanding that it was delivering the stock to the state as the owner of the stock may be well founded in light of any documentary and other evidence that supports that view, that evidence will be highly relevant at trial. The determination of whether the state or the plaintiff is the rightful owner of the stock, however, does not depend on the state of mind of Anthem Insurance at the time it delivered the stock to the state. As previously discussed, that determination

depends upon the intent of the parties, as reflected in the documentary and other relevant evidence, prior to the demutualization and the state's receipt of the stock from Anthem Insurance.

[13] The majority does not reach these claims.

[14] The state also claims that (1) its passive receipt of property under claim of right cannot constitute an unconstitutional taking, and (2) the plaintiff was obligated to exhaust his remedies with the claims commissioner in accordance with General Statutes § 4-142 et seq. before commencing the present action. With respect to the first claim, the state has provided no persuasive reason why the state cannot be held liable under article first, § 11, of the state constitution for retaining property that does not belong to it even though its receipt of that property may be characterized as passive, and I can conceive of no such reason. Indeed, as this court has explained, "property may be 'taken' [for purposes of article first, § 11] without any actual appropriation or physical intrusion"; *Tamm* v. *Burns*, 222 Conn. 280, 284, 610 A.2d 590 (1992); and "[a] constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed." (Internal quotation marks omitted.) Id. With respect to the second claim, there is nothing in our law that requires exhaustion of administrative remedies prior to commencing a claim of an unconstitutional taking. Consequently, neither of these two claims has merit.