STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE	)
MEASURABLE COST SAVINGS	)
DETERMINED BY DIRIGO	)
HEALTH FOR THE FOURTH	)
ASSESSMENT YEAR	)
	)
DOCKET NO. INS-08-900	)

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/s/ Bruce C. Gerrity
Bruce C. Gerrity, Bar No. 2047
Roy T. Pierce, Bar No. 7541

PRETI, FLAHERTY, BELIVEAU & PACHIOS, LLP
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
(207) 623-5300

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY DIRIGO HEALTH FOR THE FOURTH ASSESSMENT YEAR	)	REPLY BRIEF OF THE MAINE AUTOMOBILE DEALERS ASSOCIATION INSURANCE TRUST
DOCKET NO. INS-08-900	)	

NOW COMES the Intervenor, Maine Automobile Dealers Association Insurance Trust (the "Trust"), by and through its undersigned counsel, and, pursuant to the Superintendent's Notice of Pending Proceeding and Hearing and Order Setting Actual Hearing Date, Ruling on Interventions, and Establishing Procedures, submits the following reply brief.

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INTRODUCTION

Just as surely as the swallows return each March to Capistrano, the DHA is back before the Superintendent with yet another absurdly high AMCS determination from the Dirigo Board. That AMCS determination is based on a fundamentally flawed methodology that is founded in large measure on the uncanny and seemingly limitless ability of the DHA and its consultants to flaunt express statutory language, basic principles of statistical analysis, and prior precedent. So unsupportable is the substance of the Dirigo Board's Decision that the DHA spends much of its brief laying out arguments for why the Superintendent should not give that Decision anything more than the most deferential and cursory review possible. In short, what the DHA offers up here is a flawed methodology, based on disregard of controlling principles, cloaked in an unwarranted claim of deference.

ARGUMENT

Once again, the Trust adopts the arguments set forth in the reply brief filed by the Maine State Chamber of Commerce ("Chamber"), and, to the extent to which they do not advance a "rough justice" alternative AMCS figure, those set forth in the reply briefs of Anthem Health Plans of Maine, d/b/a Anthem Blue Cross and Blue Shield ("Anthem") and the Maine Association of Health Plans ("MAHP").

I. The Dirigo Board's Decision Is Entitled To No Deference.

A common thread throughout the DHA's brief is the notion that the Superintendent should defer to (read: uncritically accept) the Dirigo Board's AMCS determination. However, the Superintendent's statutory mandate is to determine whether the AMCS found by the Dirigo Board "are reasonably supported by evidence in the record." 24-A M.R.S.A. § 6913(1)(C). Nowhere in the Act is it written that the Superintendent is to accord any deference to the Dirigo

Board. In short, the DHA wants to turn the statutory review mechanism created by the Legislature into nothing more than an administrative rubber stamp.

The Act, however, instructs the Superintendent to approve the Board's filing *only* if it is reasonably supported by the evidence in the record. Therefore, to fulfill the express statutory mandate, the Superintendent must undertake her own independent review of the record developed before the Board. The Act was set up this way for a reason–the Board is an inherently self-interested arbiter. Accordingly, the Act requires an unbiased review by an unrelated agency with its own expertise to counter-balance the Dirigo Board's inherent self-interest.

Moreover, the circumstances of this case are such that any deference is unwarranted. The Law Court has noted that the process can be so procedurally tainted that an agency may lose any deference to which its decision may have been entitled. See Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation, 473 A.2d 406, 411 n.10 (Me. 1984). Such is the case here.

Under the Act, action by the Dirigo Board requires the affirmative vote of five members. See 24-A M.R.S.A. § 6904(6). Here, the Dirigo Board's AMCS determination was made based on a 5-0 vote.

On July 18, 2008, Consumers for Affordable Healthcare ("CAHC") disclosed that the Maine State Employees Association, SEIU Local 1989 ("MSEA") was an "organizational member" of CAHC, that Dirigo Board member, Mary Anne Turowski, an MSEA employee, had participated in CAHC meetings as MSEA's representative, and that Ms. Turowski had not attended any "regularly scheduled" CAHC meetings in 2008. (AR Binder 2 Tab 57 at p. 3). The Trust requested Ms. Turowski's recusal for the reasons set forth in CAHC's disclosure and the fact that MSEA is the second largest contributor to the PAC opposing the pending referendum regarding the Dirigo funding mechanism. (AR Binder 2 Tab 60 at pp. 7-8).

For her part, Ms. Turowski responded as follows:

> For the record, MSEA SCIU did make a contribution as indicated, we as an organization have supported Dirigo in its funding and funding capability, as well as support legislatively for the program. It should be no surprise to anyone in this room, *hence, my participation on this Board*, and I'm confident that I can render a fair and impartial decision in this matter.

(AR Binder 2 Tab 60 at 8-9) (emphasis added). Thus, Ms. Turowski determined that she could be fair and impartial in this matter despite her acknowledgement that she owes her position on the Dirigo Board to the fact that her employer has been a supporter of Dirigo's funding.

II. The Superintendent's Review Is Not Merely For Clear Error.

Continuing with its effort to preclude meaningful review, the DHA cites Griswold v. Town of Denmark, 2007 ME 93, 927 A.2d 410, for the proposition that the Dirigo Board's determination should be disapproved only if no competent evidence in the record exists in the record to support it. (DHA Brief at 3). Thus, the DHA views the Superintendent's role as being one of passively tallying the evidence. That, however, is neither the role prescribed by the Legislature nor the role undertaken by the Superintendent in the past.

"No competent evidence in the record," is the standard for determining whether a factual finding is clearly erroneous. See Marquis v. Marquis, 2008 ME 102, ¶ 5, 952 A.2d 990. The Legislature could have limited the Superintendent's role to reviewing the Dirigo Board's fact findings for clear error, but it chose not to.[1] Instead, the Legislature charged the Superintendent with determining whether the Dirigo Board's AMCS filing is reasonably supported by the evidence, a task that necessarily requires evaluation of the evidence.

[1] The Law Court has equated the "supported by substantial evidence in the record standard" applicable to appeals pursuant to M.R.Civ.P. 80C with the clearly erroneous standard of review. See Imagineering v. Superintendent of Ins., 593 A.2d 1050, 1053 n.6 (Me. 1991). Therefore, the clear error standard will be applicable to any future review by the Superior Court. What would the point be of a clear error review by the Superintendent only to be followed by a clear error review by the Superior Court? Clearly, the Legislature had a different role in mind for the Superintendent.

For the past three years, the Superintendent has made evaluations of the evidence and drawn conclusions differing from those drawn by the Dirigo Board. For example, last year in dealing with claimed CMAD savings, the Superintendent stated that "there are serious problems with the cost per CMAD methodology that compel interpretation of the evidence with a great deal of conservatism to allow for the potential measurement error." Decision, INS 07-900 at 14. In determining the amount of CMAD savings the Superintendent came to his own conclusion as to what the low end of the CMAD savings was ($15 million), what the high end of the savings was ($35 million), found that the record did not support either end of the range, and split the difference between the two to come up with $25 million in CMAD savings, rather than the $70.6 million the Dirigo Board found. Id.

Like its insistence that the Superior Court defer to the Dirigo Board's determination, the DHA insists that the Dirigo Board's decision be reviewed only for clear error simply to avoid having the Superintendent open the hood to find that the V-6 represented is really just a hamster on a wheel.

III. That the Intervenors Did Not Perform Their Own Regression Analyses Is Beside The Point.

Although it admits, as it must, that the burden of proof rested exclusively with the DHA, the DHA turns around and suggests that the fact that the Intervenors did not perform their own regression analyses somehow undermines the validity of their attacks on the DHA analysis. (DHA Brief at 10) ("If they were confident of the outcome, they surely would have performed the analysis. This is just an attempt by the DHA to draw attention away from the fact that its regression analysis is woefully deficient and that it failed miserably in its attempt to meet its burden of proof.

The fact that the Intervenors did not perform their own regression analyses does not make an iota of difference one way or the other to the validity of the regression analysis that was performed by srHS.[2] The Intervenors were not required to prove anything, much less do the DHA's work for it.

IV. The DHA Ignores The Legislature's Statutory CMAD Formula.

In its opening brief, the Trust pointed out that the formula used by srHS in calculating CMAD differs from the formula set forth in the very statute on which it relies as the basis for including of CMAD savings in AMCS. The DHA's response is contained within a single paragraph on page 14 of a 19-page brief. Operating under the premise that review by the Superintendent of legal interpretations of the Dirigo Health Act is strictly verboten, the DHA suggests that the Superintendent must ignore the statutory formula for calculating CMAD established by the Legislature and instead focus on whether the evidence reasonably supports the CMAD savings figure calculated in reference to the srHS formula that is admittedly inconsistent with the statutory formula. In other words, according to the DHA the Superintendent must confine her review of the evidence to the context of the make believe world it has created and ignore the reality established by the Legislature.[3]

The Superintendent's role of evaluating whether the AMCS determined by the Dirigo Board is "reasonably supported by the evidence" as required by 24-A M.R.S.A. § 6913(1)(C), can be undertaken only in the context of the legal framework provided by the Legislature. That means that the language of the statute actually *matters*. One would be hard-pressed to find

[2] The Trust lacks the means to pay a consultant the $900,000 the DHA pays srHS each year.

[3] If the Superintendent were reviewing DHA's determination of the area of a circle, she would apparently have to ignore πr^2 if srHS decided that it would rather multiply the circle's circumference by Jim Rice's career batting average (.298 for the curious).

another example of an administrative agency so unapologetic in its disregard of controlling statutory language.

The DHA does not bother with the niceties of explaining how its consultant's selection of a CMAD formula is a question of legal interpretation. The reason for this is clear—it cannot do it. This is not a case where, for example, srHS, the DHA, and the Dirigo Board were confronted with an ambiguous, undefined term having multiple reasonable meanings to choose from. Rather, the Legislature provided a comprehensive formula detailing *exactly* how CMAD is to be calculated; the DHA and its consultants just ignored it. An agency's abject disregard of plain statutory language is not "interpretation," it is usurpation of the legislative function.

Although undoubtedly working towards that end, the DHA is not yet immune from the requirements of Maine law.

V. The DHA Ignores The Principles Of Statistical Analysis.

Since the DHA based its entire CMAD savings calculation on what it billed as a multi-state multivariate regression analysis, the Trust and the other Intervenors pointed out that *none* of the variables driving the U.S. Model is statistically significant. Unfazed by the variables' failure to meet what its own witness described as "the traditional significance level used in most of the social sciences"—a p-value of .05 or 95% level of confidence (AR Binder 4 Tab 83 at p. 5)—the DHA's response is essentially "it doesn't matter."

According to the DHA, the failure to satisfy the traditional level of significance is irrelevant because one of its variables reached a 55% probability, which exceeds the preponderance of the evidence standard (51% probability). (DHA Brief at 8). The DHA, however, is confusing statistical significance with its burden of proof. Statistical significance is a threshold test of reliability; if the applicable level of significance is not met, the analysis is not

reliable. The fact that an analysis purports to show an association between Dirigo and savings that is statistically significant to a 55% level of confidence does not, as Dirigo suggests, prove that there is a 55% chance that the savings are the result of Dirigo. It means that there is a nine in twenty chance that the purported association is due to random chance. (AR Binder 3 Tab 61 at pp. 35-36, 147-50). Mr. Schramm himself testified that the U.S. Model is "inconclusive" in terms of whether the reduction in trend is attributable to Dirigo. (AR Binder 2 Tab 60 pp. 194-95, 228, 238, 239).

If Mr. Schramm and Dr. Thorpe sought to publish the U.S. Model, with its 55% confidence level, in a peer reviewed journal they would get laughed out of the room. Yet the DHA wants to use that model as the basis for a tax on the citizens of Maine, including every one of the Trust's plan participants.

The DHA next tries to save the U.S. Model by arguing that the suggestion that the claimed CMAD savings are the product of random chance ignores the record evidence. The DHA put it thusly:

> The hypothesis that there are no savings can be rejected because the empirical evidence shows that there are savings, regardless of the output of any statistical hypothesis testing. There is no question that CMAD cost growth in Maine has been reduced as a result of the Dirigo voluntary restraints.

(DHA Brief at 9). The "empirical evidence" on which the DHA relies is that CMAD savings were approved in each of the three prior years and anecdotal evidence from a single hospital that it was complying with the voluntary CMAD target and saving money—hardly a viable back-up plan for justifying CMAD savings of $119.4 million after the regression analysis tanked.

VI. The DHA Ignores Prior Precedent On Recoverability.

In his Year 3 Decision, the Superintendent clearly found recoverability to be relevant to the AMCS determination. The DHA's attempt to downplay that portion of the Superintendent's Year 3 Decision amounts to (1) the Superintendent was looking at recoverability because the Dirigo Board was inconsistent on the issue, and (2) since the Dirigo Board ignored the issue altogether this year, the issue is not before the Superintendent. (DHA Brief at 4-5, 11). Apparently, just as newborns lack object permanence ("If I don't see the object, it doesn't exist), the DHA lacks issue permanence ("If we don't talk about the issue, it doesn't exist").

The fact remains that last year the Superintendent has found the issue of recoverability pertinent to the determination of AMCS and the Superintendent must look at it this year. The DHA cannot simply ignore the recoverability question and place it beyond the Superintendent's review by doing so.

VII. The Bad Debt/Charity Care Methodology Is Just The Woodwork Effect Version 2.0.

In its brief, the DHA states that the bad debt/charity care methodology "captures the total reduction in uninsurance due to Dirigo, including the reduction caused by the effect the Dirigo initiatives have had in lowering the rate of increase in private health insurance premiums." (DHA Brief at 16). As noted in the Trust's opening brief and tacitly confirmed by the DHA's brief, the bad debt/charity care methodology is nothing more than the previously rejected "woodwork effect."

CONCLUSION

For all of the foregoing reasons, and those set forth in the Trust's brief dated August 26, 2008, the Superintendent should disapprove the Board's filing in its entirety.

Dated: September 5, 2008

Respectfully submitted,

/s/ Bruce C. Gerrity

Bruce C. Gerrity, Bar No. 2047
Roy T. Pierce, Bar No. 7541

PRETI, FLAHERTY, BELIVEAU & PACHIOS, LLP
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
(207) 623-5300

CERTIFICATE OF SERVICE

I, Bruce C. Gerrity, attorney for the Maine Automobile Dealers Association Insurance Trust, hereby certify that on this date I made service of the above document as follows:

1. Two hard copies via U.S. Mail to:

   Mila Kofman, Superintendent
   Attn: Vanessa J. Leon, Docket No. INS-08-900
   Maine Bureau of Insurance
   34 State House Station
   Augusta, ME 04333-0053

2. One identical electronic copy to:
   Vanessa.J.Leon@maine.gov

3. One hard copy via U.S. Mail to:

   Compass Health Analytics, Inc.
   Attn: James P. Highland, Ph.D.
   477 Congress Street, 7th Floor
   Portland, ME 04101

   and one identical electronic copy to:
   jh@compass-inc.com

4. One hard copy via U.S. Mail to:

   Thomas Sturtevant, Jr., Esq.
   Assistant Attorney General
   Office of the Attorney General
   6 State House Station
   Augusta, ME 04333-0006
   Counsel to the Superintendent

   and one identical electronic copy to:
   tom.sturtevant@maine.gov

   Michael J. Colleran, Esq.
   Office of the Attorney General
   6 State House Station
   Augusta, ME 04333-0006
   Counsel for Dirigo Health Agency

   and one identical electronic copy to:
   michael.colleran@maine.gov

D. Michael Frink, Esq.
Curtis Thaxter Broder Stevens & Micoleau, LLC
One Canal Plaza
P.O. Box 7320
Portland, ME 04112-7320
Counsel for the Maine Association of Health Plans

and one identical electronic copy to:
mfrink@curtisthaxter.com

William H. Stiles, Esq.
Verrill Dana LLP
P.O. Box 586
One Portland Square
Portland, Maine 04112-0586
Counsel for the Maine State Chamber of Commerce

and one identical electronic copy to:
wstiles@verrilldana.com and
rlefay@verrilldana.com

Christopher T. Roach, Esq.
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101

and one identical electronic copy to:
croach@pierceatwood.com

Mila Poliquin Pross, Esq.
Consumers for Affordable Healthcare
39 Green Street
P.O. Box 2490
Augusta, Maine 04338-2490

and one identical electronic copy to:
mpross@mainecahc.com

Dated: September 5, 2008

/s/ Bruce C. Gerrity
Bruce C. Gerrity, Bar No. 2047