

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

**No. SJC-13535**

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**ZURICH AMERICAN INSURANCE COMPANY & another,**

**Plaintiffs/Appellees**

**v.**

**MEDICAL PROPERTIES TRUST, INC. & others,**

**Defendants/Appellants.**

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**Certification from the United States Court of Appeals for the First Circuit**

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**BRIEF OF AMICI CURIAE**

**NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS, INC.**

**and**

**MASSACHUSETTS ASSOCIATION OF PUBLIC INSURANCE  
ADJUSTERS, INC.**

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**IN SUPPORT OF THE DEFENDANTS'/APPELLANTS' POSITION TO  
ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE**

**DISCLOSURE STATEMENT PURSUANT TO SUPREME JUDICIAL COURT**  
**RULE 1:21**

The National Association of Public Insurance Adjusters, Inc. and the Massachusetts Association of Public Insurance Adjusters, Inc. do not have any parent corporations and do not have any publicly held corporations that own 10% or more of their stock.

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## **Statement of Identity and Interests of the Amici Curiae**

The National Association of Public Insurance Adjusters, Inc. ("NAPIA") is a nationwide trade association of public insurance adjusters organized in 1951 to professionalize the growing profession of public adjusting. NAPIA exists for primary purposes of professional education, certification, legal and legislative representation, scholarship and research, and marketing and promotion of the public insurance adjusting profession. NAPIA assesses annual membership fees to its member firms in order to help further these several goals.

The Massachusetts Association of Public Insurance Adjusters, Inc. ("MAPIA") is a statewide trade association of public insurance adjusters organized in 1973. MAPIA serves, benefits and protects the general public when dealing with property insurance claims. Like NAPIA, MAPIA's multifaced purposes include, among other things, the provision of professional education, certification, legal and legislative representation and marketing and promotion of the public insurance adjusting profession.

Public insurance adjusters are the only professionals licensed and regulated by state insurance departments to work for and assist insureds who have sustained a first-party property loss. Public adjusters are licensed pursuant to G.L. c. 175 §172. Public adjusters act on behalf of the insured and seek to negotiate and resolve insurance claims on terms most favorable for the insured. A public insurance adjuster is hired

by the insured and receives payment in the form of a percentage of the claim settlement.

NAPIA's and MAPIA's interest in the outcome of this appeal is substantial and direct. Insurers often invoke the "surface water" exclusion and, as this appeal demonstrates, seek to impermissibly expand its scope and application. NAPIA and MAPIA seek to obtain clarity on the proper reaches of the "surface water" exclusion such that it is interpreted in accordance with its language and intent. Water which does not reach, touch or emanate from the ground, but instead pools on a rooftop surface, ought not be treated or characterized as "surface water" and thus should not be subject to the "surface water" exclusion. Allowing such an expansive interpretation of the "surface water" exclusion would be detrimental to Massachusetts policyholders.

### **Declaration of Amici Curiae**

Undersigned counsel, Seth H. Hochbaum, has been the Executive Director of MAPIA since 2019. On behalf of NAPIA and MAPIA, NAPIA's board of directors and MAPIA's board of directors and officers authorized the undersigned counsel to file this *Amici* Brief in support of the Defendants/Appellants. The undersigned counsel for MAPIA, in conjunction with counsel for NAPIA, coauthored this *Amici* Brief, and MAPIA and NAPIA (and no other person or entity) funded the preparation and submission of this *Amici* Brief.

## Argument

This Court is confronted with the task of determining whether rainwater that lands and accumulates on a building's roof one or more stories above the ground and subsequently enters and inundates its interior unambiguously constitutes "surface water" as that term is used in the subject insurance policies. This Court's interpretation of the term "surface water" has implications that extend far beyond this case because this term appears regularly in standard commercial property and homeowner's insurance policies issued throughout the Commonwealth.

One of the exclusions found in the standard ISO "Homeowners 3 - Special Form" (the "HO 3 Form"), the most commonly used homeowner's insurance form, is for "Water Damage." This exclusion provides as follows:

Water Damage means:

- a. Flood, *surface water*, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;
- b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or
- c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, or other structure;

caused by or resulting from human or animal forces or any act of nature.

Direct loss by fire, explosion or theft resulting from water damage is covered.

See HO 3 Form at page 12 of 22<sup>1</sup> (emphasis added).

Similarly, there are three standard ISO commercial property cause of loss forms, CP 10 10 (Cause of Loss- Basic Form), CP 10 20 (Cause of Loss- Broad Form) and CP 10 30 (Cause of Loss- Special Form). Each of these forms specifically excludes loss or damage caused by Water, defining that term as follows:

**Water**

(1) Flood, *surface water*, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain or sump; or

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

But if Water, as described in **g.(1)** through **(4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

See CP 10 10 (Cause of Loss- Basic Form) at 3 of 6<sup>2</sup> (emphasis added); *see also* CP 10 20 (Cause of Loss- Broad Form) at page 3-4 of 8<sup>3</sup> and CP 10 30 (Cause of Loss- Special Form) at page 2 of 10<sup>4</sup> (using substantially similar language).

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<sup>1</sup>[http://docs.nv.gov/doi/documents/home\\_policies/HartfordForms/Hartford\\_HO\\_00\\_03\\_10\\_00.pdf](http://docs.nv.gov/doi/documents/home_policies/HartfordForms/Hartford_HO_00_03_10_00.pdf)

<sup>2</sup> <https://services.usli.com/formslib/cp-10-10-06-07.pdf>

<sup>3</sup> [https://secure.uticanational.com/RulCov-1Vol2/Common/Bureau/ISO/Comm/CP/CP1020\\_102012.pdf](https://secure.uticanational.com/RulCov-1Vol2/Common/Bureau/ISO/Comm/CP/CP1020_102012.pdf)

<sup>4</sup> <https://colonialclaims.com/pdfs/CP-10-30-04-02.pdf>



The term “surface water” is undefined in the HO 3 Form, CP 10 10, CP 10 20 and CP 10 30, but, as this Court has previously observed, it is defined as “waters from rain, melting snow, springs, or seepage, or floods that lie or flow on the surface of the earth and naturally spread over the ground but do not form a part of a natural watercourse or lake.” Boazova v. Safety Ins. Co., 462 Mass. 346, 354 (2012); Surabian Realty Co., Inc. v. NGM Ins. Co., 462 Mass. 715, 718 (2012). Though rain which collects on a ground level artificial surface retains its character as “surface water”, this Court has recognized the limits of the “surface water” exclusion. Surabian Realty, 462 Mass. at 722.

For example, this Court observed that the surface water exclusion does not bar coverage when heavy rain enters a sewer system, is diverted out of the system and is then the sole cause of damage to property. Id. In that scenario, the water lost its character as surface water upon entering the sewer system and, at the moment of damage, the water would have been defined solely as drain or sewer water. Id. This Court concluded that a “temporary characterization as surface water before the onset of damage does not deem the damage to be indirectly caused by surface water.” Id. This discussion demonstrates this Court’s recognition that the scope of the “surface water” exclusion is not without limit and that water may initially or temporarily be “surface water” but later (namely, upon onset of damage) lose its characteristics as such.

Consistent with this Court’s recognition that the term “surface water” is not boundless, water which falls from the sky and first and only touches a rooftop or other elevated manmade surface does not become “surface water” such that any damage subsequently caused by that water is per se excluded from coverage. Instead, when precipitation falls or leaks into an insured’s building through holes or other compromised areas of a roof damaged by hail, wind or some other covered peril — rather than running off the roof and behaving as one would expect water intercepted by a roof to behave — it does not fall within the plain meaning of the term “surface water” because it was never water lying or flowing on the surface of the earth and naturally spreading over the ground (even if the roof is considered an extension of the “earth’s surface”). Morley v. United Services Automobile Association, 465 P.3d 71, 77 (Colo. Ct. App. 2019).

If this Court now concludes that rainwater which falls and collects on a roof surface and subsequently infiltrates into a building is excluded from coverage as “surface water”, insurance companies will seize that opportunity to apply this new and overly expansive definition of “surface water” in such a way as to deny covered claims for reasons extending far beyond the unambiguous language and purpose of this exclusion. Rainwater, even if it never touched, fell upon or entered from the ground, would be a regularly (and impermissibly) excluded cause of loss. This conclusion sweeps far too broadly.

Massachusetts policyholders have the right to expect coverage for loss to their property caused by rain, which is a cause of loss for which insureds generally expect coverage. *See, e.g.,* Jason Metz, “Does Homeowners Insurance Cover Water Damage from Rain or a Leak?”, *Forbes Advisor*, Oct. 27, 2023, <https://www.forbes.com/advisor/homeowners-insurance/water-damage/>; Stephanie Nieves & Kara McGinley, “Does home insurance cover water damage from rain?”, Oct. 17, 2023, <https://www.policygenius.com/homeowners-insurance/does-homeowners-insurance-cover-water-damage-from-rain/#:~:text=1%20A%20standard%20policy%20covers%20water%20damage%20from,hole%20in%20your%20roof%20over%20time.%20More%20items>.

While their policies may exclude coverage for loss caused by flood and “surface water,” no reasonable insured would expect the term “surface water” to include rain falling from the sky, pooling on a roof or other artificial surface far above the ground and infiltrating from that elevated surface downward into their building. Water which does not reach, have any contact with or emanate from the ground ought not be treated or characterized as “surface water” and thus should not be excluded from coverage. Only certain causes of water damage are excluded as “surface water,” and falling rain collecting on a rooftop surface is not one of them.

Expansively interpreting the term “surface water” to include water which pools atop a roof’s surface would be detrimental to Massachusetts policyholders and leave

them with a gap in coverage that does not exist in 46 of the other 49 states. Only three states have concluded that rain collecting on a roof constitutes excluded “surface water” in a property and casualty policy whereas seven states have rejected this interpretation. *See* Br. of Medical Properties Trust at 31-33. The remaining forty states have not ruled on this issue and narrowed the coverage available to their residents. *See* Br. of Medical Properties Trust at 31-33. Massachusetts should not join the outlier jurisdictions which consider “surface water” to broadly include water which does not reach, touch or emanate from the ground.

### **Conclusion**

For all of the reasons set forth above and in the brief of the Defendants-Appellants, NAPIA and MAPIA respectfully request that this Court answer the certified question from the United States Court of Appeals for the First Circuit in the negative: rainwater that lands and accumulates on either (i) a building’s second-floor outdoor rooftop courtyard, or (ii) a building’s parapet roof, does **not** unambiguously constitute “surface water” under Massachusetts law for purposes of the insurance policies at issue in this case.

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Dated: March 12, 2024

## CERTIFICATE OF COMPLIANCE

In accordance with Mass. R. App. P. 17(c)(9), I, Seth H. Hochbaum, Esq. certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including Rule 16(a)(13) (Addendum), Rule 16(e) (References to the Record), Rule 17 (Cover, Length and Content), Rule 18 (Appendix to the Briefs), Rule 20 (Form and Length) and Rule 21 (Redaction). This brief contains 1,783 non-excluded words, which I ascertained using Microsoft Word 365's word count function. The brief uses Times New Roman 14-point font and was composed in Microsoft Word 365.

/s/ Seth H. Hochbaum  
\_\_\_\_\_  
Seth H. Hochbaum

## CERTIFICATE OF SERVICE

I, Seth H. Hochbaum, Esq. certify that on March 12, 2024, on behalf of Amici Curiae National Association of Public Insurance Adjusters, Inc. and Massachusetts Association of Public Insurance Adjusters, Inc., I electronically filed the foregoing Brief of Amici Curiae National Association of Public Insurance Adjusters, Inc. and Massachusetts Association of Public Insurance Adjusters, Inc., SJC-13535, with which counsel for Appellants, Medical Properties Trust, Inc. and Steward Health Care System LLC, Appellees Zurich American Insurance Company and American Guarantee and Liability Insurance Company, and Amicus Curiae, United Policyholders, are registered and will receive automatic service.

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