

Maine Law Review

Volume 64
Number 2 *Symposium:*
Balancing Fairness With Finality:
An Examination of Post-Conviction Review

Article 13

June 2012

Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance: Judicial Restraint or Judicial Abdication?

David E. Sorensen
University of Maine School of Law

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Administrative Law Commons](#), [Health Law and Policy Commons](#), and the [Insurance Law Commons](#)

Recommended Citation

David E. Sorensen, *Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance: Judicial Restraint or Judicial Abdication?*, 64 Me. L. Rev. 611 (2012).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol64/iss2/13>

This Case Note 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 Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

*ANTHEM HEALTH PLANS OF MAINE, INC. V.
SUPERINTENDENT OF INSURANCE: JUDICIAL
RESTRAINT OR JUDICIAL ABDICATION?*

David Sorensen

- I. INTRODUCTION
- II. THE STATUTORY AND COMMON LAW BEHIND THE *ANTHEM* DECISION
 - A. *The Rate Review Process*
 - B. *Exceptions to the Mootness Doctrine*
- III. THE *ANTHEM* DECISION
 - A. *Factual Background*
 - B. *The Parties' Arguments and the Law Court's Reasoning*
- IV. CRITIQUE OF THE DECISION
 - A. *A Mootness Exception Was Appropriate*
 - B. *The Majority Overemphasized Legislative Concerns*
- V. CONCLUSION

*ANTHEM HEALTH PLANS OF MAINE, INC. V.
SUPERINTENDENT OF INSURANCE: JUDICIAL
RESTRAINT OR JUDICIAL ABDICATION?*

*David Sorensen**

I. INTRODUCTION

When Maine's Superintendent of Insurance told the state's largest health insurer that it could not profit in 2009, her decision ended up on appeal before the Maine Supreme Judicial Court, sitting as the Law Court, in *Anthem Health Plans of Maine, Inc. v. Superintendent of Insurance*.¹ As part of its annual rate approval process, Anthem had requested a 3% profit and risk margin on its individual lines of health insurance in Maine.² Superintendent Mila Kofman denied this request³ under her statutory authority to deny any rate increase proposals that are "excessive, inadequate or unfairly discriminatory."⁴ The Superintendent held that a profit and risk margin for 2009 would be inappropriate because of the "unique economic situation resulting in extreme financial hardship for subscribers" coupled with the "extreme financial health of the company."⁵ Anthem argued that a 0% profit and risk margin was "inadequate" within the meaning of title 24-A, section 2736(2) of the Maine Revised Statutes Annotated.⁶ By the time the case was argued before the Law Court on November 10, 2010, Anthem's opportunity for relief had passed.⁷ The company lacked any legal authority to retroactively charge its subscribers additional premiums and the issue became one of mootness.⁸ The court declined to apply one of the three mootness exceptions, citing the possibility of changes to health care laws at both the federal and state levels as cause for judicial restraint, and dismissed the appeal as moot.⁹

In dismissing Anthem's appeal, the majority, in a three-page opinion, placed an unusually heavy reliance on the prospect of future changes to statutory law. This Note will examine the reasoning behind the Law Court's decision and its ramifications, arguing that although moot, the appeal did fit within a mootness exception and a decision on its merits would have provided guidance on an important question of law while remaining squarely within the Law Court's proper role within the branches of government. This Note begins, in Part II, by examining

* J.D. Candidate, 2013, University of Maine School of Law. I would like to thank Mr. Henry Evans and Dr. James D. Rice for teaching me how to write.

1. 2011 ME 48, 18 A.3d 824 (5-2 decision).

2. *Id.* ¶ 2.

3. *Id.*

4. ME. REV. STAT. ANN. tit. 24-A, § 2736(2) (Supp. 2011-2012).

5. Anthem Blue Cross & Blue Shield 2010 Individual Rate Filing for HealthChoice, HealthChoice Standard and Basic, and Lumenos Consumer Directed Health Plan Products, No. INS-10-1000 at 21, Decision and Order (Me. Bur. of Ins. Sept. 2, 2010).

6. Brief of Appellant at 10-11, *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, 18 A.3d 824 (No. BCD-10-255).

7. *Anthem*, 2011 ME 48, ¶ 6, 18 A.3d 824.

8. *Id.* ¶ 7.

9. *Id.* ¶ 14.

the relevant law of health insurance rate review and the mootness doctrine and its exceptions. Part III will explore the *Anthem* decision itself: the factual background, the parties' arguments, and the reasoning employed by both the majority and the dissent. Part IV will critique the decision, arguing that the court should have reached the merits of the case and that the concern over changing law was both inappropriate and unfounded. Lastly, Part V will conclude the Note with some final thoughts on the ramifications of the *Anthem* decision.

II. THE STATUTORY AND COMMON LAW BEHIND THE *ANTHEM* DECISION

A. *The Rate Review Process*

Under Maine law, insurers are required to file any proposed rate increase for their individual and small group health insurance plans with the Superintendent of Insurance,¹⁰ who may approve or deny such a change based on whether the proposed rate is “excessive, inadequate or unfairly discriminatory.”¹¹ An excessive rate is one that is too high,¹² an unfairly discriminatory rate is one that unreasonably burdens one policyholder over another,¹³ and an inadequate rate is one that either causes the insurer to lose money or simply does not generate a profit, depending on whose interpretation prevails.¹⁴ It is this last issue of defining “inadequate” that constitutes the merits of the *Anthem* appeal.¹⁵

Once the Superintendent renders a decision, the insurer may appeal that decision to a trial court by filing a petition for judicial review of final agency action in the appropriate Superior Court.¹⁶ The insurer or the Superintendent may appeal the Superior Court's decision to the Law Court, which reviews agency records directly, “to determine whether the agency abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record.”¹⁷ However, the Law Court is deferential to the Superintendent's interpretation of statutes “and will overturn the Superintendent's action only if the

10. 6 C.M.R. 02031 940-2 § 6(D) (2006).

11. ME. REV. STAT. ANN. tit. 24-A, § 2736(2) (Supp. 2012).

12. See Brief of Appellant, *supra* note 6, at 12 (defining excessive as setting one of the “boundaries within which rates must be set: not so high that they are excessive with respect to customers”); Brief of Appellee at 13-14, *Anthem*, 2011 ME 48, 18 A.3d 824 (No. BCD-10-255) (noting Appellant's definition of “excessive” without objection).

13. There is little language defining unfair discrimination within the context of individual health insurance rates. Cf. ME. REV. STAT. ANN. tit. 24-A, § 2382(4) (2008) (defining unfair discrimination in Workers' Compensation rates as follows: “Unfair discrimination exists if, after allowing for practical limitations, price differentials fail to reflect equitably the differences in expected losses and expenses. A rate is not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expenses, or like expenses but different loss exposures, so long as the rate reflects the differences with reasonable accuracy.”)

14. For two interpretations, see Brief of Appellee, *supra* note 12, at 18-19, which describes the “not inadequate” requirement as a solvency standard, and Brief of Appellant, *supra* note 6, at 10-11, which describes “not inadequate” as requiring a “fair and reasonable rate of return.”

15. *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 1, 18 A.3d 824.

16. ME. REV. STAT. ANN. tit. 5, § 11002 (2002); ME. R. CIV. P. 80C.

17. *Consumers for Affordable Health Care, Inc. v. Superintendent of Ins.*, 2002 ME 158, ¶ 22, 809 A.2d 1233 (citing *Green v. Comm'r of Dep't of Mental Health, Mental Retardation & Substance Abuse Servs.*, 2001 ME 86, ¶ 9, 776 A.2d 612).

statute or regulation plainly compels a contrary result.”¹⁸

Maine’s general scheme of requiring small group and individual health insurers to file rate increases with a commissioner or a superintendent who has the authority to approve or deny the proposal, and allowing the insurer to appeal the agency’s decision to a court, is similar in its broad outlines to regulatory procedures followed in other states.¹⁹ Many states also use the language, “excessive, inadequate, or unfairly discriminatory” in establishing what constitutes impermissible rates.²⁰

In Massachusetts, however, the Commissioner of Insurance is not empowered, upon a finding that the rate is impermissible, to set rates, but rather may only approve or deny the insurer’s rate request.²¹ New York law provides that an insurer may forgo the rate approval process altogether and avoid the superintendent’s scrutiny by submitting a rate increase with a loss ratio that falls between 82% and 105% and is accompanied by an actuarial certification of accuracy.²² Echoing Maine Superintendent Kofman’s economic considerations on behalf of policyholders, Delaware allows its insurance commissioner to consider “administrative expenses” due to “trends in the economy” that may benefit insurers and to bring in expert witnesses to speak to those concerns in determining the reasonableness of rates.²³

B. Exceptions to the Mootness Doctrine

The adversarial nature of the American judicial system demands that when a case comes before a court, it must contain a “real and substantial controversy, admitting of specific relief through a judgment of conclusive character,” or else it is moot and will be dismissed.²⁴ Such a controversy exists only when “there remain sufficient practical effects flowing from the resolution of [the] litigation to justify the application of limited judicial resources.”²⁵ There are, however, three exceptions to the mootness doctrine that are recognized by Maine courts:

- (1) sufficient collateral consequences will result from the determination of the questions presented so as to justify relief;
- (2) the appeal contains questions of great public concern that, in the interest of providing future guidance to the bar and the public, [the court] may address; or

18. *Id.* ¶ 30 (quoting *Me. AFL-CIO v. Superintendent of Ins.*, 595 A.2d 424, 429 (Me. 1991)).

19. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 176M §§ 1-5 (West 2010); DEL. CODE ANN. tit 18, §§ 2503-2508, 2531 (2011); N.Y. INS. LAW § 4308 (McKinney 2011).

20. *See, e.g.*, N.Y. INS. LAW § 4308(b) (McKinney 2011); DEL. CODE ANN. tit. 18, § 2501 (2011).

21. MASS. GEN. LAWS ANN. ch. 176M, § 5(e) (West 2010). *See also* *Blue Cross of Mass., Inc. v. Comm’r of Ins.*, 489 N.E.2d 1249, 1250 (Mass. 1986).

22. N.Y. INS. LAW § 4308(g)(1) (McKinney 2011). *See also In re Excellus Health Plan, Inc. v. Serio*, 809 N.E.2d 651, 652 (N.Y. 2004).

23. *See* *Blue Cross & Blue Shield of Del., Inc. v. Elliott*, 479 A.2d 843, 847-48 (Del. Super. Ct. 1984).

24. *Smith v. Hannaford Bros.*, 2008 ME 8, ¶ 6, 940 A.2d 1079 (quoting *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 16, 738 A.2d 1239).

25. *Id.* (quoting *Lewiston Daily Sun*, 1999 ME 143, ¶ 14, 738 A.2d 1239).

(3) the issues are capable of repetition but evade review because of their fleeting or determinate nature.²⁶

For example, in *Maine School Administrative District 37 v. Pineo*, when two town selectmen refused to sign warrants and notices of elections that they believed to be illegal, the Law Court found an exception in an otherwise moot case because the issue was one of great public concern and capable of repetition.²⁷ Conversely, in *Maine Civil Liberties Union v. South Portland*, when the City of South Portland consolidated municipal voting districts for a special election on unusually short notice due to outside circumstances, the court held that the confluence of events was too unlikely to be repeated for the case to fall within the third exception.²⁸

It is common for states to carve out exceptions to the mootness doctrine in their case law. States share much of the language used to enunciate these exceptions, perhaps because some of it originated in federal courts. The phrase “capable of repetition, yet evading review,” for example, came from the U.S. Supreme Court case of *Southern Pacific Terminal Company v. Interstate Commerce Commission*.²⁹ The federal courts further explain their equivalent of Maine’s third mootness exception by providing that it only applies when, in the absence of a class action, “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the complaining party would be subjected to the same action again.”³⁰

New York state courts recognize three mootness exceptions, which include: “(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.”³¹ Maine’s third exception seems to combine New York’s first two, and New York’s “substantial and novel issues” exception may overlap in some cases with Maine’s public interest exception, but there is no New York equivalent to Maine’s “sufficient collateral consequences” exception.

Connecticut courts recognize two classes of mootness exceptions. First, when “prejudicial collateral consequences are reasonably possible”; meaning, “if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief.”³² Second, when issues presented are “capable of repetition, yet evading review,” an intensive, three-part test is applied to determine eligibility under the mootness exception.³³

In *Blue Cross of Massachusetts, Inc. v. Commissioner of Insurance*, a rate review case similar to *Anthem*, the Massachusetts Supreme Judicial Court provided the following insightful reasoning:

26. *Id.* ¶ 8 (quoting *Lewiston Daily Sun*, 1999 ME 143, ¶ 17, 738 A.2d 1239).

27. 2010 ME 11, ¶ 10, 988 A.2d 987.

28. 1999 ME 121, ¶ 11, 734 A.2d 191.

29. 219 U.S. 498, 515 (1911).

30. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

31. *In re Hearst Corp. v. Clyne*, 409 N.E.2d 876, 878 (N.Y. 1980).

32. *State v. McElveen*, 802 A.2d 74, 79 (Conn. 2002).

33. *Loisel v. Rowe*, 660 A.2d 323, 330 (Conn. 1995).

The Commissioner argues that the statute does not permit retroactive rate adjustment and that the case is therefore moot. We need not decide whether retroactive rate adjustment is permissible. If it is permissible, then the case is obviously not moot. If it is not permissible, then the case falls within the “capable of repetition, yet evading review” exception to the mootness doctrine.³⁴

Such was the extent of the explanation that the Massachusetts high court believed was necessary to apply that state’s equivalent of Maine’s third mootness exception to a case that was technically moot for the same reason as *Anthem*.

III. THE *ANTHEM* DECISION

A. *Factual Background*

Anthem Maine is a subsidiary of Wellpoint, Inc., the largest health benefits company in the country by membership.³⁵ Anthem sells four different individual insurance products in Maine,³⁶ which together make up 6.5% of the company’s business in the state.³⁷ Maine’s Superintendent of Insurance sets rates for the company’s individual and small group business, but Anthem’s large group policies may charge whatever the market will bear.³⁸ From 2000, when Anthem began selling the products in question, to 2008, the company was generally approved for a 3% profit and risk margin within an average annual approved rate increase of 14.58%.³⁹ Anthem first filed its 2009 proposed rate increase on December 22, 2008, requesting a 14.5% increase with a May 1, 2009 effective date.⁴⁰ The company amended this filing in January 2009 to 18.1% for a July 1 effective date, and then again in March for an 18.5% increase, also to be effective on July 1.⁴¹ The final proposal entailed a nearly \$1100 average premium increase for 12,000 individual policyholders in Maine,⁴² and a 3% profit and risk margin for Anthem.⁴³ As is customary in rate proceedings before the Bureau of Insurance, both the public and the state’s Attorney General participated and gave their input.⁴⁴ The Attorney General, on behalf of consumers, argued against allowing a profit and risk margin and members of the public opposed the rate increase generally through three public

34. *Blue Cross of Mass., Inc. v. Comm’r of Ins.*, 465 N.E.2d 252, 254 (Mass. 1984) (citation omitted).

35. Brief of Appellee, *supra* note 12, at 3.

36. Anthem Maine’s individual plans are HealthChoice, HealthChoice Standard, HealthChoice Basic, and Lumenos Consumer-Directed Health Plan. *Id.* at 7.

37. *Id.* at 2.

38. Brief of Appellant, *supra* note 6, at 2-3.

39. *See* Brief of Appellee, *supra* note 12, at 10. The Author arrived at this figure by manually averaging the several years’ worth of rate increases by adding and dividing.

40. *Id.* at 8.

41. *Id.*

42. *See id.* at 9. The Author arrived at this figure because “before rate increase” is \$5,831, subtracted from “after rate increase,” which is listed as \$6,924 makes \$1,093, or nearly \$1100.

43. *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 2, 18 A.3d 824.

44. ME. BUREAU OF INS., PRELIMINARY REPORT: THE HEALTH INSURANCE MARKET IN MAINE 13-15 (Feb. 2010); Brief of Appellee, *supra* note 12, at 11.

hearings and written testimony.⁴⁵

Superintendent Kofman denied Anthem's filing and immediately, as required by statute,⁴⁶ provided Anthem with a rate increase that she would approve: 10.9% with a 0% profit and risk margin.⁴⁷ Anthem appealed to the Superior Court, which found the Superintendent's decision to be statutorily and constitutionally sound.⁴⁸ Anthem then appealed to the Law Court and, while the appeal was pending, filed its rate increase proposal for 2010 with the Superintendent.⁴⁹ For the 2010 proposal, the Attorney General recommended a 0% profit and risk margin, and Anthem again requested a 3% margin, but the Superintendent allowed for a slight profit of 0.5%⁵⁰ in a decision of which the Law Court took judicial notice during the appeal of the 2009 case.⁵¹

B. *The Parties' Arguments and the Law Court's Reasoning*

The issue on appeal before the Law Court was whether the Superintendent "may establish rates for individual health insurance products pursuant to which the insurer will not make a profit, but will break even."⁵² Anthem argued that the Constitutions of both Maine and the United States require that title 24-A, section 2736 of the Maine Revised Statutes be interpreted in such a way that insurers have a right to earn a "fair and reasonable rate of return," and that the Superintendent cannot use cross-subsidization by an insurer's other products to satisfy that requirement.⁵³ The Superintendent argued that the "not inadequate" requirement in section 2736 is a solvency standard, designed to ensure not that insurers earn a profit but that they are able to satisfy claims, that rate orders need only be just and reasonable to be constitutional, and that the history of profitability of Anthem's individual plans defeats Anthem's allegation of mandated cross-subsidization.⁵⁴

The court brushed aside these arguments on the merits and held that because the issue was not replicated in the then-current 2010 rate filing before the Superintendent, who had already approved a 0.5% profit and risk margin, and because Anthem would not be able to retroactively collect rate increases from consumers, "a decision in Anthem's favor would provide it with no effective relief," and was therefore moot.⁵⁵ The dissent agreed that the case was "technically moot."⁵⁶

The majority declined to fit the case into one of the three mootness exceptions, after considering the second and third of them, in part because of the prospect of

45. Brief of Appellee, *supra* note 12, at 11.

46. ME. REV. STAT. ANN. tit. 24-A, § 2736-B (2000).

47. *Anthem*, 2011 ME 48, ¶ 2, 18 A.3d 824.

48. *Id.* ¶ 3.

49. *Id.* ¶¶ 3-4.

50. Anthem Blue Cross & Blue Shield 2010 Individual Rate Filing for HealthChoice, HealthChoice Standard and Basic, and Lumenos Consumer Directed Health Plan Products, No. INS-10-1000 at 21-22, Decision and Order (Me. Bur. of Ins. Sept. 2, 2010).

51. *Anthem*, 2011 ME 48, ¶ 4 n.3, 18 A.3d 824.

52. *Id.* ¶ 1.

53. Brief of Appellant, *supra* note 6, at 10-11.

54. Brief of Appellee, *supra* note 12, at 18-19.

55. *Anthem*, 2011 ME 48, ¶ 7, 18 A.3d 824.

56. *Id.* ¶ 15 (Levy, J., dissenting).

changes to health care laws at both the state and national levels.⁵⁷ The court dealt first with the third exception, which applies to moot cases where the issues may be repeated but their fleeting nature makes them evasive of review.⁵⁸ Doubting that the “precise issues presented in this case will recur” because the Superintendent’s decision regarding the 2009 rates was made in consideration of a “unique economic situation”⁵⁹ and because of the potential for change in healthcare regulation, the court held that the case would not be capable of repetition.⁶⁰ Next, regarding the second mootness exception, which applies to “questions of great public concern that, in the interest of providing future guidance to the bar and the public, [the court] may address,”⁶¹ the majority simply concluded that even if a great public concern existed, judicial restraint is in order because of possible changes to health care laws in the future.⁶²

The dissent believed that the majority erred in looking at the issue as the narrow one of whether the Superintendent was correct in setting a 0% profit margin for Anthem in 2009, under the circumstances.⁶³ The issue, the dissent argued, is broader; particularly, whether “rates that are ‘not ... inadequate’ must include a reasonable return, including a reasonable profit.”⁶⁴ The dissent took issue with the majority’s assessment of whether the case fell within the third mootness exception, arguing that since the issue on appeal arose from an annual rate review process, it is naturally fleeting,⁶⁵ and since the Superintendent has not abandoned or modified her interpretation of the statute, which Anthem contends was applied again in the 2010 rate filing, the issue is indeed capable of repetition.⁶⁶ The dissenters did not opine as to the merits of the case.

IV. CRITIQUE OF THE DECISION

A. A Mootness Exception Was Appropriate

The issue on appeal in *Anthem* properly fit within the third, and perhaps the second, mootness exceptions. Although Anthem argued for both the second and third exceptions,⁶⁷ the dissent focused on the third in its objection to the majority’s position.⁶⁸ The first exception, which requires that “[s]ufficient collateral consequences will result from the determination of the questions presented so as to justify relief,”⁶⁹ was inapplicable here, and thus unaddressed by either party or the court, because in the absence of an ability to retroactively charge consumers, no

57. *Id.* ¶ 1 (majority).

58. *Id.* ¶ 8.

59. *Id.* ¶ 10.

60. *Id.* ¶ 14.

61. *Id.* ¶ 8.

62. *Id.* ¶ 11.

63. *Id.* ¶ 17 (Levy, J., dissenting).

64. *Id.*

65. *Id.* ¶ 16.

66. *Id.* ¶¶ 17-18.

67. *Id.* ¶ 9 (majority).

68. *Id.* ¶ 15 (Levy, J., dissenting).

69. *Smith v. Hannaford Bros.*, 2008 ME 8, ¶ 8, 940 A.2d 1079 (quoting *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 17, 738 A.2d 1239).

sufficient collateral consequences resulting from the decision would have directly benefited Anthem. Litigants seeking the application of the first mootness exception must demonstrate that relief on the merits of their case will have “more than conjectural and insubstantial consequences.”⁷⁰ For example, the Law Court found no sufficient collateral consequences to flow from a revocation of parole when, at the time of appeal, an appellant had already served his unsuspended term of imprisonment but argued that the revocation of parole would leave a negative mark on his record, which would be to his detriment for sentencing purposes if convicted of another crime in the future.⁷¹

When considering application of the second, public interest exception, courts consider “whether the question is public or private, how much court officials need an authoritative determination for future rulings, and how likely the question is to recur in the future.”⁷² While the issue in *Anthem* concerned a public agency, the appellant in the case was a private corporation.⁷³ Additionally, issues that fall within the public concern exception have concerned subjects such as the authority of public officials in relation to one another⁷⁴ and the establishment of a public charitable health care trust;⁷⁵ matters that are of more direct public concern than the denial of Anthem’s requested profit and risk margin. However, although Anthem is a private corporation, it is in an extraordinarily regulated market, making it naturally intertwined with a government agency and thus making the question quite public. Furthermore, the issue on appeal affects the insurance rates of approximately 12,000 people in Maine,⁷⁶ making it arguably one of “great public concern.”⁷⁷ While a stronger case can be made with the third exception, the second exception is applicable here as well. Notably, in dismissing the public concern argument, the majority forwent this analysis and based their decision on restraint in the face of yet unrealized challenges and deference to the policy prerogatives of the political branches.⁷⁸

However, the third exception, which applies when “the issues are capable of repetition but evade review because of their fleeting or determinate nature,”⁷⁹ is particularly appropriate for the *Anthem* appeal. The majority held that the particular facts at issue in *Anthem* were unlikely to recur because of the economic hardship of 2009 and the potential for policy changes, but as the dissent argued, the

70. *Sordyl v. Sordyl*, 1997 ME 87, ¶ 6, 692 A.2d 1386 (quoting Nat’l Council on Comp. Ins. v. Superintendent of Ins., 538 A.2d 759, 763-764 (Me. 1988)) (quotation marks omitted).

71. *State v. Irish*, 551 A.2d 860, 861-62 (Me. 1988).

72. *Me. Sch. Dist. No. 37 v. Pineo*, 2010 ME 11, ¶ 9, 988 A.2d 987 (quoting *Young v. Young*, 2002 ME 167, ¶ 9, 810 A.2d 418) (quotation marks omitted).

73. See Brief of Appellee, *supra* note 12, at 3 (describing the ownership of Anthem Maine).

74. See *Pineo*, 2010 ME 11, ¶¶ 2-4, 988 A.2d 987.

75. See *Consumers for Affordable Health Care v. Superintendent of Ins.*, 2002 ME 158, ¶ 2, 809 A.2d 1233.

76. Brief of Appellee, *supra* note 12, at 7.

77. *Smith v. Hannaford Bros.*, 2008 ME 8, ¶ 8, 940 A.2d 1079 (quoting *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 17, 738 A.2d 1239).

78. *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶¶ 11-13, 18 A.3d 824.

79. *Smith*, 2008 ME 8, ¶ 8, 940 A.2d 1079 (quoting *Lewiston Daily Sun*, 1999 ME 143, ¶ 17, 738 A.2d 1239).

issue is actually the broader one of whether a 0% profit and risk margin is “inadequate” for the purposes of section 2736. Even if one concedes that the scope of the issue is as narrow as the majority presents it, it is quite likely that Maine and the nation will see economically difficult years again. In fact, economic conditions in 2010 were such that the Attorney General again argued for a 0% profit and risk margin.⁸⁰

But it is the fleeting or determinate nature, and not the repetitive nature, of the issue that is the emphasis of the exception, and as the Massachusetts Supreme Judicial Court held in *Blue Cross of Massachusetts, Inc.*, and the dissent argued in *Anthem*, an annual rate review process without any possibility of retroactive billing provides the epitome of a fleeting issue. An appeal by an insurer from an agency decision is nearly impossible to bring to the Law Court without being moot because of this dynamic. Insurers must file rate change requests annually⁸¹ and wait up to 60 days for a decision.⁸² They may then appeal an adverse decision to the Superior Court,⁸³ wait for its decision (which may take the better part of a year) and finally, appeal to the Law Court.⁸⁴ If specificity of circumstances is what the majority saw when dismissing the possibility of these issues recurring, then it may have considered that an appeal of a Superintendent’s decision is set apart from appeals in non-administrative cases, as it must traverse an extra adjudicative layer—the Superior Court, in its capacity as intermediate appellate court—before it reaches the Law Court.⁸⁵

Furthermore, the propriety of using the third exception in *Anthem* would have been borne out by the case law. Unlike in *Maine Civil Liberties Union*, there is only one event that would have to recur in order for the issue in *Anthem* to come before the Law Court again: the denial of a profit and risk margin. In *Pineo*, the “truncated timeline” between the refusal of officials to sign warrants and the election itself called for the application of the third mootness exception.⁸⁶ So, too, should the truncated timeline between when an insurer’s appeal is filed and when that appeal becomes moot have necessitated the application of the third mootness exception in *Anthem*.

B. *The Majority Overemphasized Legislative Concerns*

The major shortcoming of the Law Court’s decision, however, is not that it dismissed the appeal as moot, but that it did so by relying on the highly speculative prospect of future changes to or from new legislation instead of on present legal reality. Indeed the very principles that provide the jurisprudential underpinnings of the mootness doctrine also provide the reason why the court should not have based

80. The Attorney General argued that “the conditions she cited last year still have not changed.” *Anthem Blue Cross & Blue Shield 2010 Individual Rate Filing for HealthChoice, HealthChoice Standard and Basic, and Lumenos Consumer Directed Health Plan Products*, No. INS-10-1000 at 21, Decision and Order (Me. Bur. of Ins. Sept. 2, 2010).

81. 6 C.M.R. 02031 940-2 § 6(D) (2006).

82. ME. REV. STAT. ANN. tit. 24-A, § 2736-B (2000).

83. ME. REV. STAT. ANN. tit. 5, § 11002(1) (2002).

84. ME. R. CIV. P. 80C(m).

85. See ME. REV. STAT. ANN. tit. 5, § 11002(1) (2010).

86. Me. Sch. Dist. No. 37 v. *Pineo*, 2010 ME 11, ¶ 10, 988 A.2d 987.

its decision on “the potential for change in healthcare regulation” and concerns that the statute at issue “may well be altered, amended, or eliminated.”⁸⁷ Such concerns involve “hypothetical or future”⁸⁸ changes such as those in *Smith*, and thus are not “real and substantial.”⁸⁹

The majority’s concerns about health care policy were not only inappropriate but largely unfounded. The Patient Protection and Affordable Care Act of 2010 (ACA),⁹⁰ the major health care reform law recently enacted in Congress, has two main provisions that could possibly affect rate regulation. First, under the reform, federal regulators will target insurers who impose “unreasonable” rate increases on subscribers, soliciting input from states on what constitutes an unreasonable rate increase.⁹¹ The U.S. Department of Health and Human Services (HHS) will then require insurers who impose unreasonable rate increases to produce documents justifying the new rates, which will be available to the public on a federal website.⁹² This modest new rule is not designed to supersede any state law regulating insurance rates, and federal regulators will not have the power to approve or deny even those rates they determine to be unreasonable.⁹³ Maine will remain free to review rate increases in the same way it did when Superintendent Kofman denied Anthem’s 2009 increase request. Second, beginning in 2011, the ACA requires individual health insurers to meet an 80% loss ratio, meaning that insurers’ claims paid must total at least 80% of revenues.⁹⁴ Over the five rate years 2004-2008, Anthem’s loss ratio averaged 88%, never falling below 80%.⁹⁵ In short, the common consensus among experts seems to be that the ACA lacks “regulatory teeth” when it comes to rate increases on individual health insurance policies and that states will continue to regulate rates in much the way that they have been.⁹⁶ That being established, the Law Court’s position that “judicial restraint is appropriate” because “a shift in public policy . . . has been discussed following the recent election”⁹⁷ is without basis because a repeal or successful

87. *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 8, 18 A.3d 824.

88. *Smith v. Hannaford Bros.*, 2008 ME 8, ¶ 10, 940 A.2d 1079.

89. *Anthem*, 2011 ME 48, ¶ 5, 18 A.3d 824 (quoting *Smith*, 2008 ME 8, ¶ 6, 940 A.2d 1079).

90. Pub. L. No. 111-148, 124 Stat. 119.

91. Ann Mills et al., *Truth and Consequences—Insurance-Premium Rate Regulation and the ACA*, 363 NEW ENG. J. MED. 899, 900 (2010).

92. Hilary Rowen, *How the Federal Healthcare Reform Law Will Affect Healthcare Premiums, Healthcare Benefits and the Market for Coverage*, HEALTH LAW., Apr. 2011, at 55, 59.

93. *Id.*

94. *Id.* at 58.

95. ME. BUREAU OF INS., *supra* note 44, at 12.

96. See Mills, *supra* note 91, at 900 (stating that the unreasonableness standard will make “little difference” even in states with “weak or no rate-regulatory authority,” and describing its “lack of regulatory teeth”); Rowen, *supra* note 92, at 59 (stating that “HHS has indicated that in its view, a majority of the states have acceptable rate review processes for individual products, small group products or both,” and describing the effect of new federal regulations on state rate regulations as “indirect.”); Noam M. Levey, *Healthcare Overhaul Won’t Stop Premium Increases*, L.A. TIMES (Apr. 13, 2010), <http://articles.latimes.com/2010/apr/13/nation/la-na-health-premiums13-2010apr13>; Sean P. Carr, *HHS Finalizes Rate Review Regulation for Health Plans*, BESTWIRE (May 20, 2011), <http://www.consumerwatchdog.org/story/hhs-finalizes-rate-review-regulation-health-plans> (quoting Consumer Watchdog director Carmen Balber describing ACA’s unreasonable rate disclosure provision as an “empty threat”).

97. *Anthem*, 2011 ME 48, ¶¶ 11-12, 18 A.3d 824.

court challenge to a law that had no effect in the first place on the issue before the court does not constitute a shift in public policy that warrants restraint.

In an attempt to compensate for this shortfall, Senator Dianne Feinstein (D-CA) and Representative Jan Schakowsky (D-IL) introduced a bill in March 2010 to allow the Secretary of Health and Human Services to regulate rate increases in states where such regulation does not occur on the state level.⁹⁸ Maine is not one of those states and Feinstein's bill failed.⁹⁹ Feinstein introduced a similar bill in January of 2011,¹⁰⁰ but if anything its chances for passage are significantly less likely this time around and even if it did become law, Maine would still not be one of those states affected.¹⁰¹ It is therefore unlikely that ACA will develop those regulatory teeth and upset Maine's regulatory applegart in any meaningful way.

Changes at the state level similarly fail to live up to the majority's expectations. Although the court declined to reach the merits in part because "a new Governor and a substantially changed Legislature have not yet had a chance to weigh in on the policy issues presented,"¹⁰² the Governor's first budget address was one such chance, and he made no reference to the state's private health insurance market.¹⁰³ The legislature began to weigh in a month before the court issued its decision, referring a health care reform bill to the Committee on Insurance and Financial Services that did not affect the rate review process.¹⁰⁴ The bill, L.D. 1333, was ultimately enacted weeks after the Law Court's decision and its final version contains a provision that exempts individual insurers from rate review if their requested rate increase is less than ten percent and their loss ratio is at least 80%.¹⁰⁵ The company consistently achieves a loss ratio in excess of 80%,¹⁰⁶ but only twice in the ten rate years¹⁰⁷ from 2001 to 2011 did Anthem request a rate increase of less than ten percent.¹⁰⁸ Thus, Anthem would still routinely face rate reviews if its proposals continue to follow this pattern. The rate review process itself remains the same—courts may still face the question of whether a rate with no profit and risk margin is an inadequate rate. If anything, the imposition of these stringent loss ratio requirements will leave less room for profit, leading to more frequent denials by the Superintendent of requested profit and risk margins.

98. Health Insurance Rate Authority Act of 2010, S. 3078, 111th Cong. (2010).

99. See Gloria Park, *States Resist HHS Premium Control*, POLITICO (July 6, 2010, 4:38 AM), <http://www.politico.com/news/stories/0710/39377.html> (quoting Sen. Feinstein as saying, "In some states, insurance commissioners already have that authority, and that is fine. The bill doesn't touch them.").

100. Health Insurance Rate Review Act, S. 137, 112th Cong. (2011).

101. See Sen. Dianne Feinstein, Rep. Schakowsky, *Maine Insurance Official Urge Strong Regulation of Health Insurance Premiums as Insurance Company Premiums and Profits Soar*, CONSUMER WATCHDOG (May 11, 2011), <http://www.consumerwatchdog.org/newsrelease/sen-dianne-feinstein-rep-schakowsky-maine-insurance-official-urge-strong-regulation-heal> (where Sen. Feinstein touts Maine as an example of the use of successful rate review practices).

102. *Anthem*, 2011 ME 48, ¶ 12, 18 A.3d 824.

103. Governor Paul LePage, Biennial Budget Address (Feb. 10, 2011).

104. L.D. 1333 (125th Legis. 2011).

105. John Richardson, *Anthem Given OK to Increase Rates 5.2%*, PORTLAND PRESS HERALD (May 20, 2011), http://www.pressherald.com/news/anthem-given-ok-to-increase-rates-5_2_2011-05-20.html.

106. ME. BUREAU OF INS., *supra* note 44, at 12.

107. Anthem did not file in 2004. *Id.* at 9.

108. See *id.* (for 2001-2010 rates); Richardson, *supra* note 105 (for 2011 rates).

Leaving aside prudential concerns, neither recent changes and challenges to federal law, nor recent changes to state law, when examined closely, give reason for the Law Court to discard mootness exceptions.

V. CONCLUSION

The Law Court's decision in *Anthem* poses an interesting prospect for observers of the judiciary: did the court signal an intention to refrain from decision-making when faced with murky, but as yet undisturbed, regulatory waters? This should concern those who believe that the courts should act as detached arbiters, confined to the facts before them and not the evening news, and that courts have just as great an obligation to act when appropriate as to defer when not. The concern is especially real when one considers that the legislation to which the court referred, when examined closely, does little to affect the question presented and its prospects for recurrence, revealing the extent to which the Law Court stepped back. Indeed the court even seemed to give new meaning to the term "judicial restraint"—used primarily within the context of deciding whether to strike down statutes, it has been applied to a case involving whether to reverse a decision from below. Time will tell the prudence of actions by the legislatures, but in the more principled world of the judiciary, actions are immediately ripe for review. This one is cause for concern.