

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT OF MASSACHUSETTS

SUFFOLK COUNTY

NO. SJC - 09966

ATTORNEY GENERAL

Plaintiff-Appellant,

v.

COMMISSIONER OF INSURANCE,

Defendant-Appellee,

MASSACHUSETTS PROPERTY UNDERWRITING ASSOCIATION,

Defendant-Intervener-Appellee.

On Appeal from a Final Judgment of the Superior Court

Brief of Amici Curiae

Senator Robert A. O'Leary (Cape & Islands District);
Representative Cleon H. Turner (1st Barnstable);
Representative Eric T. Turkington (Barnstable, Dukes &
Nantucket); Representative Matthew C. Patrick (3rd
Barnstable); and Representative Sarah K. Peake (4th
Barnstable)
in Support of Plaintiff-Appellant

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE ... 1

STATEMENT OF ISSUE ... 1

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE ... 2

ARGUMENT ... 3

I. THE STATUTORY CAPS SHOULD BE APPLIED TO ALL LARGE SHARE
TERRITORIES AS MANDATED BY STATUTE ... 3

II. PUBLIC POLICY CONSIDERATIONS WEIGH STRONGLY AGAINST
APPROVING RATE INCREASES OVER THE STATUTORY CAPS ... 6

CONCLUSION ... 8

INTEREST OF AMICI CURIAE

The *amici curiæ* in this matter are the legislative representatives who represent Cape Cod, Nantucket and Martha's Vineyard in the General Court, including: Senator Robert A. O'Leary (Cape & Islands District); Representative Cleon H. Turner (1st Barnstable); Representative Eric T. Turkington (Barnstable, Dukes & Nantucket); Representative Matthew C. Patrick (3rd Barnstable); and Representative Sarah K. Peake (4th Barnstable). This action is an issue of great concern to the residents of Cape Cod and the Islands, in part because over 40 percent of Cape homes are now insured through the Massachusetts Insurance Property Underwriting Association. As legislators, the *amici curiæ* are well situated to discuss the policy decisions made during the legislative process and the General Court's intent when it revised the enabling statute for the Massachusetts Insurance Property Underwriting Association.

STATEMENT OF ISSUE

The *amici curiæ* adopt the Plaintiff-Appellant's statements of the issues presented.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The *amici curiæ* adopt the Plaintiff-Appellant's statements of facts and statements of the case.

The legislation at issue was originally filed in 2003 as House No. 1684, "An Act Relative to the Massachusetts Property Insurance Underwriting Association", (H. 1684), and sought to revise the Massachusetts Property Association's (MPIUA) enabling statute, M.G.L. ch. 175C. See, St.1968, c. 731, §1; amended by St. 1996, c. 93, §§ 10, 11. House No. 1684 proposed limited changes to the statutory provisions relative to MPIUA's ratemaking process to address the significant growth that MPIUA had experienced since 1996, while continuing to provide reasonably affordable property insurance to residents in areas where it is difficult to obtain insurance from the private insurance market.

On January 1, 2003 H. 1684 was referred by both the Senate and the House of Representatives to the Joint Committee on Insurance. In accordance with legislative Joint Rule 10, on December 4, 2003, the Joint Committee on Insurance held a public hearing on H. 1684. At that hearing, John K.

Golembeski, President of the Massachusetts Property Insurance Underwriting Association, testified in favor of the bill. Mr. Golembeski testified, "At this time, MPIUA believes that it is essential that some *limited* changes be made to the statutory provisions related to MPIUA's homeowners ratemaking process in order to stem the significant growth that MPIUA has experienced since 1996 *while keeping intact the intent of the statute to make basic property insurance available at reasonable price [sic] to eligible applicants in territories with significant MPIUA market share.*" (emphasis added).

Statement of John K. Golembeski, attached as appendix A.

On April 15, 2004, the Joint Committee on Insurance reported the bill favorably as a new draft, H. 4672, to the House. 2003 H. Jour. 1572. The bill was amended by both branches several times concerning issues that do not pertain to the issues before the court. (See, 2004 S. Jour. 2534-2535; 2004 H. Jour. 2594; 2004 S. Jour. 3051-3052.)

On December 22, 2004, Governor Romney signed H. 4672 making it Chapter 436 of the Acts of 2004.

ARGUMENT

I. THE STATUTORY CAPS SHOULD BE APPLIED TO ALL LARGE SHARE TERRITORIES AS MANDATED BY STATUTE

The primary source of insight into the intent of the Legislature is the language of the statute. *Anderson Street Associates v. City of Boston*, 442 Mass. 812 (2004). In making what the *MPIUA* itself saw as "limited changes" to the statute, the statutory language clearly demonstrates an overriding legislative intent to control the costs of property insurance through rate caps.

First, the intention of the Legislature has always been, both in the previous and the revised statutes, clearly stated within the language of the statute, "the intent of this chapter (is) to make basic property insurance available at reasonable cost to eligible applicants in large share territories." See, MGL ch. 175C §5 (b).

Secondly, the Legislature specifically retained the long existing statutory cap structure for rate increases in large share territories. Chapter 175C, § 5 (c), states:

(2) no rate for the territory in any calendar year increases over the lowest rate for that product charged by the association during the prior calendar year in the territory by more than the overall statewide average percentage increase in rates charged from December 31 of the year preceding the prior calendar year to December 31 of that prior calendar year for homeowners insurance by the 10 insurers with the largest market shares of such insurance written in the commonwealth on a statewide basis.

The Massachusetts Property Underwriting Association (MPIUA) seeks to impose rates on three territories far in excess of the 5.9% rate cap for 2006. In territories 32, 33, and 37, the MPIUA's proposed rates increases are 9.5%, 20% and 25%. As a justification for these extraordinary rates, the MPIUA relies on a sentence of chapter 175C, § 5, as amended by the Chapter 436 of the Acts of 2004, that requires the Commissioner of Insurance to consider the effects of predicted hurricane losses and the costs of catastrophe reinsurance. The MPIUA argues that this newly created factual consideration has the effect of completely removing the statutory caps.

The plain language and legislative history of the statute, however, contradict this argument and shows that the Legislature intended to keep the caps in place. The Legislature struck the previous MGL ch. 175C §5 in its entirety and substituted new language that included the caps. In addition, the summary provided to legislators by the Joint Committee on Insurance makes clear the intent to retain the caps, "For large share territories, (over 7% of premiums), rate increases can not exceed the statewide average percentage increase charged by the ten insurers with the largest market shares." Massachusetts House of Representatives Bill Summary for H. 1684 (appendix B).

Finally, the statute's revised language does not state that the Commissioner has the power to exceed the established caps. Such a power would defeat the clear intent of the Legislature to control rate increases. This revised statute should be construed in light of the preexisting statutory law, and "it is not to be lightly supposed that radical changes in the law were intended where not plainly expressed in the statute. *Greater Boston Real Estate Bd. V. Department of Telecommunications and Energy*, 438 Mass. 197 (2002), quoting *Ferullo's Case*, 331 Mass. 635, 637 (1954). The Commissioner should have observed the caps that are central to the Legislature's plan to control insurance costs. Furthermore, the Court should not now grant her this extraordinary new power.

II. PUBLIC POLICY CONSIDERATIONS WEIGH STRONGLY AGAINST APPROVING RATE INCREASES OVER THE STATUTORY CAPS

Public policy demands that the statute not be read in such a way that will lead to unaffordable insurance rates. This court has consistently interpreted statutes, "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and

the main object to be accomplished, to the end that the framers may be effectuated." *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745; *Kobrin v. Gastfriend*, 443 Mass. 327, 331 (2005); *Triplett v. Oxford*, 439 Mass. 720, 723 (2003), quoting *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975).

The very reason for creating the MPIUA or "Fair Plan" in 1968 was to make basic property insurance available to all Massachusetts property owners who were otherwise unable to secure such insurance in the voluntary insurance marketplace. In 40 years since the law was enacted the ability to secure affordable property insurance in the Commonwealth, and specifically on the Cape and Islands, has grown increasingly difficult and given the current trends the problem may only worsen. Without the caps, or other limitations on the Commissioner's discretion, the insurance rates imposed on residents in those areas will become cost prohibitive. These rate changes have an especially detrimental effect on the large senior citizens population on the Cape and the Islands, who are living on fixed incomes, and the working-class families who are both essential to the economies of the Cape and Islands and are struggling to remain in the coastal communities that they call home. This court has held that statutes should be

read as a whole, so as to ensure that the statute serves its intended purpose. *Boston Police Patrolmen's Ass'n, Inc. v. Police Dept. of Boston*, 446 Mass. 46 (2006). This statute should, therefore, be read in such a way as to preserve the important public policy that framed the debate and statutory language at issue. The caps retained by the revised statute should be observed and not be rendered meaningless by the unfettered discretion of the Commissioner of Insurance.

CONCLUSION

For the reasons described above and in the briefs of Plaintiff-Appellant, the MPIUA rate approval by the Commissioner of Insurance should be overturned.

Respectfully Submitted,

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