

2010

Fair Access To Insurance Requirements: Do "Fair" Property Insurance Premiums For Individual Coastal Property Owners In Massachusetts Equate With Fairness To The Greater Market?

Joshua Aaron Randlett
University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.gov/oclj>

Recommended Citation

Joshua A. Randlett, *Fair Access To Insurance Requirements: Do "Fair" Property Insurance Premiums For Individual Coastal Property Owners In Massachusetts Equate With Fairness To The Greater Market?*, 15 *Ocean & Coastal L.J.* (2010).
Available at: <http://digitalcommons.maine.gov/oclj/vol15/iss1/20>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

FAIR ACCESS TO INSURANCE REQUIREMENTS:
DO “FAIR” PROPERTY INSURANCE PREMIUMS
FOR INDIVIDUAL COASTAL PROPERTY OWNERS
IN MASSACHUSETTS EQUATE WITH FAIRNESS
TO THE GREATER MARKET?

*Joshua Aaron Randlett**

I. INTRODUCTION

The insurance industry is one of the oldest industries in the world, with some accounts dating it as far back as the Code of Hammurabi (Code)—the first known set of codified laws that were promulgated by the famed Babylonian king.¹ The practice of bottomry, “one of the earliest forms of insurance . . . used throughout the ancient world,”² can conservatively be traced to the Code, which was created in the eighteenth century B.C.³ There is further evidence suggesting that, prior to the establishment of the Code, the Babylonians entered into primitive insurance contracts as far back as the fourth millennium B.C.⁴ The modern insurance industry has its roots in the well-known insurance company Lloyd’s of London, which began underwriting marine insurance policies in English coffee houses in 1688.⁵ Underwriting is the

* University of Maine School of Law, 2010. The author would like to thank his mother, father, and sister for all of their love and support over the years.

1. See JIM DAVIS ET AL., *PAYING THE PRICE: THE STATUS AND ROLE OF INSURANCE AGAINST NATURAL DISASTERS IN THE UNITED STATES* 18 (Howard Kunreuther & Richard J. Roth, Sr., eds., Joseph Henry Press 1998) [hereinafter DAVIS].

2. *Id.*

3. See DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* 27 (Harvard University Press 2002).

4. *Id.*

5. RAYMOND FLOWER & MICHAEL WYNN JONES, *LLOYD’S OF LONDON: AN ILLUSTRATED HISTORY* 20 (Hastings House Publishers, Inc. 1974). See also Lloyd’s Chronology, http://www.lloyds.com/About_Us/History/Chronology.htm (last visited Apr. 18, 2009).

process by which insurers determine whether, and at what cost, to insure against a given risk.⁶

The United States currently has the world's largest insurance market.⁷ As of 2005, the American insurance industry "employ[ed] about 2.3 million people, and insurance gross premiums totaled \$1.15 trillion."⁸ In 2006, insurance gross premiums totaled \$1.4 trillion, an increase of nine percent over the 2005 totals,⁹ and there were 7660 domestic insurers in the United States.¹⁰ Yet, despite the prevalence and importance of insurance, the industry remains almost entirely regulated by state law.¹¹ The primary federal statute dealing with insurance, the McCarran-Ferguson Act, declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest"¹² and that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance"¹³

With the ubiquity of insurance in our society, the industry affects nearly everyone and influences a vast array of relationships; however, many are unaware of the ways in which insurance impacts their lives until something goes wrong.¹⁴ There are myriad social institutions that shape the lives of individuals, and it would be cumbersome to

6. DAVIS, *supra* note 1, at 84.

7. *See generally* JACK W. PLUNKETT, PLUNKETT'S INSURANCE INDUSTRY ALMANAC: INSURANCE INDUSTRY MARKET RESEARCH, STATISTICS, TRENDS AND LEADING COMPANIES (Jack W. Plunkett ed., Plunkett Research Ltd. 2007).

8. *Id.* at 8.

9. National Association of Insurance Commissioners, NAIC Releases 20th Edition of IDRR (Aug. 1, 2007), *available at* http://www.naic.org/Releases/2007_docs/naic_releases_20th_edition_of_idrr.htm.

10. *Id.*

11. *See* 15 U.S.C. §§ 1011-1015 (2006).

12. 15 U.S.C. §1011.

13. 15 U.S.C. §1012(b). Prior to the McCarran-Ferguson Act, American jurisprudence did not consider insurance to be a part of interstate commerce; thus, it was left exclusively within the jurisdiction of the several states. *See generally* Paul v. Virginia, 8 Wall. 168 (1868). The U.S. Supreme Court did not hold that insurance was within the jurisdiction of the federal government and subject to federal regulation until the mid-twentieth century. *See* United States v. Se. Underwriters Ass'n et al., 322 U.S. 533, 539, 553 (1944).

14. TOM BAKER, INSURANCE LAW AND POLICY 1 (Been et al. eds., Aspen Publishers 2d ed. 2008) ("For most people most of the time, insurance remains firmly in the background of consciousness, part of the dimly understood and taken-for-granted social infrastructure.") [hereinafter BAKER].

contemplate each one on a daily basis. For many, “[i]t is enough that they work and that we know how to use them.”¹⁵

This Comment seeks to address an issue of primary importance for many homeowners in coastal Massachusetts—the inability to purchase property insurance through the voluntary market. In many areas of the Massachusetts seacoast, private insurers have completely withdrawn coverage.¹⁶ The only means through which many of these homeowners can obtain property insurance is through the Massachusetts Property Insurance Underwriters Association (MPIUA), a state agency organized under the Massachusetts Fair Access to Insurance Requirements (FAIR) statute.¹⁷ The MPIUA is intended to act as an “insurer of last resort,” allowing homeowners otherwise unable to buy property insurance through the private market to obtain property insurance through the government sponsored program.¹⁸ While the MPIUA was meant to be an insurer of last resort, it has quickly become the primary insurer in several Massachusetts coastal markets.¹⁹ While the MPIUA is laudatory in its goals, this Comment addresses serious flaws inherent in the MPIUA and its potential shortcomings in the event of a catastrophe.

Part II of this Comment discusses key factors that have led to a coastal property insurance meltdown. Chief amongst these factors is an increase in the frequency and severity of catastrophic events (most particularly hurricanes) which has led to increased exposure and liability for insurance companies in vulnerable markets. Part II also introduces the concept of FAIR Plans (both in Massachusetts, and, briefly, in other markets) and analyzes how the MPIUA became the primary insurer for many Massachusetts coastal property owners. Part III concentrates on the statute that enabled the creation of the MPIUA, the statutory authority and limitations imposed on the MPIUA (as well as its potential shortcomings), and a study of a legal dispute between the Massachusetts Attorney General and the Massachusetts Commissioner of Insurance concerning the appropriate interpretation and application of the statutory authority granted to the MPIUA. Finally, Part IV examines why FAIR

15. *Id.*

16. *See generally* InsuranceJournal.com, Mass. Officials Respond to Cape Homeowner’s Crisis, Feb. 26, 2004, <http://www.insurancejournal.com/news/east/2004/02/26/37195.htm> [hereinafter *Mass. Officials*].

17. MASS. GEN. LAWS ch. 175C, §§1-9 (1998 & Supp. 2008).

18. *See* The Mission Statement of the Massachusetts Property Insurance Underwriters Association, *available at* <http://www.mpiua.com/aboutus.asp> (last visited Apr. 18, 2009).

19. Attorney Gen. v. Comm’r of Ins., 878 N.E.2d 554, 562 n.14 (Mass. 2008) (stating that, by 2004, the MPIUA was the largest property insurer in Cape Cod, Martha’s Vineyard, and Nantucket).

Plans are typically ill-suited to act as primary insurers, and contains a discussion of different approaches which could be taken to remedy the coastal property insurance conundrum.

II. COASTAL PROPERTY MARKET FAILURE AND THE FAIR RESPONSE

A. *The Increased Risk Confronting Coastal Property Insurers*

Because insurance companies are very much concerned with risk, it is no surprise that as insurers face an increase in liability exposure they adjust their business models accordingly. Factors that increase risk exposure and potential liability, such as global warming, change the insurance industry's approach to underwriting. For instance, in response to the heightened risk facing insured coastal property (and, therefore, the greater likelihood that insurance companies will have to pay claims for the losses of policy holders), private insurers have largely fled the Massachusetts coastline. It is the purpose of this section to put that occurrence in context.

Global warming has become one of the leading causes for concern in the scientific and political communities.²⁰ The phenomenon is believed to have contributed in large part to the concurrent warming and rising of the oceans,²¹ and some scientists believe that "shifting weather patterns" are among the many "unavoidable results" of the global warming phenomenon.²² It is widely thought that global warming will lead not only to a higher frequency of storms, but that the severity of storms will also increase.²³ Of particular concern to coastal property owners is the risk of hurricanes, and it is not surprising to learn that recent destruction caused by hurricanes has been attributed, at least partially, to global warming.²⁴ Indeed, there were sixteen named tropical storms in 2008,

20. See Elisabeth Rosenthal & Andrew C. Revkin, *Science Panel Calls Global Warming 'Unequivocal'*, N.Y. TIMES, Feb. 3, 2007, at A1 [hereinafter *Science Panel*]; see also Elisabeth Rosenthal, *Amid a Hopeful Mood, U.N. Talks Set Countries on Path Toward a Global Climate Treaty*, N.Y. TIMES, Dec. 12, 2008, at A7 (stating that U.N. leaders have set goals to address and combat global warming and the attendant global climate change on a multi-national level).

21. *Science Panel*, *supra* note 20.

22. *Id.*

23. See generally GUY CARPENTER & COMPANY, LLC., WORLD CATASTROPHE REINSURANCE MARKET 2008 9 (2008).

24. NEIL A. DOHERTY ET AL., MANAGING LARGE-SCALE RISKS IN A NEW ERA OF CATASTROPHES 5 (Wharton School of the University of Pennsylvania, 2008) [hereinafter DOHERTY] ("There is a growing concern that global warming might lead to the

eight of which were classified as hurricanes.²⁵ Of those eight hurricanes, five were “major hurricanes [classified] at Category 3 strength or higher.”²⁶ According to the Climate Prediction Center of the National Oceanic and Atmospheric Administration, the United States has been in an “active hurricane era” since 1995, in which all but four hurricane seasons experienced a higher than average number of hurricanes.²⁷

In recent years, the hurricanes that have hit the United States have led to a vast amount of destruction and economic loss.²⁸ In 2005 alone, hurricanes Rita, Katrina, and Wilma cost an estimated \$180 billion in insurance reimbursements and federal relief.²⁹ On its own, Hurricane Katrina accounted for nearly \$100 billion worth of losses and damaged approximately 300,000 homes; it was the first American natural disaster to cause such extensive destruction.³⁰ In the fall of 2008, Hurricane Ike reaped devastation along the coasts of Texas and Louisiana. The

occurrence of much more intense hurricanes hitting the coast over a [short] period of time.”); *see also* Cornelia Dean, *Will Warming Lead to a Rise in Hurricanes?*, N.Y. TIMES, May 29, 2007, at F1 (writing that some scientists believe that the increased frequency and force of hurricanes are “directly linked to the trend in sea-surface temperature,” an effect of global warming).

25. The National Oceanic and Atmospheric Administration, Atlantic Hurricane Season Sets Records (Nov. 26, 2008), http://www.noaanews.noaa.gov/stories2008/20081126_hurricane_season.html.

26. *Id.*

27. National Oceanic and Atmospheric Administration, 2008 Atlantic Hurricane Season Outlook Update (Aug. 7, 2008), <http://www.cpc.noaa.gov/products/outlooks/hurricane.shtml> (last visited Apr. 18, 2009).

28. *See generally* DOHERTY, *supra* note 24.

29. *Id.* at 5. Moreover, four major hurricanes in 2004 (Charley, Frances, Ivan, and Jeanne) destroyed nearly 85,000 homes. DEPARTMENT OF HOMELAND SECURITY, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 7 (2006) [hereinafter DEPARTMENT OF HOMELAND SECURITY]. On average, the Atlantic hurricane season will experience ten tropical storms, five of which will typically be classified as hurricanes and hit the mainland. *Id.* at 21. Of the five hurricanes that are likely to hit the eastern seaboard, two are likely to be designated as Category Three storms or higher—the same Category as Hurricane Katrina. *Id.* Further, from 2000 through 2008, the United States experienced approximately \$420.6 billion in natural disaster losses. DOHERTY, *supra* note 24, at 3.

30. DEPARTMENT OF HOMELAND SECURITY, *supra* note 29, at 7. For an interesting and thorough analysis of the financial and social impacts of Hurricane Katrina, as well as a study of the factors that contributed to the destruction of New Orleans and the governmental response, *see generally* JENNI BERGAL ET AL., CITY ADRIFT: NEW ORLEANS BEFORE AND AFTER KATRINA (Diane Fancher, ed., Louisiana State University Press 2007) [hereinafter CITY ADRIFT]. Beyond structural and economic damages, Katrina also took a high human toll, as it was the deadliest natural disaster to hit a major U.S. city in over a century. *Id.* at 3.

financial impact to Texas was estimated by officials to be between \$27 and \$35 billion; for Louisiana, that figure rose to an estimated \$30 to \$40 billion.³¹ The staggering amount of damages can be attributed in part to the fact that there has been increased development in high-risk areas,³² as well as an increase in the value of the developments that are insured in such areas.³³

It goes without saying that an increase in the frequency and intensity of hurricanes inevitably leads to increased liability for insurance companies that insure properties at risk of hurricane-related damage. Because the likelihood of occurrence and the potential impact of hurricanes in any given market is difficult (if not impossible) to accurately predict, insurance companies are not able to effectively use the law of large numbers³⁴ to aid in predicting losses or calculating appropriate premiums for home owners in hurricane-prone areas.³⁵ This

31. Siobhan Gorman, *The Financial Crisis: Texas, Louisiana Press for Aid*, THE WALL ST. J., Sept. 24, 2008, at A6.

32. DOHERTY, *supra* note 24, at 4. To illustrate, over fifty percent of the United States population lives in coastal communities, leading to an increase in the number of homes and businesses that require property insurance in such markets. *Id.*

33. *Id.* For example, in 2004, there was approximately \$1.9 trillion worth of insured properties in Florida alone, and, as of March 2008, eighty percent of the insured assets in Florida were located near the coast. *Id.*; see also PHILLIP E. AUERSWALD ET AL., *Where Private Efficiency Meets Public Vulnerability: The Critical Infrastructure Challenge*, in SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY 3, 7 (Auerswald et al. eds., 2006) [hereinafter SEEDS OF DISASTER] (explaining that a combination of population growth, an increase in the value of assets, and a lack of mitigation efforts have led to the highest levels of economic loss due to natural hazards in history).

34. BAKER, *supra* note 14, at 3 (“[T]he basic idea of the law of large numbers is that we can be more certain about the future experience of large groups in the aggregate than we can be about the future experience of any particular individuals in the group.”). While large numbers of people have experienced property loss and damage over the years due to hurricanes, the fact remains that hurricanes are sporadic and infrequent in any particular market. Additionally, there are numerous factors that can influence the amount of damage caused by a hurricane, including the storm’s intensity and duration, the extent of development on the affected coastline, and the value of property and buildings located thereon. Thus, for underwriting purposes, it is difficult to compare losses (even in the aggregate) of one coastal community to another due to the varying factors. Likewise, due to the infrequency of hurricanes in any particular community, aggregate predictions about risk of loss and potential liability are difficult to make even in particularized markets.

35. See Dwight M. Jaffee & Thomas Russell, *Catastrophe Insurance, Capital Markets, and Uninsurable Risks*, in THE WORKING PAPER SERIES 96-12 at 1 (The Wharton School Financial Institutions Center, 1996) (writing that, for the private insurance industry, catastrophe insurance “is not a point in time risk spreading problem, but rather an intertemporal problem of how to match a smooth flow of annual premium

is undesirable in a market in which insurance and reinsurance companies attempt to calculate premiums based on risk “in order to provide signals to individuals as to the hazards they face”³⁶ and to ensure insurer solvency.

Considering the general trend of increased hurricane frequency and intensity, the astronomical costs of recent hurricanes have caused growing concern within the insurance industry.³⁷ “Catastrophe insurance” has been deemed by some as an “uninsurable risk,”³⁸ and the private insurance industry is facing an uphill battle in determining how to fairly and accurately insure coastal properties in areas that are at risk for hurricane damage.³⁹ Due to the increased risk of loss, private insurers have had difficulty providing adequate coverage in coastal markets⁴⁰ and have had to reassess their approach to insuring such markets.⁴¹

B. The Insurance Industry’s Response

Various insurance companies have reacted differently to such anxiety about the state of the coastal property insurance market. Some insurance and reinsurance companies have reacted by preemptively raising premiums for property insurance in vulnerable markets in order to protect against the increased risk of loss.⁴² Other companies have responded by withdrawing coverage and refusing to underwrite property insurance policies in hurricane-prone areas.⁴³ Others still have attempted

receipts to a highly non-smooth flow of annual loss payments”); *see also* DOHERTY, *supra* note 24, at 1 (“The question is not *whether* catastrophes will occur, but *when*, how *frequently* they will strike, and the extent of damages they will cause.”).

36. DOHERTY, *supra* note 24, at 6.

37. *See generally* DOHERTY, *supra* note 24; RAWLE O. KING, CONGRESSIONAL RESEARCH SERVICE, HURRICANES AND DISASTER RISK FINANCING THROUGH INSURANCE: CHALLENGES AND POLICY OPTIONS (2005) [hereinafter KING]; MARTIN F. GRACE & ROBERT W. KLEIN, CENTER FOR RISK MANAGEMENT AND INSURANCE RESEARCH AT GEORGIA STATE UNIVERSITY, NATURAL DISASTERS AND THE SUPPLY OF HOME INSURANCE (2002).

38. Jaffee, *supra* note 35, at 1.

39. *Id.*

40. *Id.*

41. DAVIS, *supra* note 1, at 97 (“There is a question as to whether the voluntary insurance market can provide affordable coverage to customers who seek it and still ensure the long-term solvency of firms in the market.”).

42. *See generally* CARPENTER, *supra* note 23.

43. *Mass. Officials*, *supra* note 16 (writing that in February of 2004, three major insurers in Cape Cod informed policyholders that they would not renew any policies in that market); *see also* Jaffee, *supra* note 34, at 1 (stating that, at one point, the state of

to harness new technologies to aid in calculating rates that better reflect the risk of insuring coastal properties.⁴⁴ For instance, some insurance companies are using new catastrophic computer models that take into account climate change when projecting hurricane losses;⁴⁵ it is hoped that these computer models will allow insurance companies to better assess risks associated with insuring coastal properties, which in turn will allow for more appropriate premiums and an increased likelihood of insurer solvency in the event of a catastrophic loss.⁴⁶

One response to the increased risk that insurance companies are facing has been a mass exodus of insurers from the Massachusetts coastline. Insurers initially began limiting coverage on the Massachusetts coast in 1994, when they began using computer-based modeling methods to calculate risk exposure in coastal markets.⁴⁷ In 2004, three major insurers in the Cape Cod region began to notify existing policyholders that they would no longer be renewing policies in that region.⁴⁸ At the time, these three companies insured 14,000 homes in the Cape Cod region; for the next several years, roughly 1200 policy renewals were denied each month until coverage eventually faded.⁴⁹ By 2006, many of the remaining private insurers had increased their premiums by a large margin, in some instances as much as two hundred percent; other insurers continued to completely withdraw coverage.⁵⁰

As coastal homeowners faced mounting difficulty in purchasing property insurance through the private market, many were forced to find alternative means to insure their properties. A significant number of these homeowners in Massachusetts have only been able to purchase insurance through a residual market mechanism known as the Fair Access to Insurance Requirement (FAIR) Plan, a statutorily-created, state-funded insurer.⁵¹

Florida placed a moratorium on insurance company withdrawal in response to the high numbers of insurers exiting the state).

44. See generally Sarah M. Tran, *Updated Hurricane Models: A New Opportunity to Insure Against Climate Change*, 14 B.U. J. SCI. & TECH. L. 73 (2008).

45. *Id.* at 75.

46. *Id.* An increasingly popular computer model is the Risk Management Solutions model, which accounts for “overlooked climatic trends, including warming ocean water,” which leads to more accurate risk predictions. *Id.* at 90.

47. Attorney Gen. v. Comm’r of Ins., 878 N.E. 2d 554, 562 n.14 (Mass. 2008).

48. *Mass. Officials*, *supra* note 16.

49. *Id.*

50. InsuranceJournal.com, *Cape Code Home Rates Continue to Rise; Another Insurer Exits*, June 4, 2006, <http://www.insurancejournal.com/news/east/2006/06/04/69132.htm>.

51. See generally MASS. GEN. LAWS ch. 175, §§1-9 (1998 & Supp. 2008).

FAIR Plans are state-subsidized insurance companies that are intended to act as “insurers of last resort.”⁵² That is to say, FAIR Plans exist to make sure that people who are deemed to be too “high risk” to obtain insurance on the voluntary market are still able to access insurance at an affordable cost, reflecting the societal notion that insurance is a desirable and important commodity. Typically, FAIR Plans operate as “syndicated associations of property insurers doing business under the auspices of the state insurance regulator,” which “act as a single insurer.”⁵³ Such plans emerged in the 1960s due to the flight of insurance companies from major cities in response to civil disorder and urban riots, most notably the Watts riots of 1965.⁵⁴ To remedy the situation, Congress passed the Housing and Urban Development Act of 1968,⁵⁵ which sought to make sure that citizens in “risky” markets still had access to property insurance. The Act operated by offering federal reinsurance to companies that did business in states that voluntarily adopted FAIR statutes.⁵⁶ FAIR Plans now exist in thirty-four states, as well as the District of Columbia, and are particularly common in coastal areas.⁵⁷

As private insurers fled the Massachusetts coast, so many coastal property owners turned to FAIR policies for property insurance that by 2004, the MPIUA had become the largest insurer in Cape Cod, Martha’s Vineyard, and Nantucket.⁵⁸ Currently, the MPIUA insures approximately 150,000 properties throughout the state of Massachusetts⁵⁹ and has become the largest insurer in many markets. For instance, looking solely at Cape Cod and the surrounding islands, the MPIUA insures an estimated 59,000 properties, or about forty-four percent of the market share.⁶⁰ The dominance of the FAIR Plan in the insurance market

52. See, e.g., *Mitchell v. United Nat. Ins. Co.*, 127 Cal. App. 4th 457, 464 (Ca. 2005).

53. KING, *supra* note 37, at 19.

54. *Id.* Insurance companies fled urban areas that they felt were at risk for riots, which often resulted in property loss. While no single urban riot completely precipitated FAIR plans, the infamous Watts riots of 1965 (which largely emanated in response to racial and social tension and resulted in property damage and destruction) certainly contributed to the widespread adoption of such plans. See also DAVIS, *supra* note 1, at 48 (giving an overview of the history and emergence of FAIR Plans in the United States).

55. KING, *supra* note 37, at 19 (citing to 12 U.S.C. §1749bbb-3 (repealed)).

56. *Id.*

57. *Id.*

58. *Attorney Gen. v. Comm’r of Ins.*, 878 N.E. 2d 554, 562 n. 14 (Mass. 2008).

59. Kimberly Blanton, *Coastal Areas Get Breather on Premiums*, THE BOSTON GLOBE, May 28, 2008, at C1 [hereinafter *Coastal Areas Get Breather*].

60. David Kibbe, *SJC Upholds FAIR Plan Rate Hike*, THE CAPE COD TIMES, Jan. 4, 2008, at B7 [hereinafter *SJC Upholds FAIR Plan*].

is not a phenomenon limited to Massachusetts; the Insurance Information Institute reports that state-created insurers of last resort have grown “exponentially” to encompass a combined two million policies with a liability exposure of \$600 billion across the nation, a tenfold increase from just \$54.7 billion in 1990.⁶¹ Most of this growth has come from coastal areas at risk of hurricane damage and is attributed to “the rapid rise in coastal development and property values.”⁶²

IV. THE MASSACHUSETTS FAIR ACCESS TO INSURANCE REQUIREMENTS STATUTE

A. *The Operation of the FAIR Statute*

In Massachusetts, the residual market insurance mechanism known as the FAIR Plan was created through the Fair Access to Insurance Requirements statute.⁶³ Sections 4 through 9 of the statute operate together to create a “joint underwriting association” that is intended to provide “basic property insurance to eligible applicants who are otherwise unable to obtain such coverage in the voluntary market.”⁶⁴ The MPIUA serves as this “joint underwriting association”⁶⁵ and is the entity with which most people interact when taking advantage of the FAIR statute; therefore, the terms MPIUA and FAIR Plan may be used interchangeably.⁶⁶

Section 4(a) of the statute broadly states that “[a]ll insurers licensed to write . . . basic property insurance or any component thereof in multi-peril policies [in Massachusetts], shall cooperate in organizing a joint underwriting association which shall provide basic property insurance”

61. Press Release, Insurance Information Institute, State-Run Property Insurers See Rapid Growth in Hurricane-Prone Regions (Jun. 8, 2007), *available at* <http://www.iii.org/media/updates/archive/press.772976/>.

62. *Id.* See also Liam Pleven, *Hurricane Warnings: As Insurers Flee Coast, States Face New Threat*, THE WALL ST. J., June 6, 2007, at A1 (writing that state insurers of last resort have quickly expanded up and down the east coast, doubling the number of policies written and increasing liability threefold from 2001 to 2007).

63. MASS. GEN. LAWS ch. 175C, §§ 1-9 (1998 & Supp. 2008).

64. §§ 4-9.

65. See PLAN OF OPERATION OF MASSACHUSETTS PROPERTY INSURANCE UNDERWRITING ASSOCIATION, Section I A. [hereinafter PLAN OF OPERATION], *available at* <http://www.mpiua.com/pdf/MAPlanOfOperation.pdf>.

66. CONSTITUTION OF THE MASSACHUSETTS PROPERTY INSURANCE UNDERWRITING ASSOCIATION, art. I [hereinafter CONSTITUTION], *available at* <http://www.mpiua.com/pdf/ConstitutionOfMa.pdf> (stating that the MPIUA may also use the FAIR plan as its trade name).

to those who are unable to procure property insurance through the private market.⁶⁷ That section further mandates that every insurer in the state of Massachusetts participate and remain engaged in the MPIUA as “a condition of its authority” to sell insurance.⁶⁸ The FAIR statute also prohibits all property insurance companies from refusing a request for inspection from an eligible applicant,⁶⁹ unless that applicant is either already indebted to that company or is unwilling to make payment arrangements with such insurance company.⁷⁰ In short, all insurance companies that provide property insurance, either directly or through multi-peril policies (such as homeowner’s policies) are required to be lumped into one comprehensive company, the MPIUA. Such member-insurance companies are required to participate in and remain a member of the MPIUA; failure to do so results in a revocation of the privilege to sell property insurance in Massachusetts. While the statute may be well intentioned, there is an inherent conflict between the operation and sustainability of the MPIUA and its overarching goal of providing property insurance to those individuals who, absent the MPIUA, would be unable to procure property insurance policies due to any number of factors (which typically include refusal to underwrite due to high risk of liability to insurers due to hurricane losses).⁷¹

While section 4(a) requires private insurers to organize and maintain the MPIUA, section 4(b) grants the MPIUA authority to “issue policies, collect premiums . . . adjust claims and pay losses on behalf of its members” and to “take all other actions necessary or appropriate to carry out its functions” as a residual market insurer.⁷² The policies put forth by the MPIUA must be “consistent with plans offered by voluntary market

67. MASS. GEN. LAWS ch. 175C, § 4(a) (1998 & Supp. 2008); *see also* CONSTITUTION, *supra* note 66, art. III (“Every insurer licensed to write in the Commonwealth of Massachusetts, on a direct basis, basic property insurance as defined in the statute, or any component thereof in multi-peril policies, shall be a member of the Association.”).

68. MASS. GEN. LAWS ch. 175C, § 4(a) (1998 & Supp. 2008).

69. § 1 (defining “eligible applicant” as “any person having an insurable interest in property eligible for basic property insurance”). Further, a “credit eligible territory” is defined as “any territory of the commonwealth in which at least twenty percent of the homeowners premium averaged over the most recent three calendar years was written by the association.” *Id.*

70. § 3.

71. *Mass. Officials*, *supra* note 16 (stating that the voluntary property insurance market in many areas of coastal Massachusetts has dwindled, in large part due to new storm models that predict substantial liability for insurance companies in the event of a “storm of the century”).

72. § 4(a), (b).

insurers.”⁷³ Each member-insurer within the MPIUA is required to participate in the “expenses, profits and losses” of the MPIUA in the proportion that the “premiums written by each such member for basic property insurance . . . bear to the aggregate premiums for such insurance written in the commonwealth by all members of the association,” which is to be determined on an annual basis.⁷⁴

In its real world application, the FAIR statute not only forces private insurers into an artificial residual market carrier that underwrites policies to individuals who have already been deemed to be too high risk to insure, but also requires that each individual member-insurer within the MPIUA share in its profits—which are few and far between—and losses based on the respective market share of each individual insurer. For private insurers that participate in the MPIUA, this profit and loss sharing approach has historically translated into a pattern of loss.⁷⁵ For example, in 2003, the MPIUA experienced a loss of approximately \$138 per policy written by the association.⁷⁶

In the event that any member-insurer becomes insolvent and cannot pay its portion of the MPIUA’s expenses and/or losses, the remaining member-insurers within the MPIUA must cover the unpaid expenses and losses left by the insolvent company.⁷⁷ Moreover, the MPIUA becomes subrogated to any rights of the remaining private member-insurers in any liquidation proceedings against the insolvent company.⁷⁸

The MPIUA is governed by a board of eighteen unpaid directors, ten of whom are elected yearly by members of the MPIUA.⁷⁹ The remaining eight include two representatives of insurance agents and brokers and six public officials unaffiliated with the insurance agency, all of whom are appointed yearly by the Massachusetts Commissioner of Insurance (Commissioner).⁸⁰ The Commissioner is charged with the responsibility

73. § 4(b).

74. § 4(e)(1); *see also* CONSTITUTION, *supra* note 66, art. IV(D) (“The Association may assess members from time to time for funds necessary to defray the expenses of the Association, including losses on policies issued by the Association on behalf of member companies.”).

75. Attorney Gen. v. Comm’r of Ins., 878 N.E. 2d 554, 562 n.15 (Mass. 2008) (“MPIUA’s average underwriting profit-loss per policy over fiscal years 1994-2003 is a loss of \$81 per policy, and of \$101 per policy excluding the year 1998, which experienced unusual profits.”).

76. *Id.*

77. CONSTITUTION, *supra* note 66, art. X(A).

78. *Id.*

79. MASS. GEN. LAWS ch. 175C, § 4(f) (1998 & Supp. 2008).

80. *Id.*

of supervising and regulating the MPIUA⁸¹ and essentially is entitled to have the final say in any plan of action proposed by the MPIUA.

*B. The Relationship Between the MPIUA and the
Commissioner of Insurance*

As an illustration of the breadth of the authority that the Commissioner has over the MPIUA, the FAIR statute clearly states that the commissioner must give prior approval to all insurance rates that the MPIUA proposes for the coming year.⁸² When the MPIUA seeks to propose rate increases, it must first file the proposed rate increases with the Commissioner.⁸³ There are requirements for proper notice and a hearing, wherein the MPIUA is entitled to introduce evidence in support of the rate increase, which must be satisfied before the Commissioner is able to decide upon the proposal.⁸⁴ The MPIUA bears the burden of proving that the increase falls within “a range of reasonableness” and otherwise meets the requirements of the FAIR statute.⁸⁵ If the Commissioner does not approve the increases, she may either flatly reject the proposal or conditionally deny it and make recommendations.⁸⁶ The MPIUA then has the option to either adopt the recommendations and re-file, revise and re-file, or start over from scratch.⁸⁷

Admittedly, in some areas of the state (those not designated as “large share territories”),⁸⁸ the Commissioner is statutorily required to be deferential in approving insurance rates; the Commissioner “shall approve all rates . . . if the commissioner finds that the proposed rates . . . comply with the requirements of the General Laws.” In those areas, the Commissioner may disapprove of rates only if they are higher than ninety percent of the rates in that respective territory, as set by the ten

81. § 5(a).

82. § 5(c).

83. § 5(b); *see also* Attorney Gen. v. Comm’r of Ins., 878 N.E. 2d 554, 557 (Mass. 2008).

84. § 5(b).

85. *Attorney Gen.*, 878 N.E. 2d at 557.

86. *See generally id.* at 556, 559.

87. *See generally id.* at 556.

88. MASS. GEN. LAWS ch. 175C, § 1 (1998 & Supp. 2008) (defining “large share territory” as “any territory in which at least 7 per cent of the homeowners premium averaged over the most recent 3 calendar years was written by the association,” adjusted annually so that “in no event shall there be more than 13 large share territories designated in any given year”).

insurers with the largest market shares in Massachusetts.⁸⁹ Generally, in regular markets (those where the MPIUA has minimal involvement and residents are able to obtain property insurance through the private market), the Commissioner shall approve the MPIUA's rates as long as the rates are generally lawful and reasonable (as measured by the voluntary market).⁹⁰ However, considering the fact that the MPIUA has a negligible impact on markets other than large share territories, the Commissioner is not held to this standard exceedingly often. Rather, it is more typically the case that the Commissioner is asked to approve rates for large share territories; in such instances, the Commissioner has many more factors to consider in determining whether to accept or reject the proposed rates. When analyzing proposed rates for large share territories, the Commissioner:

shall approve all rates . . . *only* if the commissioner finds that: (1) the proposed rates . . . comply with the requirements of the General Laws; and (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 . . . for the homeowners insurance by the 10 insurers with the largest market shares of such insurance written in the commonwealth on a statewide basis.⁹¹

In essence, this means that in large share territories the Commissioner may only approve the MPIUA's rates if they are both lawful *and* the rates do not increase by a higher percentage than the statewide percentage increase for the same type of insurance. Historically, this statutory limitation has resulted in approval for only minimal rate increases.⁹² For instance, from 1998 through 2003, the MPIUA's rates were consistently increased by two percent or less.⁹³

Nevertheless, in section 5(c) there is an important caveat to the general directive for the commissioner to reject any and all MPIUA rate increases beyond the applicable percentage limit. Immediately following

89. § 5(c).

90. *Id.*

91. *Id.*

92. Attorney Gen. v. Comm'r of Ins., 878 N.E. 2d 554, 562 (Mass. 2008).

93. *Id.* However, the 2005 hurricane season that brought Hurricane Katrina and other destructive hurricanes led to increased coastal property insurance premiums throughout the country, and the FAIR plan premiums were no exception; in 2006 the FAIR plan raised its premiums in Cape Cod by twenty-five percent. *Coastal Areas Get Breather*, *supra* note 59.

the two conditions quoted above, the FAIR statute language provides a notwithstanding clause which states that “the commissioner shall consider the effects of predicted hurricane losses and the cost of catastrophe reinsurance on the rates charged by voluntary market insurers and the cost of catastrophe reinsurance and the predicted hurricane losses on the association approving rates for homeowners insurance in all territories.”⁹⁴ It is important to note that such “notwithstanding” language did not originally appear within the statute; rather, it was added as an amendment in 2004.⁹⁵ Beyond such language, section 5(b) of the statute states that the Commissioner shall also take into consideration “the loss experience of insurers in the voluntary market, as well as the experience of the association and . . . the intent of this chapter to make basic property insurance available at a *reasonable cost* to eligible applicants” when deciding whether to approve rate increases.⁹⁶

Thus, a plain reading of the statute makes it appear as though the commissioner, in determining the appropriateness of MPIUA proposed rate increases, *must* take into consideration catastrophic computer models (such as the Risk Management Solutions model) that private insurance companies use to predict losses and calculate premiums within any given market. Regardless, for a large number of years, the Commissioner refused to approve rates that exceed a two percent increase over the previous year’s rates.⁹⁷

An analysis of the FAIR Plan statute reveals both the breadth of the MPIUA, as well as the potential problems inherent in it. All insurers that underwrite property insurance policies, either directly or indirectly, are forced into a state-created insurer, the MPIUA. This entity is statutorily required to sell property insurance to those individuals who are considered by the private insurance industry as too risky to insure, at least at the rates that they are allowed to charge. The private individual insurers that collectively represent the MPIUA are each responsible for a portion of the MPIUA’s expenses, losses (which have proven to be consistent and substantial) and profits (which are of little benefit to most private insurers). Moreover, the MPIUA’s rates are heavily regulated by statute, and must meet prior approval by the Massachusetts Commissioner of Insurance. The combination of insuring high risk individuals and being restrained in what premiums they can charge

94. § 5(c).

95. *Attorney Gen.*, 878 N.E. 2d at 556.

96. MASS. GEN. LAWS ch. 175C, § 5(b) (1998 & Supp. 2008) (emphasis added).

97. *Attorney Gen.*, 878 N.E. 2d at 562.

seems to put the MPIUA in quite an economically vulnerable situation in the event that a catastrophic hurricane wreaks havoc on the Massachusetts coastline. Nevertheless, sections 5(b) and (c) of the statute appear to allow the MPIUA to charge premiums in excess of the statutory cap. For whatever reasons, the MPIUA has not historically attempted to use these provisions to its advantage.

C. The Massachusetts Attorney General Takes on the MPIUA

In 2006, the interpretation of the “notwithstanding clause” and section 5(b) of the FAIR statute gave rise to a legal dispute between Commissioner Julianne Bowler and Attorney General Thomas Reilly.⁹⁸ The dispute at issue was whether, in light of the “notwithstanding” clause, the MPIUA’s proposal for a 12.5% average statewide increase was appropriate and statutorily permitted.⁹⁹ Under this proposal, three large share territories were to experience significant insurance rate increases: 20% for Barnstable, Dukes and Nantucket counties; 33% for the city of New Bedford; and 9.5% for the city of Fall River.¹⁰⁰ The average increase of 12.5%, while seemingly high, was in fact lower than

98. While the dispute originally began between Commissioner Bowler and Attorney General Reilly, the case was largely advanced by Bowler’s successor, Commissioner Nonnie Burnes, and Reilly’s successor, Attorney General Martha Coakley. *See SJC Upholds FAIR Plan*, *supra* note 60.

99. *See generally Attorney Gen.*, 878 N.E. 2d at 554. The proposed increase of 12.5 percent was actually a revised proposal by the MPIUA, as their original proposal was rejected by Commissioner Julianne Bowler. *Id.* at 556. Bowler initially denied the proposal but invited the MPIUA to re-file if they obtained catastrophe reinsurance with a premium of at least \$17.5 million and calculated the effect of “demand surge” on their proposed rates. *Id.* at 559. Demand surge is “short term price inflation for labor and materials caused by an increase in demand for and shortage of goods and services created by a natural catastrophe.” *Id.* at 559 n.11. The MPIUA chose not to appeal the decision, instead opting to purchase \$455 million worth of reinsurance for a premium of \$38 million, and then re-filed the proposal that Bowler eventually approved. *Id.* at 556; *see also* Andrew G. Simpson, *Reinsurance Poses Dilemma for Mass. FAIR Plan and Regulator*, *INSURANCE JOURNAL*, Jul. 9, 2006, available at <http://www.insurancejournal.com/news/east/2006/07/09/70182.htm>. Upon assuming the role of Commissioner, Burnes supported Bowler’s approval of the MPIUA rate increase, despite the fact that a Cape Cod citizens’ group urged Burnes to do otherwise, and Martha Coakley sued to block the rate increase. Bruce Mohl, *Business in Brief: Insurance Chief Backs FAIR Plan Rate Hike*, *THE BOSTON GLOBE*, Jul. 26, 2007, at D2.

100. *Attorney Gen.*, 878 N.E. 2d at 558. As calculated under section 5(c) of the FAIR statute, and disregarding the “notwithstanding” language, the maximum allowable increase for 2008 would have been 5.9 percent. *Id.*

the actuarial rate¹⁰¹ that the MPIUA should have sought in order to more accurately reflect the level of risk that they would be undertaking in such large share territories. For instance, the actuarial rate increase for the counties of Barnstable, Dukes and Nantucket was 68.5%, and the actuarial rate increase for the city of New Bedford was 64.7%.¹⁰²

After the requisite evidentiary hearings, commissioner Bowler determined that the proposed increase of 12.5% was within a range of reasonableness, as it was supported by the Risk Management Solutions computer based catastrophe models.¹⁰³ Moreover, Bowler concluded that the 2004 statutory amendment of the “notwithstanding” language authorized her to approve rates in large share territories in excess of the 5.9% limitation—as calculated under the above mentioned formula in section 5(c)—but “only to the extent that the amount of the increase . . . is based solely on ‘the effects of predicted hurricane losses and the cost of catastrophe reinsurance.’”¹⁰⁴

Quite predictably, the approved rate increase was ill-received among citizens in coastal communities. As an adverse reaction to the increase, a group of Cape Cod residents banded together to form a citizens group aimed at voicing opposition to the rate hike.¹⁰⁵ In protest, the group attempted to persuade Nonnie Burnes, Bowler’s successor, to reject what they described as an “illegal rate [increase].”¹⁰⁶ Bowler’s decision to approve the rate hike also met the disapproval of newly elected Attorney General Martha Coakley, as shortly after the rate hike was approved Coakley sought judicial review of Bowler’s decision.¹⁰⁷

Coakley, backed by the Cape Cod citizens group, appealed Bowler’s decision to the Supreme Judicial Court of Suffolk County on the grounds that Bowler’s decision was in violation of the FAIR statute.¹⁰⁸ Specifically, Coakley argued that the rates approved by Bowler exceeded the statutory limitations on rate increases, that the “notwithstanding” clause did not authorize Bowler to approve rates in excess of the

101. *Id.* at 559 n. 9 (writing that indicated—or actuarial—rates are those generated by the computer models and other means of calculations that insurance companies could justifiably charge and that would accurately reflect their potential risk).

102. *Id.*

103. *Id.* There were twenty days worth of evidentiary hearings in total, with expert witnesses testifying both for and against the rate increases. *Id.* at 558. Further, briefs were submitted upon the culmination of testimony. *Id.*

104. *Id.* at 558.

105. Mohl, *supra* note 99.

106. *Id.*

107. *Attorney Gen.*, 878 N.E. 2d at 556.

108. *Id.*

statutory limitations in making her decision, and that Bowler abused her discretion in relying on the computer based catastrophe models that the MPIUA used in calculating the rate increase.¹⁰⁹

Focusing mainly on the question of whether the “notwithstanding” language in the statute permitted Bowler to approve rates in excess of the statutory cap, the Suffolk County Court held that the use of the “notwithstanding” clause “evidences an intent to afford relief from” the rate increase cap of section 5(c).¹¹⁰ The Court further wrote that “the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section”¹¹¹ and that “[a] ‘clearer statement is difficult to imagine.’”¹¹² To hold to the contrary, the Court determined, would be to ascribe no meaning to the “notwithstanding” clause.¹¹³

109. In calculating the rate increases, the MPIUA analyzed data from two separate computer modeling programs—the Air Worldwide Corporation (AIR) and Risk Management Solutions (MRS)—and averaged the results created by each of the two models. *Id.* at 559. Bowler felt it appropriate for the MPIUA to rely on such data in predicting hurricane losses, as both programs were widely used by the private insurance and reinsurance markets, as well as by various rating agencies and governmental entities. *Id.* Both computer models created “probabilistic simulations of 10,000 to 100,000 years of hurricanes” and used that data to predict the average probable amount of hurricane losses; the alternative approach of using “historical data” is “substantially more limited” with respect to the amount of data available to predict losses. *Id.* Coakley argued that the computer models used by the MPIUA were inherently inaccurate, as they were not specifically tailored to the climactic patterns of Massachusetts. *Id.* at 565. Specifically, Coakley objected to the fact that the models included predictions that Cape Cod would be hit by a category four or five hurricane, an event that hasn’t occurred in New England in 156 years. Kimberly Blanton, *AG Objects to Hike by FAIR Plan*, THE BOSTON GLOBE, Mar. 12, 2008, at C1 [hereinafter *AG Objects to Hike*]. James O’Brien, an expert that testified in opposition to the rate increase, stated that “[n]o model should be used if the hurricane frequency, intensity distribution, or geographic location of the hurricanes are not consistent with the historical data.” *Id.* While Bowler agreed with Coakley that the models “should consider . . . specific provisions in the Massachusetts building code,” Bowler found that the two models offered reliable data as to the range of hurricane losses that Massachusetts may experience. *Attorney Gen.*, 878 N.E. 2d at 565. The Court quickly disposed of this argument in favor of the commissioner.

110. *Id.* at 561.

111. *Id.* (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

112. *Id.* (quoting *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991)).

113. *Id.* (stating that statutes should be construed “so that effect is given to all its provisions, so that no part will be inoperative or superfluous”) (quoting 2A B. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992)). The Court noted that:

“[p]rior to the 2004 amendment, [the FAIR Statute] already permitted and directed the commissioner to consider the impact of predicted losses and cost of

In making such a determination, the Court considered the legislative history concerning the 2004 amendment that added the “notwithstanding” language to the FAIR statute.¹¹⁴ The Court noted that the 2004 amendment was a legislative response to a report given in 2004 to the legislature by the commissioner.¹¹⁵ That report noted that the MPIUA was consistently experiencing losses on each policy issued, “despite loss experience that would warrant a significant rate increase to bring rates to the break-even point, but for statutory prohibitions.”¹¹⁶ As a result of the commissioner’s report, the legislature amended the FAIR statute by adding the “notwithstanding” language in an effort to remedy the ailing MPIUA.¹¹⁷ Considered in such a context, the Court held that the 2004 amendment was “plainly intended to ameliorate the conditions identified by the commissioner”¹¹⁸ and that it “comports with the commissioner’s interpretation” of the amendment.¹¹⁹

D. The Resulting Effects of the Court’s Resolution

For the average property owner on Cape Cod, the court’s 5-0 ruling in allowance of the rate hike led to an increase in premiums from \$1,300 to \$1,625 per year.¹²⁰ Not surprisingly, the increase was met with mixed reactions. John Golembeski, the president of the MPIUA, stated that the association was “pleased with the decision from the court” and that it was “the right decision” in light of the MPIUA’s need for higher premiums created by the necessity for millions of dollars worth of reinsurance to cover increased liability.¹²¹ Conversely, Coakley

reinsurance on rates in determining whether to approve MPIUA’s rates. . . . ‘[t]he ‘notwithstanding’ clause takes on meaning only when we assume that the [amendment] has made some change in the law to which the ‘notwithstanding’ statement is noting a specific exception.’”

Id. at 561-62 (quoting *Shomberg v. United States*, 348 U.S. 540, 546 (1955)). Specifically, “[t]hat change is to override the rate cap when consideration of the ‘predicted hurricane losses and the cost of catastrophe reinsurance’ require it.” *Id.*

114. *Id.* at 562.

115. *Id.*

116. *Id.* (quoting Commissioner of Insurance).

117. *Id.* at 562-63.

118. *Id.* at 562-63.

119. *Id.* at 562. The Court also stated that the amendment evidenced an intent to “leave to the commissioner’s discretion how much of an increase over the rate cap (if any) would be reasonable in light of the effects of predicted hurricane losses and the cost of reinsurance.” *Id.* at 563.

120. *SJC Upholds FAIR Plan*, *supra* note 60.

121. *Id.*

expressed disappointment that “the court upheld the commissioner’s record-breaking rate increases” and claimed that “[o]ver 100,000 homeowners in the commonwealth will bear the brunt of this decision.”¹²² Coakley was also quite blunt in opining about the future of the FAIR Plan, stating that the decision “will make it harder to ensure that consumers get a fair deal from the FAIR Plan.”¹²³ Coakley’s sentiments were mirrored by members of Citizens for Homeowners Insurance Reform, a citizen group formed in opposition to the MPIUA’s rate increase,¹²⁴ as well as several members of the Massachusetts senate.¹²⁵

The judicial resolution of the above dispute has led to further conflict between Coakley and the MPIUA. The MPIUA has recently submitted a proposal for another increase in premiums, this time for another 25% increase in Cape Cod and a 13.2% increase throughout the rest of the state.¹²⁶ This increase would have raised premiums for the average Cape Cod property owner to \$2,282; for the average property owner throughout the rest of the state, the average premiums would have increased to \$2,007.¹²⁷ Coakley filed an objection to this increase, averring that a large number of “FAIR Plan customers are on a fixed income and cannot afford the proposed drastic annual increases.”¹²⁸ Perhaps to the surprise of potentially affected homeowners, Burnes initially rejected the MPIUA’s request and opted not to include recommendations concerning revision of the proposal, as she had previously done with the 2006 rate proposal.¹²⁹ Golembeski said that the MPIUA would not appeal the decision, though he did not explain why. When asked, Golembeski merely stated that the MPIUA would have to meet with Burnes in order to understand her rejection of the plan, as well as to gain clarification of a number of issues in the decision.¹³⁰

122. *Id.*

123. *Id.*

124. *Id.* (writing that Citizens founder, Paula Aschettino, said that it was “concerning that . . . people with the authority to review [the MPIUA’s] procedures do not pay attention to the flaws in the evaluation”).

125. *Id.*

126. *AG Objects to Hike*, *supra* note 109.

127. *Id.* (an increase of \$456 and \$401 respectively).

128. *Id.* Coakley’s office also renewed the objection to the use of the MPIUA’s catastrophe computer models as being unreliable because of the fact that they were based on weather patterns typical of the southeast; Coakley’s office further “criticized as ‘inflated’ FAIR Plan’s estimates of how much it would have to pay for reinsurance.” *Coastal Areas Get Breather*, *supra* note 59.

129. *Coastal Areas Get Breather*, *supra* note 59.

130. *Id.*

The court's ruling on the 2006 rate increases has also sparked legislative action. Massachusetts Senator Robert O'Leary has been particularly vocal in regards to the FAIR Plan. One of Senator O'Leary's initiatives that met with success was a proposal to put a temporary freeze on FAIR Plan rate increases.¹³¹ O'Leary has also passed a comprehensive bill through the Massachusetts Senate, aimed at easing the financial burden on FAIR Plan consumers. The bill, if passed by the House, would allow for rebates to be given to FAIR Plan customers who live beyond a certain distance from the coastline, who are owners of primary residences, who own less expensive homes, and to elderly customers.¹³² The bill also allows for policy holders to receive a rebate check of up to one third of their premiums, minus the cost of the FAIR Plan's reinsurance, if a hurricane does not occur for three consecutive years and the FAIR Plan turns a profit.¹³³ O'Leary's bill further establishes a hurricane research facility at the University of Massachusetts-Lowell, which will be used to study and evaluate the catastrophe computer models employed by the MPIUA in calculating premiums.¹³⁴ The bill appears to address the controversy between Bowler (and later Burnes) and Martha Coakley, as the bill amends the FAIR statute by giving the Attorney General the authority to appoint two representatives to the MPIUA board.¹³⁵ Lastly, the bill seeks to

131. David Kibbe, *Home Insurance Bill Clears State Senate*, THE CAPE COD TIMES, July 2, 2008, at A1 [hereinafter *Home Insurance Bill*]. O'Leary's amendment, which was approved by the Massachusetts Senate, put a freeze on FAIR Plan rate increases until March 1, 2009. *Id.*

132. *Id.*

133. *Id.* However, this rebate provision may seem more generous on paper than in actuality, as the FAIR Plan has a consistent track record of losing money (as discussed above). By preventing the MPIUA from increasing rates to more accurately reflect costs and risk, O'Leary's bill appears to put the MPIUA in a position to continue to lose money, thereby making it far less likely that FAIR Plan policy holders will actually receive rebate checks.

134. *Id.* The University of Massachusetts-Lowell is known for its expertise in meteorology, and the center would provide their analysis of the computer models to both the Commissioner and the Attorney General to assist them in determining the accuracy of the projected risk and the reasonableness of the rate increases. Kimberly Blanton, *Unlimited FAIR Coverage May Fade*, THE BOSTON GLOBE, Jul. 9, 2008, at C1 [hereinafter *Unlimited FAIR Coverage*]. "The idea is to set it up and give it some real academic credibility and some real money so it can do the job . . . [with more information] the commissioner can say, 'Maybe these rate requests are excessive.'" *Id.* (quoting Sen. O'Leary).

135. *Home Insurance Bill*, *supra* note 131, at 1. Currently, the commissioner has the power to appoint two representatives. The amendment, if passed, would take those two appointments from the commissioner and give them to the Attorney General. *Id.*

incentivize private insurers to return to the coastal Massachusetts market by decreasing the amount of money that they would have to pay the MPIUA in the event of a loss.¹³⁶

Despite his efforts, O'Leary was unsuccessful in attempting to push an amendment that would create a cash reserve to cover insurance expenses for private insurers in the event of a catastrophic disaster.¹³⁷ O'Leary has stated that he has taken action for this cause because FAIR Plan premium increases since 2003 have cost constituents in his district alone approximately \$100 million per year.¹³⁸ "People are hurting . . . I'll be back next year on this issue, attempting to move it even farther," O'Leary stated in regards to his legislative efforts.¹³⁹

Another piece of legislation that was passed through the Massachusetts Senate will operate to limit the potential liability of the MPIUA in coastal markets. As it currently stands, all FAIR Plan policy holders are eligible to purchase "unlimited coverage," which offers policy holders additional coverage against steep increases in building materials and associated costs after a catastrophe,¹⁴⁰ a phenomenon known as "demand surge."¹⁴¹ Policy holders who purchase unlimited coverage may insure their properties up to a combined total of \$1 million,¹⁴² an amount that some feel leads to policy holders being "over insured."¹⁴³ It is hoped that such action will reduce the liability of the MPIUA in the event of a catastrophic hurricane on the Massachusetts coast by lowering the amount of policy coverage issued and in turn reducing the amount of reinsurance required by the MPIUA. The legislation also gives the commissioner the authority to approve differential rates, whereby the MPIUA would be permitted to charge

136. *Id.* While it is important to get private insurers back into the coastal market, O'Leary's plan seems to put the MPIUA at further risk of failing, especially in the event of a catastrophic loss.

137. *Id.* The reserve fund would have operated as an alternative reinsurance pool that private insurers could have purchased, aimed at lowering reinsurance costs in an effort to encourage private insurers to return to the Massachusetts coast. *Id.*

138. *Id.*

139. *Id.*

140. *Unlimited FAIR Coverage, supra* note 134. Nearly two thirds of the FAIR Plan policy holders on Cape Cod have purchased unlimited coverage. *Id.*

141. Attorney Gen. v. Comm'r of Ins., 878 N.E. 2d 554, 559 n. 11 (Mass. 2008).

142. *Unlimited FAIR Coverage, supra* note 134. The average basic FAIR Plan policy coverage, without unlimited coverage, is \$263,000. *Id.*

143. *Id.* Massachusetts House of Representatives member Ronald Mariano, chairman of the Joint Commission on Financial Services, favors eliminating unlimited coverage on these grounds. *Id.*

higher premiums for properties closer to the coastline and for second-residences.¹⁴⁴

However, such action has been met with resistance. A consultant for the Center for Insurance Research has stated that the bill is “masquerading as a proconsumer [sic] bill,” but may lead to policy holders being underinsured and unable to rebuild their homes after a catastrophic hurricane.¹⁴⁵ The same consultant questioned, “[h]ow is it proconsumer [sic] to tell people an option they currently have is being eliminated?”¹⁴⁶ Nevertheless, before characterizing this bill as anti-consumer it is important to note that additional coverage would still be available to customers, albeit in lesser amounts.¹⁴⁷

E. Why the Court’s Decision Was Correct

The decision of the court in the dispute between Burnes and Coakley may serve as the MPIUA’s sole hope in achieving financial stability in the event of widespread losses. By holding otherwise, the court would have placed the MPIUA under a burden of insuring high risk properties while charging premiums that are insufficient to pay policy holders their policy limits after their insured properties had been damaged by a coastal storm system. This, in turn, would have led to the MPIUA assessing fees upon other insurers in Massachusetts, even those that do not write property insurance. Quite obviously, these private insurers would recoup this expense through the only means available to them—charging their insureds higher rates. Effectively, the citizens of Massachusetts, even those far removed from the coastline, would be subsidizing property insurance for those who live near the coast, a proposition that is fundamentally unfair.

While the court’s decision is a step in the right direction, more action is required. If the MPIUA is to remain solvent and to pay insureds their due after a coastal storm causes property damage along the Massachusetts coastline, the FAIR statute needs to be further amended in order to allow the MPIUA to raise premium costs by a larger margin than has historically been done.

Besides being the correct decision policy wise, the court’s ruling was also compelled by sound legal reasoning. The “notwithstanding” language of section 5(c) of the statute is a clear directive that the

144. *Id.*

145. *Id.*

146. *Id.* Senator O’Leary was also in opposition to this bill. *Id.*

147. *Id.*

commissioner is not completely restrained by the statutory caps on rate increases described earlier in section 5(c). Further, section 5(b) evidences legislative intent that the commissioner, while deciding whether to approve the MPIUA's rate requests, should consider the state of the voluntary market and loss trends therein. Finally, it is imperative to note that the "notwithstanding" clause of section 5(c) was a 2004 amendment to the statute, and the legislative history reveals that it was added in response to a former commissioner's concerns about the MPIUA's continuing viability. Attorney General Coakley's arguments to the contrary appear to have been ill founded and perhaps politically motivated. As the court pointed out, the "notwithstanding" language of the statute is as clear a legislative statement as can be made that the notwithstanding clause was intended to override prior, more restrictive sections.

For the sake of the continued existence of the MPIUA, as well as for the private insurers and citizens of Massachusetts, the MPIUA should use this decision to their advantage when calculating and requesting rate increases in the future. Moreover, Massachusetts politicians should seriously consider the long term implications of the pieces of legislation that are being put before them. For example, Senator O'Leary's proposed legislation would act to further impede the MPIUA's ability to request appropriate rate increases. However, some legislation, such as the proposed bill to eliminate the option of "unlimited coverage" and thereby reduce the potential liability of the MPIUA in coastal markets, may positively impact the MPIUA. It may be politically difficult to oppose the O'Leary bill while supporting elimination of unlimited coverage, but voters do not always think of long term implications of proposed legislation. In this instance it is in the interest of the citizens of Massachusetts for their politicians to oppose Senator O'Leary's bill while supporting a bill to reduce MPIUA liability—even if voters find such legislation to be contrary to their short term interests.

V. ALTERNATIVE APPROACHES TO FAIR PLANS ARE NECESSARY TO SOLVE THE COASTAL PROPERTY INSURANCE PROBLEM

One may wonder why private insurers do not simply charge actuarial rates in hazard prone markets. Aside from the obvious fact that market demand lowers as rates increase,¹⁴⁸ there is also a legal answer to this

148. As with virtually any market commodity, economic principles dictate that there is an inverse relationship between the price of the commodity and the demand thereof. It is interesting to note that there is another recognized reason for such an inverse relationship

question. As previously intimated, the insurance industry is highly regulated by the states.¹⁴⁹ When private insurers are prevented from charging actuarial premiums, both by market and regulatory constraints, insurers are forced to sell coverage at levels far below what should actually be charged—that is to say, insurers are forced to charge premiums that do not provide them with a large enough pool of reserves to pay claims in the event of a widespread loss.¹⁵⁰ This flies in the face of the traditional market mechanisms of insurance, in which “the price of insurance [should] therefore be viewed as a good indicator of the level of risk of certain activities.”¹⁵¹ As previously mentioned, this underappreciation of the economic risk of living on the coastline has, in part, contributed to more frequent and more expensive development on the eastern seaboard. It is this combination of increased risk exposure and the inability to charge appropriate premiums that has led to the rise in the number of policies written by state residual market mechanisms such as the Massachusetts FAIR Plan.

FAIR Plans became increasingly popular during a time in which coastal areas experienced a combination of high private insurance costs and fleeing private insurers. It is therefore no great surprise that FAIR Plans’ premiums are designed to be, and are under political pressure to remain, equal to or less expensive than premiums sold by private companies. If private insurers faced insolvency after a catastrophic

between cost and demand in the property insurance context. SEEDS OF DISASTER, *supra* note 33, at 283 (writing that market demand for insurance is effected because “with time potential purchasers tend to underestimate the real level of risks (“it will not happen to me”) and dismiss insurance premiums as being too expensive, thus limiting the level of coverage” that they purchase).

149. *Id.* See also DAVIS, *supra* note 1, at 9 (stating that, due to the McCarran-Ferguson Act, the states are the primary regulatory body over the insurance industry). Moreover, each state has an insurance official who is responsible for ensuring the financial solvency of the insurers within the state and for “examining insurers’ rates and market practices.” *Id.* The National Association of Insurance Commissioners is an advisory body made up of state insurance regulators which serves to maintain consistent oversight over the insurance industry from state to state. *Id.*

150. SEEDS OF DISASTER, *supra* note 33, at 283 (writing that the loss estimates that insurance companies use to calculate premiums—even actuarial premiums—are still, at best, estimates). This is one difficulty in ensuring insurers can pay out large numbers of insureds in the event of widespread loss. Paying insureds in the event of widespread loss is further complicated by the fact that only a portion of a company’s reserves are available at any given point in time. *Id.* at 320. Moreover, the U.S. property insurance market has been described as “highly segmented” and “highly cyclical in nature”—this led to a period of twelve straight years in which the industry’s capital costs exceeded their total returns. *Id.*

151. *Id.* at 282.

storm due to premiums that inaccurately reflected risk, and FAIR Plans are meant to be an affordable alternative to private insurers, it logically follows that FAIR Plans are at as least as great a risk of insolvency as their private counterparts. Not surprisingly, the premiums collected by FAIR are likely insufficient to cover liability in the event of a catastrophic loss.¹⁵² As one market analysis has concluded:

Since FAIR Plans are typically subsidized (rates are less than costs), a larger FAIR Plan imposes a burden on the voluntary market as insurers in the voluntary market are required to pay for any deficit in the FAIR Plan. . . . [W]hen a FAIR Plan becomes relatively large compared to the voluntary market, the resulting financial burden becomes a problem and induces insurers to decrease their voluntary market writings in order to reduce their assessment of FAIR Plan deficits. This leads to decreased availability of voluntary market coverage . . . cost escalation, rate inadequacy and further FAIR Plan growth. This phenomenon is sometimes referred to as the “downward spiral” of the voluntary market.¹⁵³

Accordingly, as the FAIR Plan becomes increasingly utilized, it appears as though private insurers are going to have fewer and fewer incentives to return to the Massachusetts coastline. In the event of a major hurricane and the attendant exorbitant losses, it is highly unlikely that the MPIUA would have sufficient reserves to pay policyholders their due. In such a circumstance, the MPIUA would have to effectively tax private property insurance companies throughout Massachusetts in order to pay the policyholders; if that sum is still insufficient, the MPIUA would then move on to assessing fees to non-property insurance companies.

While the scenic views and social clout associated with living or working on the coastline lure many developers to the coast, severe and unavoidable coastal storm systems pose a serious threat, both physically and financially, to the people and buildings located near the shore. It has been recognized by “public officials and private developers” alike that it is in the public interest to keep “the coast open to the people while protecting them from the dangers of coastal storms. The policy challenge lies in striking the appropriate balance between coastal

152. See generally GRACE & KLEIN, *supra* note 37, at 46.

153. *Id.*

development and hazard mitigation.”¹⁵⁴ There have been a number of approaches suggested for dealing with the coastal property insurance conundrum, all of which seek to address the problem through means other than reliance upon government subsidization of premiums. While no single approach is likely to be successful, diversification should be seen as a practical approach for solving this problem.

In the insurance industry, the best defense is a good offense. It is for this reason that mitigation techniques have been advanced as an effective solution to the coastal property insurance problem.¹⁵⁵ In fact, it has been posited that the insurance industry may be able to “play a key role in improving the bridge between higher investment in security and mitigation in exchange for lower insurance price or better coverage, which should limit the damage after a catastrophe has occurred.”¹⁵⁶

Mitigation techniques are improvements and alterations that can be made to homes, buildings, and the landscape in an effort to reduce the amount of damage that will occur during hurricanes, flooding or other risks associated with living near the coast.¹⁵⁷ Such improvements can include elevating or relocating the home,¹⁵⁸ implementing new building codes,¹⁵⁹ or utilizing more appropriate building materials.¹⁶⁰

154. DAVID R. GODSCHALK ET AL., *CATASTROPHIC COASTAL STORMS: HAZARD MITIGATION AND DEVELOPMENT MANAGEMENT* 5 (Duke University Press 1989) [hereinafter *CATASTROPHIC COASTAL STORMS*].

155. *See generally* *CATASTROPHIC COASTAL STORMS*, *supra* note 154.

156. *SEEDS OF DISASTER*, *supra* note 33, at 282.

157. *See* *CATASTROPHIC COASTAL STORMS*, *supra* note 154, at 5. Mitigation techniques are not a new phenomenon – they have been in use for centuries; early forms of mitigation efforts along coastlines include erecting seawalls and dikes. *Id.* at 23.

158. FED. EMERGENCY MGMT. AGENCY, *REPORT ON THE STATE OF THE ART MITIGATION OF FLOOD AND EROSION DAMAGE TO RESIDENTIAL BUILDINGS IN COASTAL AREAS* 5 (Oct. 1994) [hereinafter *MITIGATION*]. Elevating existing homes on piles or walls can be an effective way to prevent flood and storm surge damage to foundations and ground-level floors. *See id.* at 13-15. Such measures may also protect against damage due to coastal erosion. *See id.* While costly, elevating a home has proven to be comparable to the cost of constructing a new home—with the added benefit of not replacing personal property. *Id.* Relocating a home, while a more drastic approach, is the only certain way to eliminate all risk of loss due to hurricanes or other coastal storms. These approaches, however, do not ensure that future development along the coastline will adopt measures aimed at reducing the risk of loss and liability from hurricane exposure.

159. RAYMOND J. BURBY ET AL., *SHARING ENVIRONMENTAL RISKS: HOW TO CONTROL GOVERNMENTS' LOSSES IN NATURAL DISASTERS* 228 (Westview Press 1991) [hereinafter *SHARING ENVIRONMENTAL RISKS*]. Building codes apply to both new construction and structures that are rebuilt or improved due to any number of reasons, and have the benefit of requiring minimum standards of safety and preventative measures for coastal development. *CATASTROPHIC COASTAL STORMS*, *supra* note 154, at 31. The use of

Other mitigation techniques involve alterations to the coastal environment itself. In fact, altering the coastline in order to strengthen or replenish the natural environment so as to help prevent erosion, combat rising sea levels, and reduce damage caused by storm surge and violent waves has been described as a “traditional approach” to the coastal development dilemma.¹⁶¹ Unfortunately, altering the environment may have unwanted consequences, such as shifting erosion patterns downstream from the alterations. As such, this approach may not be appropriate in all circumstances and may require scientific study prior to implementation.

Whatever mitigation approaches are taken, the insurance industry can encourage use of such techniques through lowered premium charges. The insurer will be able to charge lower rates, because the mitigation techniques will lower the potential liability on the property, thus reducing the risk exposure to the insurer.

A more aggressive approach that has been advanced to prevent large economic losses in the event of coastal disasters is for the government to use zoning as a means to prohibit development in certain areas along the coastline.¹⁶² While recognizing that in some instances the economic benefits to be had from developing along the coast may outweigh the potential costs, it has been suggested that it may be in the public interest

building codes to mitigate against damage from natural hazards has already been used by the National Flood Insurance Program (NFIP), which applies to construction in recognized “flood plains.” *Id.* at 31-32. The NFIP code requires buildings in “V-zones” (areas where high velocity storm surge is likely to occur) to be elevated on pilings or columns. *Id.* at 32. While this is a good system, it only applies to a limited geographic scope. Some states and local governments have already been pro-active in implementing special coastal area building codes as a supplement to their already existing standard building codes. *Id.*

160. *See generally* CATASTROPHIC COASTAL STORMS, *supra* note 154, at 31-33. For example, a property owner could utilize stronger roof tie-downs or shatter-resistant windows so as to make their property less vulnerable to damage during storms. Placing electric and utility lines underground, requiring buildings to be above known flood and wave impact zones, and designing structures to withstand minimal wind speeds are also ways to decrease potential liability and to strengthen structures against coastal storms. *Id.* at 32-34.

161. *Id.* at 26-27. Such techniques may include trapping or moving sand in order to prevent erosion and protect beaches, which absorb energy and impact from storms; erecting seawalls, breakwaters or revetments to reduce the impact of storm surge and waves; or creating retaining ponds, dikes, levees, dams or flood channels in order to prevent flooding and divert standing water from developments. *Id.* at 26-28.

162. SHARING ENVIRONMENTAL RISKS, *supra* note 159, at 227-28.

to prevent further development in coastal areas that have little to no current development.¹⁶³

In municipalities that have taken this approach, the land has not turned out to be worthless; for instance, the land may have value as a public recreational area or as part of an environmental protection program.¹⁶⁴ Moreover, some communities have found that this approach has actually led to increased economic activity; such as development on adjacent lots that are less at risk but were historically less desirable than the coastal front property, or in some instances increased tourist activity.¹⁶⁵ Where this approach may not be feasible, municipalities still have the option of adopting and enforcing new building codes—both residential and commercial—that will make new development along the coastline less vulnerable to wind and water damage.¹⁶⁶

More aggressive still is an idea advanced by some that governments should exercise their eminent domain¹⁶⁷ powers to accomplish the goal of reducing, and eventually eliminating, development in coastal areas that are prone to disaster.¹⁶⁸ Even with the understanding that the government will have to provide compensation for the taking, it is argued that this approach may save the government, and taxpayers in general, money in the long run.¹⁶⁹ After a coastal disaster both federal and state

163. This approach has already been taken by the National Flood Insurance Program, which incentivizes local governments not to build new construction projects in flood prone areas. *Id.*

164. *Id.*

165. *Id.*

166. *See id.* at 228-29. Unfortunately, the process of revising building codes has been described as “painfully slow,” and it may take decades before there has been enough new construction in any given community to have any significant impact. *Id.* However, motivated municipalities that recognize the importance of preventing widespread damage to their coastline may be able to expedite the process of revising and enforcing new building codes. Admittedly, such expedition doesn’t solve the temporal problem of widespread implementation in the locality – it may be years before new buildings are built or old ones are renovated. *See id.*

167. At base, the eminent domain power of the state has been described as the “taking of private property for public use.” STEVEN GREENHUT, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* 7 (Seven Locks Press 2004).

168. *See generally* Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993) [hereinafter *Takings*] (discussing land use policy of beachfront property).

169. *Id.* at 262-63 (discussing the cost of disaster relief and government subsidies). *See also generally* Travis Martay Brennan, Comment, *Redefining the American Coastline: Can the Government Withdraw Basic Services From the Coast and Avoid Takings Claims?*, 14 OCEAN & COASTAL L.J. 101 (2008) (discussing whether or not the

governments spend astronomical sums of money in the form of clean-up and other projects carried out by the Federal Emergency Management Agency, National Guard, similar state agencies, and subsidized insurance payouts. In fact, it has been suggested that “moral hazard” may help to explain why individuals are not hesitant to build on the shorefront; they anticipate governmental disaster relief aid, help in rebuilding infrastructures, low cost loans for rebuilding, and subsidized insurance to reduce their economic burden after coastal storms.¹⁷⁰

Economic approaches to this problem may also be desirable. Allowing insurance companies to charge actuarial rates for coastal properties has the potential for being an extremely effective mitigation tool. Individuals will come to appropriately realize the level of risk facing their investment when faced with high insurance premiums for coastal property. This appreciation of the risk may incentivize developers to invest in mitigation techniques for their property, or to choose a less risky area to develop. Aside from mitigation, this approach also has the added benefit of ensuring that insurers have adequate sums to pay policy holders in the event of loss.

Unfortunately, this approach faces political roadblocks, as the “public expects to be able to get low-cost insurance to protect it fully against hurricane and storm hazards,” and when “insurance prices go up dramatically (perhaps only to actuarial levels) or when insurance becomes unavailable because the market will not support the actuarial pricing, the public becomes outraged.”¹⁷¹ Thus, it may be difficult to convince state law makers to ease state regulations on insurance company pricing, as doing so may prove to be political suicide.

The federal and state taxation systems may also be able to encourage hazard mitigation. For instance, taxpayers could be given dollar-for-dollar credits on their income taxes for money spent implementing mitigation techniques on their coastal properties. This approach would mean less taxation income for the government, however, it would also reduce the amount of money the government had to pay to clean up and restore coastal communities after damaging storms. Further, insurance companies could then charge such property owners lower premiums, as mitigation techniques would lower the insurance risk associated with the property. Furthermore, governments could implement “special

government would have to compensate residents for a taking if it withdrew basic services).

170. *Takings*, *supra* note 168, at 263-65. These programs may create an “inappropriate incentive to take risks in developing” coastal property. *Id.* at 264.

171. *Id.* at 308.

assessments” and “impact fees” upon people in high hazard areas who reap benefits from public expenses relating to their coastal property; examples of such public expenses include evacuation costs, temporary housing expenses, repair or reconstruction fees, and other costs associated with “special storm services.”¹⁷²

Lastly, local governments could provide coastal developers and property owners with transferrable development rights, either on a voluntary or mandatory basis, which would reduce the amount of at-risk coastal property in any given locality. Coastal communities would determine a high-hazard zone, and allow land owners within this zone to transfer their undeveloped land within the high-hazard zone to an area of town that has been classified as low-hazard, or to sell their high-hazard property on the open market so that the purchaser may develop in the low-hazard zone.¹⁷³ This approach would encourage development in less risky areas of town while limiting risk exposure in areas prone to coastal damage, thus reducing both governmental and insurer economic exposure in the event of disaster.

Unfortunately, there are several impediments to the implementation of coastal hazard mitigation efforts and governmental remedies, as has heretofore been mentioned. Common obstacles include: apprehension to government involvement in private property rights; general feelings that mitigation is not needed; the financial burden of mitigation efforts; the existence of other problems or concerns that are seen as more pressing; opposition to such efforts on behalf of real estate and development interests; a perceived lack of governmental incentives; and the absence of “politically active individuals and groups advocating storm hazard mitigation.”¹⁷⁴ However, such efforts and remedies must play a role in addressing the coastal property insurance problem that is plaguing many coastal communities. Absent the implementation of these recommendations, governments and insurance companies alike will continue to face astronomical expenses in the wake of coastal storms. Individuals will continue to under-appreciate the risk involved in building near the ocean, as well as continue to reap benefits from government programs and subsidized insurance. As such, motivated individuals and government officials who recognize the seriousness of this problem must communicate the social and economic need for change and influence both public and private decision makers by convincing them that the above recommendations are in their best interest.

172. CATASTROPHIC COASTAL STORMS, *supra* note 154, at 174-75.

173. *Id.* at 175.

174. *Id.* at 213-14.

VI. CONCLUSION

While the MPIUA certainly has commendable goals, it was never intended to act as a primary insurer. The MPIUA is flawed in that it does not charge policyholders actuarial rates; rather, the rates are arbitrarily reduced well below what should actually be charged. While this sounds desirable in the short term (especially to policyholders, who favor low premiums) it could mean financial disaster if a major hurricane were to strike Massachusetts. It is likely that the premiums collected by the MPIUA would not cover the insureds' losses, and the MPIUA would have to assess fees upon private insurers throughout the state in order to pay out amounts due to the insureds. This would effectively mean that property owners, far removed from the Massachusetts coastline, would subsidize the coastal property owners' insurance. Further, in the event of extreme losses, the private insurers may be incapable of paying enough to cover the MPIUA's debts. In such circumstance, the taxpayers of Massachusetts would be called upon to carry the MPIUA's burden. Not only is it fundamentally unfair for individuals who do not own coastal property to subsidize coastal property insurance, it is also a recipe for economic disaster.

To remedy such a situation, the MPIUA should charge premiums at or above the actuarial rate, so as to induce private insurers to re-enter the voluntary market. This may require an amendment to the FAIR statute to enable the MPIUA to increase premium rates by a larger margin than has historically been possible. Further, the state of Massachusetts should take into serious consideration the prospect of incentivizing coastal property owners to engage in pre-disaster mitigation improvements to their homes in order to reduce the amount of damages in the wake of a hurricane. The state of Massachusetts could encourage such mitigation efforts through two primary means: by charging those property owners who have made mitigation improvements to their homes lower FAIR Plan premiums; and by giving said property owners credits on their state tax returns. While this will undoubtedly lead to foregone revenue for the state in the immediate future, it will significantly lower the potential liability of the MPIUA (and also, by correlation, private insurers and the taxpayers) in the long run. Moreover, engaging in disaster mitigation efforts will aid in fostering a re-growth in the voluntary coastal property insurance market by inducing private insurers to resume underwriting insurance policies in coastal communities.

Lastly, the Massachusetts Commissioner of Insurance should be lenient in allowing private insurers to charge actuarial rates that accurately reflect the level of risk that is associated with (and assumed

by) living near the coastline. In short, people who decide to live near the coast are aware of risks of potential damage to or loss of their property, and should be prepared to pay high insurance premiums. That is to say,

[i]f private insurance is to play a central role in a hazard management program, as we feel it should, then . . . [t]hose in hazard-prone areas need to bear a substantial cost of making their communities safer and should be responsible for most of the losses after a disaster occurs. The larger the subsidy provided by the general taxpayer, the less important the role that private insurance can play in covering damage from disasters. . . . If there is genuine public concern with the increasing costs of natural disasters, as we believe there is today, then an insurance system with rates based on risk can serve as the cornerstone of a hazard management program.¹⁷⁵

Natural disasters along the coastline have increased in size, severity, and cost to individuals and the public alike. Government subsidized insurance has become the norm in many parts throughout the Massachusetts coast, but it was never designed to be the primary vehicle through which most individuals are insured. Due to the fact that the FAIR program is not operating as intended, it is bound to fail in the wake of a severe coastal storm, and has the potential to significantly damage the Massachusetts economy. It is time to recognize that the coastal property insurance market is flawed, and that steps need to be taken to allow private insurers to re-enter the market. In their quest to obtain fair insurance premium rates, individuals along the Massachusetts coast have potentially placed an unfair burden on other players in the system.

175. DAVIS, *supra* note 1, at 3.