

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

FOR THE COMMONWEALTH
No. DAR-6291.

JEAN POZNIK, ET AL.,
PLAINTIFF-APPELLANT,

v.

MEDICAL MALPRACTICE PROFESSIONAL
INSURANCE ASSOCIATION,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

**Joint Amici Curiae Brief of the Massachusetts
Bar Association and the Massachusetts
Academy of Trial Attorneys.**

Statement of the Amici Curiae.

The Amici Curiae, the Massachusetts Bar Association (“MBA”) and the Massachusetts Academy of Trial Attorneys (“MATA”), are voluntary, non-profit, state-wide professional associations of attorneys in the Commonwealth of Massachu-

Statement of the Issue.

Whether the Medical Malpractice Professional Insurance Association (hereinafter "MMPIA"), formerly known as the Medical Malpractice Joint Underwriting Association (hereinafter "JUA"), is subject to G.L. c. 176D and G.L. c. 93A?

Statement of Prior Proceedings and Relevant Facts.

The amici are content with the statement of prior proceedings and relevant facts contained in Mrs. Poznik's brief. Their only comment in this regard, as suggested by the statement above, is that the pernicious effects of this decision are not limited to Mrs. Poznik, but encompass other malpractice victims and their families.

Argument.

I. THE MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION IS ENGAGED IN THE BUSINESS OF INSURANCE, AND SHOULD THEREFORE BE SUBJECT TO G.L. C. 93A AND G.L. C. 176D.

The Consumer Protection Statute, G.L. c. 93A, was enacted "to improve the commercial relationship between businessmen. By requiring proper disclosure of relevant information and proscribing unfair or deceptive acts or practices, the Legislature strove to encourage more equitable behavior in the marketplace." *Manning v. Zuckerman*, 388 Mass. 8, 12 (1983). So important are these goals with respect to insurance companies that the Legislature did not await judicial interpretation of the statute on a case-by-case basis, but rather enacted a separate statute, G.L. c. 176D, enumerating particular conduct on the part of insurers which is proscribed by G.L. c. 93A.

and to the insureds themselves. The MMJUA has no other function except to provide legal defense and indemnity coverage to its insureds. However, despite the lack of any practical difference between the MMJUA and other insurance carriers, the trial court held that the MMJUA is exempt from the application of G.L. c. 176D because it is not engaged in trade or commerce (A. 64-65). In so ruling, the court relied heavily on the fact that the MMJUA is not a for-profit entity, and thus has “no profit-minded private owners who would feel the effect of or be deterred by the possibility of punitive damage awards” (A. 69). The amici believe that this narrow view ignores the practical realities that govern the operation of the MMJUA.

This Court has established certain standards for determining whether the parties to a transaction are engaged in trade or commerce: “1) the nature of the transaction, 2) the character of the parties, 3) the activities participated in, and 4) whether the transaction was motivated by business or personal reasons.” *Begelfer v. Najarian*, 381 Mass. 177, 190-191 (1980). It is clear that with respect to the first three parts of this test, the relationship between Jean Poznik and the MMJUA is identical to that of any other claimant and insurer. It is likewise clear that the operations of the MMJUA are in no way motivated by personal reasons, and instead are intended to further the interests of the insureds.

These considerations, and the structure of the MMJUA, are entirely different from those which prompted this Court to hold that the state insolvency fund, which provides limited coverage for claims against insolvent insurers, is not subject to G.L. c. 93A or 176D. See, *Barrett v. Massachusetts Insurers Insolvency Fund*, 412 Mass. 774 (1992). The guaranty fund is supported solely by the forced contributions of insurance companies doing business in the Commonwealth, and not by premium payments. Further, the fund does not solicit business, nor do insureds voluntarily seek its protection. Unlike the

the Superior Court. Based upon the experience of the amici, through our members and committees concerning work on administration of justice issues, medical malpractice trials in which the MMJUA represents the insured account for the majority of the civil jury cases being tried in the Superior Court. The exemption of the MMJUA from the fair dealing requirements of G.L. c. 176D will serve to aggravate this situation on two fronts; first, free from concerns about accountability for failing to settle a case where liability is clear, the MMJUA will be free to try every case in the hope of benefitting from an aberrant jury verdict; and second, free from concerns about responsibility for a verdict in excess of the policy limits, many "large exposure" cases which are now settled because of concerns about a bad-faith claim by the defendant-physician will be tried to a verdict. The amici believe that the Court should remember that the MMJUA need concern itself with the applicability of G.L. c. 93A and G.L. c. 176D only on those occasions when it engages in unfair and deceptive practices; if it conducts its business fairly and in accordance with the law, it need not worry about the effects of these statutes.

If the trial court's ruling is affirmed, both claimants and insureds will be at the mercy of a large and powerful insurance company which can engage in unfair and deceptive acts with impunity. The result will be that medical malpractice trials will consume even more of the court's already scarce time and resources. The effect on claimants, insureds, and the judicial system will be devastating. The amici file this brief not only out of concern for victims like Jean Poznik, but also out of concern for the overtaxed judicial system. The legislature, cognizant of the "crisis in our courts," could not have intended to compound this crisis by allowing the MMJUA to exploit and overburden the judicial system for its private benefit and the benefit of its insureds.