

COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

One South Station • Boston, MA 02110-2208
(617) 521-7794 • FAX (617) 521-7475
TTY/TDD (617) 521-7490
<http://www.mass.gov/doi>

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

DANIEL O'CONNELL
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

DANIEL C. CRANE
DIRECTOR

NONNIE S. BURNES
COMMISSIONER OF INSURANCE

**Suspended Rules of Operation of
Commonwealth Automobile Reinsurers
Promulgated on December 13, 2006**

Docket Number C2004-02

**Decision and Order on Suspended Rules of Operation
Following Hearing On February 15, 2007**

I. Introduction

On December 13, 2006, Commissioner of Insurance Julianne M. Bowler (“Commissioner Bowler”) approved revisions to the Rules of Operation of the Commonwealth Reinsurers (“CAR”) promulgated in accordance with Massachusetts General Laws Chapter 175, section 113H and Article X of the CAR Plan of Operation. The Decision and Order of December 13, 2006 (“December 13th Decision and Order”) marked the culmination of efforts by CAR and the Division of Insurance (“Division”) to revise the CAR Rules of Operation in response to concerns that the previously-existing rules resulted in an inequitable distribution of the residual market burden among CAR Servicing Carriers.

On January 19, 2007, the Acting Commissioner of Insurance (“Acting Commissioner”), Joseph G. Murphy, issued a Notice of Hearing in which he suspended application of the Rules of Operation promulgated in the December 13th Decision and Order, pursuant to Article X of the CAR Plan of Operation, for a period not to exceed ninety days, and reopened the docket to accept additional comment on those Rules. In accordance with the Notice of Hearing, Acting Commissioner Murphy held a hearing on February 15, 2007, at which public comment on the suspended rules was received. During the hearing, Acting Commissioner Murphy stated that the record in Docket Number C2004-02 would be held open until further notice. On March 19, 2007, Commissioner of Insurance Nonnie S. Burnes (“Commissioner Burnes”) issued a Notice of Closing of Record, announcing that the record in Docket Number C2004-02 would close on Friday, March 30, 2007. A total of 84 participants submitted written and/or oral testimony into the record of this proceeding.

II. Procedural History of CAR Rules

A detailed procedural history surrounding the CAR Rules is set forth in the December 13th Decision and Order and, like all other portions of this record in this docket, is incorporated into this Decision. We therefore highlight only the most salient aspects of that history here.

On June 30, 2004, in response to a directive by Commissioner Bowler to address concerns about an inequitable distribution of the residual market burden among insurance companies, CAR submitted to the Commissioner a proposal to amend the CAR Rules. The proposal contained amendments to Rules 2, 9 through 14, and 17, and also contained a proposed set of new Rules, numbered 21 through 40. Rules 21 through 40 were

intended to implement an assigned risk plan, the Massachusetts Automobile Insurance Plan (“MAIP”), governing the private passenger motor vehicle insurance residual market. Because CAR Rules of Operation 1 through 20, as they apply to the residual market for private passenger automobile insurance, were expected to be in effect only until the MAIP was fully implemented, the proposed revisions to Rules 2, 9 through 14 and 17 have been characterized collectively as the “Transition Rules.” Rules 21 through 40 have been referred to as the “MAIP Rules.”

Several hearings on those proposed amended CAR Rules followed in subsequent months, including hearings on intervening changes to the CAR Rules made both by CAR and by the Commissioner. On December 31, 2004 (the “December 31, 2004 Decision and Order”), Commissioner Bowler issued a Decision and Order approving the amended CAR Rules, as set forth in that Decision, including the promulgation of an assigned risk plan in the residual market.

Commerce Insurance Company (“Commerce”), a CAR member, subsequently filed in the Superior Court a complaint for judicial review and for declaratory relief of the December 31, 2004 Decision and Order.¹ In short, Commerce alleged that the Commissioner lacked the authority to implement an assigned risk plan under M.G.L. c. 175, §113H and that certain other statutory infirmities existed within the proposed plan. The Superior Court ordered a stay of the assigned risk plan pending judicial review. Commerce later filed a motion for judgment on the pleadings, which the court allowed in June of 2005. Commissioner Bowler then filed an appeal, and the Supreme Judicial Court granted the parties’ applications for direct appellate review. *Commerce Insurance Co. v. Commissioner of Insurance*, 447 Mass. 478, 479-480 (2006).

¹ Additional parties joined Commerce’s suit shortly thereafter.

On August 23, 2006, by unanimous decision, the SJC reversed the lower court's opinion and affirmed the Commissioner of Insurance's authority to promulgate an assigned risk plan. *Commerce Insurance Co.*, 447 Mass. at 493. In addition, the SJC found in favor of the Commissioner on ancillary issues raised in Commerce's appeal from the December 31, 2004 Decision and Order, with the exception of the "clean-in-three" provision. *Id.* at 491-493. The SJC remanded only the "clean-in-three" provision to the Commissioner for further proceedings. *Id.* at 491, 493.

In order to address the Supreme Judicial Court's concern about the "clean-in-three" provision, as well as other intervening changes to the CAR Transition Rules that arose subsequent to the December 31, 2004 Decision and Order, Commissioner Bowler made additional revisions to the Transition Rules and the MAIP Rules as previously adopted on December 31, 2004. In essence, the revisions were as follows: 1) the elimination of provisions of the Transition Rules that were no longer necessary because of intervening changes to CAR Rules 11 through 14; 2) the integration of retained provisions of the Transition Rules into the current CAR Rules; 3) the issuance of a new timetable for the implementation of the MAIP; and 4) the revision of the MAIP Rules to conform to the court's remand decision regarding "clean in three" risks and to clarify procedures relating to the operation of the MAIP. The CAR Rules, as thus modified, were referred to as the "Second Revised Rules." On October 18, 2006, Commissioner Bowler scheduled a hearing on the Second Revised Rules to be held on November 10, 2006.

Following the November 10, 2006 hearing, Commissioner Bowler issued the December 13th Decision and Order approving the Second Revised Rules, with certain

revisions. The December 13th Decision and Order provided that the MAIP would be implemented over the course of a three-year transition period. Beginning April 1, 2007, companies could place new business risks that were not written voluntarily into the MAIP. For the time period April 1, 2007 through June 30, 2007, all other business would remain eligible to be ceded to CAR. As of July 1, 2007, only business, including renewal business, with risk ratings of 10 or more points under the Safe Driver Insurance Plan that is not written voluntarily would be referred to the MAIP, rather than ceded to CAR. As of April 1, 2008, all business would become eligible for placement through the MAIP, and could no longer be ceded to the CAR pool.

Pursuant to the December 13th Decision and Order, the Second Revised Rules, with the additional revisions described in the December 13th Decision and Order, went into effect on January 1, 2007 and remained effective until the Acting Commissioner suspended them on January 19, 2007.

Pursuant to Article X of the CAR Plan of Operation, “the Commissioner may modify, amend or disapprove the suspended Rule” following a public hearing on the suspended rules. CAR Plan of Operation, Article X, paragraph 5. In addition, pursuant to M.G.L. c. 175, § 113H, the Commissioner possesses the authority to request amendments to a plan. M.G.L. c. 175, 113H(E). For the reasons set forth below, we make the following findings and rule as follows.

III. The Transition Rules

Since its initial filing on June 30, 2004, CAR’s proposals have included revisions to the Transition Rules, Rules 2, 9 through 14 and 17, as well as new rules establishing the MAIP. The revisions to the Transition Rules generally fall into two categories: 1)

changes addressing financial issues, such as Rules 11 and 12, relating to Assessments and Participation in the Plan by Servicing Carriers and to Credits for Writing Business that Might Otherwise be Ceded to the Plan; and 2) changes needed to conform the rules to evolving CAR policies and procedures relating to the oversight and operation of the residual market. This second category includes Rule 2, Definitions; Rule 9, Audit Review; Rule 10, Claim Practices; Rules 13 and 14, relating to Servicing Carrier Responsibilities and Requirements for ERPs and Representative Producers; and Rule 17, Expense Allowance to Servicing Carriers.

The Transition Rules address issues that are critical to the effective management of the residual market, including financial arrangements that, by their terms, must be reviewed annually. Therefore, the Transition Rules did not remain static following the court-ordered stay of Commissioner Bowler's December 31, 2004 Order. Between January 1, 2005 and December 16, 2005, the CAR Governing Committee voted to adopt changes to Rules 11 through 14 and submitted them to the Commissioner for her approval. Pursuant to Article X of the CAR Plan of Operation, public hearings on proposed changes were held when requested; otherwise the proposed changes were deemed approved after thirty days. Because of these approved changes, CAR Rules 11 through 14 as they were in effect on December 13, 2006, differed from the Rules 11 through 14 that were approved in the December 31, 2004 Order. Thus, the Transition Rules adopted as part of the December 13, 2006 Decision and Order incorporated the above-described interim modifications.

Other events also required modification of the Transition Rules that were approved in the December 31, 2004 Decision and Order. As Commissioner Bowler

explained in the December 13th Decision and Order, changes such as the redistribution of ERPs pursuant to an order issued by the Commissioner in January 2006 obviated the need for certain provisions in the Transition Rules that had previously been approved on December 31, 2004.²

Moreover, to the extent that periodic changes are required to Rules 11 and 12, in the December 13th Decision and Order Commissioner Bowler anticipated that the CAR Governing Committee would submit revisions to those Rules, as it had routinely done so in past years. Indeed, on February 22, 2007, CAR submitted to Commissioner Burnes for her review and approval, proposed changes to Rules 11 and 12 to be effective immediately. No CAR member or other person requested a hearing on those changes, and they were deemed effective as of March 26, 2007.

The January 19 Order suspending the CAR Rules approved on December 13, 2006 encompassed both the Transition Rules and the MAIP Rules. However, neither the oral testimony at the February 15 hearing regarding the suspension of the CAR Rules nor the written statements filed regarding the suspension specifically objected in any substantive fashion to the Transition Rules. Indeed, at the close of the hearing, Acting Commissioner Murphy noted that there had been extensive comment on the MAIP Rules, pointed out that the Division also sought comment on the Transition Rules, and invited submissions providing such comment. In response, one participant, Plymouth Rock

² On January 27, 2006, Commissioner Bowler issued a decision approving a plan for the one-time redistribution of ERPs.

Assurance Corporation, in written testimony filed after the hearing, explicitly supported the changes to the Transition Rules, with one exception that is now moot.³

Because the Transition Rules relate to CAR's current ongoing operations, rather than to the implementation of an assigned risk plan, we are persuaded that it is appropriate to approve them in their most current form. Therefore, the Transition Rules, as identified in the December 13th Decision and Order, and as revised to incorporate the March 26, 2007 changes to Rules 11 and 12, are hereby approved. With respect to the Transition Rules that required no changes following remand by the Supreme Judicial Court, we reaffirm the orders issued on November 23, 2004 and December 31, 2004.⁴

IV. The MAIP Rules

The SJC entered judgment in favor of the Commissioner of Insurance, affirming the promulgation of the assigned risk plan in all respects, except as to the "clean-in-three" provision. *Commerce Insurance Company*, 447 Mass. at 493. The "clean-in-three" provision, as promulgated under the December 31, 2004 Decision and Order and remanded by the SJC, prohibited an insurer from placing an insured into the residual market who had not been found to be at-fault for an accident that generated an insurance claim, including a claim under personal injury protection coverage, or a traffic moving violation, within the 36 months immediately preceding the effective date of the policy. *See* December 31, 2004 Decision and Order. The Supreme Judicial Court noted the potential conflict that could arise from such "clean-in-three" provision. Because no take-all-comers law applies in the voluntary market, it is possible that a "clean-in-three" driver

³ By letter dated February 22, Plymouth Rock observed that it objected to Rule 12, as approved for 2006, because it had been superseded by subsequent changes for 2007, recently approved by the CAR Governing Committee. That change, as noted above, became effective as of March 26, 2007.

⁴ On April 11, 2007, CAR submitted additional changes to Rule 11 and changes to Rule 2. As the docket in this proceeding closed on March 30, 2007, we do not consider such recommended changes.

could, indeed, be rejected by an insurer in the voluntary market and yet be unable to obtain insurance in the residual market under the Commissioner's "clean-in-three" rule. Therefore, the Supreme Judicial Court remanded the "clean-in-three" provision of the MAIP Rules to Commissioner Bowler to remedy the conflict created by this provision such that all drivers are afforded coverage either in the voluntary market or in the residual market. *Id.*

Seeking to address the concerns expressed by the Supreme Judicial Court regarding "clean-in-three," Commissioner Bowler made changes to Rule 26C in the Second Revised Rules. Specifically, rather than rendering all risks with "clean-in-three" driving records ineligible for assignment to the MAIP, the revised Rule 26C required CAR to distribute to all its members information on all consumers who satisfied the "clean-in-three" criterion but nevertheless were insured in the residual market, anticipating insurers would, and effectively encouraged, insurers to write these good risks voluntarily.

At the hearing on the Second Revised Rules held on November 10, 2006, however, this revised "clean-in-three" provision engendered a host of new concerns. Specifically, some parties expressed the belief that consumers' privacy rights could be compromised by a wholesale distribution of such information. In addition, many insurance producers expressed concern that the "clean-in-three" provision in the Second Revised Rules violated their alleged rights to control policy expirations granted to them by G.L. c. 175, § 162F, and thus allegedly interfered with the business relationships they had established. Furthermore, some producers argued that this practice could negatively affect consumers' rights to select producers. Furthermore, the Attorney General, in

written testimony submitted after the November 10, 2006 hearing, advocated for a more proactive “clean-in-three” provision and provided a proposal to that effect. The Attorney General’s recommendation, in essence, re-introduced a limited “take all comers” requirement into the voluntary market through a CAR rule.

In response to the testimony at the November 10th hearing and the written testimony submitted thereafter, additional revisions were made to the MAIP Rules and the “clean-in-three” provision. Specifically, as part of the December 13th Decision and Order, Commissioner Bowler revised Rule 21 to create a phase-in period that: 1) established separate dates for MAIP eligibility for new and renewal business; 2) in substance, retained the current system for most renewal business during the period April 1, 2007 through March 31, 2010; and 3) during the three-year period April 1, 2007 through March 31, 2010, prohibited insurers from non-renewing certain business that conformed to specified standards (a hybrid “clean-in-three” provision). Rule 26C elaborated upon this principle by providing that all “clean-in-three” risks with renewal dates during the period April 1, 2007 through March 31, 2010 “shall not be non-renewed by a Member,” subject to the exceptions outlined in Rule 21C. Additionally, and in furtherance of the effort to assist “clean-in-three” policyholders, Rules 26A.1.b and 29F.1.A were revised to permit CAR to inform all of its members, and a policyholder’s producer of record, of an insured’s eligibility to be written in the voluntary market upon the renewal of his/her policy, *if requested to do so by the policyholder*. An election provision to this effect would be provided for on the MAIP application. Finally, Commissioner Bowler noted that a market-based approach such as a credit mechanism

would be a reasonable approach to encourage carriers to insure voluntarily risks that satisfy the “clean-in-three” criteria.

At the hearing held on February 15, 2007 on the suspended CAR Rules of Operation, some participants, including the Attorney General and a representative of Plymouth Rock Assurance Company, raised concerns about the “clean-in-three” provision from the December 13th Decision and Order.⁵ In addition, the Automobile Insurance Study Group (“Study Group”) convened by Governor Deval L. Patrick, which was directed to examine the entire system of private passenger automobile insurance in the Commonwealth of Massachusetts, opined that an assigned risk plan should contain safeguards to control the size of the residual market, including a requirement that companies write and renew “clean-in-three” drivers until they no longer meet the criterion.

In view of the continuing concerns related to the “clean-in-three” provision from the December 13th Decision and Order, we find that were an assigned risk plan to be implemented in our residual market at some point in time, additional amendments would be required to the current “clean-in-three” provision. Therefore, we find that the MAIP rules, as they pertain to the “clean-in-three” provision only, need further amendment. Accordingly, pursuant to M.G.L. c. 175, § 113H, we hereby remand the MAIP Rules to CAR and instruct CAR to submit amendments to the “clean-in-three” provision only, as well as any other necessary amendments solely related to “clean-in-three”, that may be contained in other MAIP Rules, within 30 days. CAR is to consider all of the historic testimony in the lengthy record of this docket regarding “clean-in-three”, and the

⁵ Some of the participants expressed continuing concerns about the implementation of the MAIP as a whole.

Supreme Judicial Court's decision comments on such rule, in devising its amendment. Following an evaluation of CAR's submission, the Commissioner will be in a position to determine whether the MAIP, including an appropriately amended "clean-in-three" provision, should be approved for eventual implementation.

Additionally, we find that the time constraints imposed by the schedule of implementation of the MAIP Rules, as articulated in the December 13th Decision and Order, now renders it impossible to comply with those rules in a timely manner. Commissioner Bowler's December 13th Decision and Order required that the first phase of the implementation of the MAIP begin on April 1, 2007, during which companies could refer to the MAIP only new business that they declined to write voluntarily. As the April 1, 2007 deadline for placing all new drivers into the MAIP has passed, we also find that an amendment to the time frame within which to implement the MAIP is required. Therefore, we find that in the event the MAIP, including an appropriately revised "clean-in-three" provision, is ultimately approved, that amendments to the timetable for its implementation will be required. The Commissioner will revisit such timetable and modify it accordingly if and when such approval occurs.

V. Conclusion and Order

In conformance with the our opinions stated above, the Transition Rules, as revised to incorporate the March 26, 2007 changes to Rules 11 and 12, are hereby approved and are to be implemented effective immediately. With respect to the CAR Rules that required no changes following remand by the SJC, we reaffirm the orders issued on November 23, 2004 and December 31, 2004. A copy of the current, and approved, Transition Rules will be posted on the Division's website shortly.

Further, we find that amendments to the “clean-in-three” provision are necessary at this time. We therefore remand to CAR the MAIP Rules, Rules 21 through 40, and, in accordance with M.G.L. c. 175, § 113H, direct CAR to make amendments only to the “clean-in-three” provision, as well as any other appropriate amendments solely related to “clean-in-three” that may be contained in other portions of the MAIP Rules. We direct such amendments to be submitted to the Commissioner within 30 days of this Decision. Following CAR’s submission, the Commissioner will render a decision on whether to approve the MAIP and the “clean-in-three” provision contained therein. Until such time, and if the MAIP is not ultimately approved, the residual market, and CAR, shall continue to operate under the current CAR Rules 1 through 20 as approved by this Decision.

Dated: April 19, 2007

Joseph G. Murphy
First Deputy Commissioner
of Insurance

Elizabeth B. Brodeur
Presiding Officer

Julie D. McAlarney
Presiding Officer

Affirmed by:

Nonnie S. Burnes
Commissioner of Insurance