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October 21, 2005

By E-mail and U.S. Mail

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional & Financial Regulation
124 Northern Avenue
Gardiner, Maine 04345

*Re: In Re: Review of Aggregate Measurable Cost Savings Determined by Dirigo
Health for the First Assessment Year
Docket No. INS-05-700*

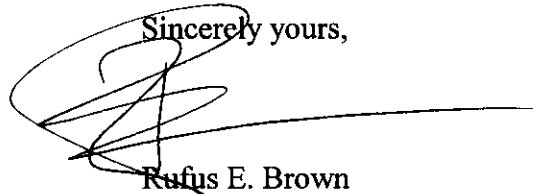
Dear Superintendent Iuppa:

Enclosed for filing in the above-reference matter please find the original and one (1) copy of the following documents:

1. Filing Cover Sheet; and
2. Pre-Hearing Memorandum of Law of Consumers for Affordable Health Care.

Thank you for your attention to this matter.

Sincerely yours,



Rufus E. Brown

REB/ncw
Enclosures
cc: Service List (by e-mail)

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

IN RE:)
)
REVIEW OF AGGREGATE) FILING COVER SHEET
MEASURABLE COST SAVINGS)
DETERMINED BY DIRIGO HEALTH)
FOR THE FIRST ASSESSMENT YEAR)

DOCKET NO. INS-05-700

To: Alessandro Iuppa, Superintendent of Insurance
Attn: Vanessa J. Leon

Dated Filed: October 21, 2005

Name of Party: Consumers for Affordable Health Care

Document Title: Pre-Hearing Memorandum of Law of Consumers for Affordable Health Care

Document Type: Memorandum of Law

Confidential: No

Respectfully submitted.



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

IN RE:)
)
REVIEW OF AGGREGATE) **PRE-HEARING**
MEASURABLE COST SAVINGS) **MEMORANDUM OF LAW OF**
DETERMINED BY DIRIGO HEALTH) **CONSUMERS FOR AFFORDABLE**
FOR THE FIRST ASSESSMENT YEAR) **HEALTH CARE**
)
Docket No. INS-05-700)

Intervenor Consumers for Affordable Health Care (“CAHC”) submits the following as its Pre-hearing Memorandum of Law:

- I. The Determinations of the Aggregate Measurable Cost Savings as Set Forth in the September 19, 2005 Filing by the Dirigo Health Board are Reasonable.*

Assuming, as the Superintendent has ruled, that as a filer Dirigo Health has the initial burden of proof in these proceedings, the Dirigo Board’s September 19, 2005 filing, with all its appendices (together with the transcripts of all the hearings before the Board, namely, the hearings dated August 29, 2005, September 6, 2005, September 13, 2005, and September 14, 2005) established a prima facie case that its determinations are reasonable and supported by the evidence. *See*, P.L. 2005, 400, Part B, Sec. B-2.2.B (“The superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.”) This means that the Board’s determinations should be approved unless the Superintendent’s own analysis or the analysis or evidence from other Intervenors persuade the Superintendent that one or more of the Board’s findings are essentially arbitrary or capricious. *See*, CAHC’s Memorandum of Law on the Standard of Review,

dated October 7, 2005; *Kroeger v. Dept. of Environmental Protection*, 2005 ME 50, ___A.2d ___, at ¶8. As we explained in our prior Memorandum of Law, the Superintendent should give deference to the Board in the process of reviewing its determinations. *Id; Conservation Law v. Dept. of Environmental Protection*, 823 A.2d 551, 2003 ME 62, ¶23.

In support of its determinations, the Dirigo Board will present its experts, including Steven Schramm and Nancy Kane, who will address questions and challenges to their analyses that the Board relied upon in making its findings on aggregate measurable cost savings. In further support of the reasonableness of the Board's determinations, CAHC has filed the testimony of Dr. Kenneth Thorpe, a leading expert on health policy and management. In his testimony and from cross examination at the hearings, he will address and support from his own perspective several of the Board's cost determinations, including savings from reduced CMAD and reduction of costs attributable to bad debt and charity care. CAHC also has filed testimony for Commissioner Rebecca Wyke in support of the Dirigo findings on the cost savings from the time value of money relating to the settlement of the historical claims and increased PIP payments, and for the increased payments to physicians.

In assessing the reasonableness of the Dirigo Board's findings, we urge him to bear in mind that the Board has already built into its findings fourteen (14) different compromises that render the findings on savings conservative. These are all set out in Tab 3 of the Dirigo Board's filing. For example, on the first initiative, the Dirigo legislation called for hospitals to limit increases of their consolidated operating margins ("COM") "to *no more than 3%* for the hospital fiscal year beginning July 1, 2003 and

ending June 30, 2004.” P.L. 2003, Chapter 469, Part F, Section F-1, subsection B.

[Emphasis added]. The Board compromised on this initiative by including in its savings analysis only hospitals whose baseline margin was above 3% and reduced to below 3%, thereby excluding savings from hospitals that reduced their COM in compliance with the statutory criteria but not below 3%, and savings for hospitals whose COM started at or below 3% and was reduced further in response to Dirigo. The same compromise was made in the voluntary hospital limits (3.5%) on cost for case mix adjusted discharges (“CMAD”). *Id.* Accordingly, from these two and the twelve other compromises, the Board’s determinations should be viewed as lower than they could have been following the letter of the Dirigo legislation.

II. The Dirigo Legislation Does Not Contemplate Netting.

The Dirigo legislation specifies in part that:

No later than the effective date of this Act, the board shall file with the Superintendent of Insurance its determination of the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care cost to health care providers as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004 as well as the supporting information for that determination.

P.L. 2005, Ch. 400, Part B, Section B-2, subsection 2.A. Several Intervenors argue that under this mandate the Board, when determining savings from voluntary targets for CMAD, hospital COM and Carrier VUG, should reduce (“net”) its findings of cost savings attributable to Dirigo by the extent to which some hospitals and carriers did not comply with the voluntary targets. This argument fails for both technical and logical reasons.

As a technical matter, the mandate of the Legislature to determine “aggregate measurable cost savings” does not contemplate netting. The plain meaning of “aggregate” means a “total considered with reference to its constituent parts; a *gross amount*.” *Dictionary.com*. [Emphasis added.] Moreover, when the Dirigo legislation (L.D. 1577) was being considered, the Minority Report of the House Insurance and Financial Services Committee (Amendment “B”, S-360) included an amendment to the proposed Section 6913(1) to read as follows:

1. Determination of cost savings. After an opportunity for a an adjudicatory hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the ~~board~~ superintendent shall determine annually not later than ~~April~~ February the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care costs to health care providers ~~in this State~~ as a result of the operation of Dirigo Health and any net savings from increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

This amendment was defeated. What it shows, however, is that when the Legislature wanted to net, it said so in reference to a specific initiative. Netting was not considered embodied in the other words of the statute, including the word “aggregate.”

There is also a logical reason why netting should not be used. Assume a voluntary target goal in Dirigo legislation to reduce hospital COM from a historical 10% increase down to 5%. Assume 4 four hospitals of equal size in the state, all of which had COM increases of 10% for the last several years. Then assume one hospital responds to the voluntary target, reducing the increases of COM to 5%, whereas other hospitals remain at 10%. Under this example, if netting were used, there would be no savings because the three non-conforming hospitals would have exceeded the voluntary target by an aggregate of 15%, wiping out the one hospital that cut its COM in half and reduced by

it to 5%. Yet clearly in this example, one of the hospitals did generate savings of 5% in response to the legislation. Logically, therefore, netting savings in the hospital and carrier initiatives only makes sense if the negative is a cost that is identified as having been *caused by* the Dirigo Initiatives. So far, none of the Intervenors has identified such costs.

III. The Dirigo Determinations of Savings are Attributable to the Dirigo Initiatives.

Another criticism coming from several of the Intervenors is that there is no way to tell that the savings determined for 2004 are attributable to the Dirigo Initiatives. One response to this criticism is that the Intervenors seek exactness in the measurement beyond what can be achieved within the time frame and mandates of the Legislature. Under the circumstances, it must be assumed that the Legislature expected the Dirigo to make a good faith, reasonable effort, given resources and the time available to it. We believe that the Board has done this. Another response is that it is proper for the Board to assume that the cost savings measured are attributable to Dirigo in the absence of other non-Dirigo factors impacting on costs. So far none of the Intervenors has made a convincing case that there are any of such other factors in play.

IV. The "Line of Sight Arguments" Were Not within the Power of the Board to Adopt.

Another argument advanced by Intervenors was that there are preferable, more simple and direct ways, to measure savings than those adopted by the Board. Presumably, this argument has now been abandoned. If it has not, it must be disregarded. All of the Board's measurements were derived from the Board's interpretation of its legislative mandate. See Tab 3 of the Board's Filing. The Board was not at liberty to devise its own measurements independent of its enabling legislation.

V. *If the Superintendent Finds that Any of the Board Determinations Are Unreasonable He Should Explain Why and Remand the Matter Back to the Board to Allow Amended Determinations.*

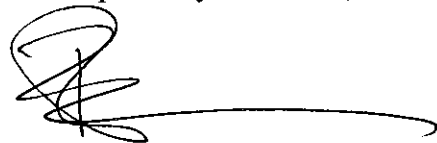
The Dirigo legislation directs the Superintendent to issue an “order *approving, in whole or in part, or disapproving* the filing” of the Dirigo Board based on a determination of whether “the aggregate measurable cost savings filed by the board are reasonably supported by the record.” P.L. 2005, Ch. 400, Part B, Section B-2, subsection 2.B. [Emphasis added.] This language does not allow the Superintendent to substitute his own number for a cost savings to the extent that he finds any portion of the findings of the Board or any methodology or rationale or calculation by the Board to be unreasonable in light of the record. To be sure, the Superintendent intends to and is expected to take evidence at the hearings that are scheduled, and based on that evidence he can and is expected to make factual findings about the reasonableness of the Board’s determinations or parts thereof. But after doing all that, he cannot simply substitute his own number because his position is that of a reviewer, not an independent fact finder; he can only approve or disapprove. He is in a position analogous to a Superior Court reviewing agency action that has taken evidence to create a record. As explained in our prior Memorandum on the Standard of Review on October 7, 2005, the “evidence which is adduced must relate to the limited issue of the reasonableness of the administrative decision.” *Frank v. Assessors of Skowhegan*, 329 A.2d 167, 171 (Me. 1974); *accord, Parkinson v. State*, 558 A.2d 361 (Me. 1989).

What, then should the Superintendent do if he finds that any portion of the Dirigo Board filing is not reasonably supported by the record? The answer is clear from decisions of the Law Court and the prior practice of the Superintendent. The

Superintendent is acting in an appellate capacity. The Law Court has ruled that “[n]either [it] nor the Superior Court, acting in an appellate capacity, is free to make factual findings independently of those made by the agency . . . ; the remedy for the failure of an a agency to act on the matters properly before it is a remand to the agency.” *Suzman v. Comm. Dept. of Health and Human Service*, 2005 ME 80, ¶25, ___ A.2d ____, citing *Harrington v. Town of Kennebunk*, 459 A.2d 557, 561 (Me. 1983). The type of remand should be analogous to those issued by the Superintendent pursuant to 24-A M.R.S.A. 2736-B on Anthem rate filings pursuant to which the Superintendent can issue a final order that disapproves of a part of a filing, say why he disapproves, and remand it to the filer with the provision that if the filing is amended to address the problem it will be approved automatically. *See, Decision and Order*, dated December 16, 2004, *In re Anthem Blue Cross and Blue Shield 2005 Individual Rate Filing*, Dkt. No. INS-04-610; , *Decision and Order*, dated November 8, 2002, *In re Anthem Blue Cross and Blue Shield 2003 Individual Rate Filing*, Dkt. No. INS-02-785. So here, the Superintendent could issue a final order on or before October 29, 2005 remanding to the Board and give the Board five (5) days to amend its filing to address any defect with provisions that the Board’s amended filing would be automatically approved upon doing so. Then any disappointed party could proceed to Superior Court for a review of all the prior proceedings should they chose to.

Dated: October 21, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Rufus E. Brown', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2005, a copy of Consumers for Affordable Health Care's Pre-Hearing Memorandum of Law was served electronically on each of the persons listed below and by U.S. Mail to the Superintendent, Thomas Sturtevant and Compass Health Analytics, Inc.

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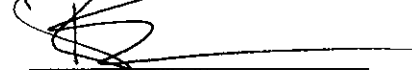
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