

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-05-____

MAINE AUTOMOBILE DEALERS)
ASSOCIATION INSURANCE TRUST,)
)
and)
)
BANKERS HEALTH TRUST,)
)
Petitioners,)
)
v.)
)
SUPERINTENDENT OF INSURANCE,)
)
and)
)
DIRIGO HEALTH AGENCY,)
)
Respondents,)
)
and)
)
ANTHEM HEALTH PLANS OF MAINE,)
)
MAINE STATE CHAMBER OF)
COMMERCE,)
)
MAINE ASSOCIATION OF HEALTH)
PLANS)
)
and)
)
CONSUMERS FOR AFFORDABLE)
HEALTH CARE,)
)
Parties-In-Interest.)

PETITION FOR REVIEW OF FINAL
AGENCY ACTION

NOW COME the Petitioners, the Maine Automobile Dealers Association Insurance Trust and the Bankers Health Trust, by and through their undersigned counsel, and, pursuant to 5 M.R.S.A. § 11002 and M.R.Civ.P. 80C, complain against the Respondents as follows:

PARTIES

1. Petitioner Maine Automobile Dealers Association Insurance Trust (“MADAIT”) is a multiple employer welfare arrangement organized and existing under the laws of the State of Maine, having its principal place of business in Augusta, Maine. MADAIT secures health insurance for employees of participating members of the Maine Automobile Dealers Association.

2. Petitioner Bankers Health Trust (“BHT”) is a multiple employer welfare arrangement organized and existing under the laws of the State of Maine, having its principal place of business in Augusta, Maine. BHT secures health insurance for employees of participating members of the Maine Bankers Association.

3. Respondent Superintendent of Insurance (the “Superintendent”) is the head of the Maine Bureau of Insurance, and, by virtue of 24-A M.R.S.A. § 211, is the state official responsible for the administration and enforcement of Maine’s insurance laws.

4. Respondent Dirigo Health Agency (“DHA”) is an independent executive agency, which, by virtue of 24-A M.R.S.A. § 6902, is directed to “arrange for the provision of comprehensive, affordable health care coverage to eligible small employers, including the self-employed, their employees and dependents, and individuals on a voluntary basis” and to “monitor[] and improv[e] the quality of health care in this State.”

5. Party-In-Interest Anthem Health Plans of Maine, Inc. (“Anthem”) is an insurance corporation organized and existing under the laws of the State of Maine, having its principal place of business in South Portland, Maine. Anthem is Maine’s largest health insurance carrier.

6. Party-In-Interest Maine State Chamber of Commerce (the “Chamber”) is a non-profit corporation organized and existing under the laws of the state of Maine, having its principal place of business in Augusta, Maine. The Chamber is a statewide business association representing Maine businesses, both large and small.

7. Party-In-Interest Maine Association of Health Plans (“MAHP”) is a non-profit corporation organized and existing under the laws of the state of Maine, having its principal place of business in Cumberland, Maine. MAHP is a trade association of health insurance carriers, health maintenance organizations, and third-party administrators licensed by the Maine Bureau of Insurance.

8. Party-In-Interest Consumers for Affordable Health Care (“CAHC”) is a non-profit corporation organized and existing under the laws of the state of Maine, having its principal place of business in Augusta, Maine. CAHC is a consumer health coalition that advocates for affordable, quality health care.

JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction over this action by virtue of 5 M.R.S.A. § 11002, and M.R.Civ.P. 80C, insofar as this action is an appeal of a final agency action.

10. Venue is proper in Kennebec County by virtue of 5 M.R.S.A. § 11002(1)(A), insofar as MADAIT and BHT each have their principal places of business in Kennebec County.

BACKGROUND

11. On June 13, 2003, the Dirigo Health Act, P.L. 2003 ch. 469 (“Chapter 469”), was passed by the 121st Legislature and signed by Governor Baldacci. By operation of Me. Const. Art. IV, pt. 3, § 16, Chapter 469 took effect on September 18, 2003.

12. On June 17, 2005, an act entitled “An Act to Modify the Calculation and Implementation Date of Savings Offset Payments under the Dirigo Health Act” was passed by

the 122nd Legislature and signed by Governor Baldacci, P.L. 2005, Chapter 400, (“Chapter 400”), which amended various provisions of Chapter 469. By operation of Me. Const. Art. IV, pr. 3, § 16, Chapter 400 took effect on September 17, 2005. The Dirigo Health Act as enacted by Chapter 469, and amended by Chapter 400, is at times referred to as “the Act.”

13. Governor Baldacci nominated five individuals to serve on DHA’s Board of Directors on September 5, 2003.

14. DHA issued a Request for Proposals on May 7, 2003, seeking proposals from insurance carriers to administer the DHA’s insurance program.

15. In August 2003, DHA entered into an agreement with Anthem whereby Anthem agreed to serve as the administrator of DHA’s insurance program.

16. DHA did not enroll its first eligible participants until October 4, 2004, and coverage for the first participants did not begin until January 1, 2005.

17. To provide funding to subsidize DHA, the Act authorizes the Dirigo Board to establish annually a so-called “savings offset payment” to be paid by health insurance carriers, employee benefit excess insurance carriers, and third-party administrators (“TPAs”). Such savings offset payments may not exceed either 4% of paid claims, or the amount of “aggregate measurable cost savings.”

18. Responsibility for determining aggregate measurable cost savings resides, in the first instance, with the Dirigo Board.

19. Under the Act, “aggregate measurable cost savings” means all savings, “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 increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.”

20. On September 19, 2005, the Dirigo Board filed with the Superintendent its first annual determination of “aggregate measurable cost savings” (the “Board Filing”). The Dirigo Board found aggregate measurable cost savings in the amount of \$136.8 million. In so finding, the Dirigo Board adopted the bulk of the methodology (the “Mercer Methodology”) advanced by DHA’s consultants, Dr. Nancy M. Kane of the Harvard School of Public Health and Mercer Government Human Services Consulting (“Mercer”). Mercer had earlier expressed to the Dirigo Board its belief that the aggregate measurable cost savings totaled \$233.2 million.

21. By Orders dated September 22, 2005 and September 26, 2005, the Superintendent granted intervenor status to MADAIT and BHT (collectively, “the Trusts”), Anthem, the Chamber, MAHP, and CAHC.

22. The Trusts filed a motion to dismiss on September 26, 2005, on the ground that the Board Filing was untimely and that the Dirigo Board did not provide interested parties the opportunity for an adjudicatory hearing before the Dirigo Board as required by the Act. The Superintendent denied the motion in an Order dated October 4, 2005.

23. The Superintendent held an adjudicatory hearing over two days on October 24 and October 27, 2005.

24. Thereafter, on October 29, 2005, the Superintendent issued his decision in which he approved, in part, the Board Filing. A true copy of the Superintendent’s Decision is attached hereto as Exhibit A.

25. In his Decision, the Superintendent determined that the record reasonably supported the existence of aggregate measurable cost savings totaling \$43.7 million. Included within the aggregate measurable cost savings that the Superintendent held were reasonably supported by evidence in the record were savings attributable to:

- a. hospitals voluntarily limiting cost increases to 3.5% as measured by expenses per Case Mixed Adjusted Discharge (“CMAD”) (\$33.7 million);
- b. reductions in bad debt and charity care (\$2.7 million);
- c. the time value of money stemming from hospitals’ accelerated receipt of payments paid by the State to settle Medicaid reimbursement claims (\$1.5 million);
- d. the time value of money stemming from accelerated payments of increased Prospective Interim Payments (“PIP”) (\$1.7 million); and
- e. increased Medicaid payments to be made to physicians in the future (\$4.1 million).

COUNT I

26. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 25 above as if fully set forth herein.

27. Under Section B-2(2) of Chapter 400, the Dirigo Board was required to file its determination of aggregate measurable cost savings “[n]o later than the effective date of this Act.”

28. Chapter 400 took effect on Saturday, September 17, 2005.

29. The Dirigo Board did not file its determination with the Superintendent until Monday, September 19, 2005.

30. Because the Dirigo Board made its filing after the statutorily prescribed deadline for doing so, the Superintendent lacked jurisdiction over the Board Filing, and his Decision approving in part the Board Filing constitutes an error of law, abuse of discretion, and/or a finding not supported by substantial evidence in the record.

COUNT II

31. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 30 above as if fully set forth herein.

32. Under the Act, the Dirigo Board was required to make its determination of aggregate measurable cost savings, “After an opportunity for a hearing conducted pursuant to Title 5, chapter 375, subchapter 4.”

33. Title 5, chapter 375, subchapter 4, 5 M.R.S.A. §§ 9051-9064, is the portion of the Administrative Procedures Act setting forth the standards and requirements for adjudicatory proceedings.

34. The Dirigo Board did not provide the Trusts, or any other interested party, with an opportunity for an adjudicatory hearing before it made its determination of aggregate measurable cost savings. Instead, Dirigo Board determined that such an adjudicatory hearing was unnecessary given the fact that the Superintendent had scheduled an adjudicatory hearing.

35. The Act specifically calls for the opportunity for adjudicatory hearing before the Dirigo Board makes its determination of aggregate measurable cost savings; it does not offer up the alternative of an adjudicatory hearing by the Superintendent after the Dirigo Board has filed its determination.

36. Because the Dirigo Board did not provide an opportunity for an adjudicatory hearing, the Superintendent’s Decision approving in part the Board Filing constitutes an error of law, abuse of discretion, and/or a finding not supported by substantial evidence in the record.

COUNT III

37. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 36 above as if fully set forth herein.

38. The \$43.7 million in aggregate measurable cost savings that the Superintendent has held are reasonably supported by evidence in the record consists of purported savings, including those allegedly attributable to CMAD, the time value of money stemming from

hospitals receipt of Medicaid reimbursement and increased PIP payments, and future Medicaid payments to be made to physicians that are not “as a result of the operation of Dirigo Health.”

39. In addition, the Superintendent considered the inclusion of alleged cost savings attributable to hospitals voluntarily limiting their consolidated operating margins to no more than 3% (“COM”), and to insurance carriers voluntarily limiting the pricing of products to a level of that supported no more than a 3% underwriting gain, less federal taxes (“VUG”). Neither the purported COM nor VUG savings are “as a result of the operation of Dirigo Health.”

40. Although the Trusts called into question whether savings attributable to CMAD, COM, VUG, the time value of money stemming from accelerated payments from the State, and future Medicaid payments could properly be included in the calculation of aggregate measurable cost savings “as a result of the operation of Dirigo Health,” the Superintendent found the issues to be purely questions of law beyond his statutory jurisdiction, and declined to address them.

41. The Superintendent’s Decision approval in part of the Board Filing constitutes an error of law, abuse of discretion, and/or a finding not supported by substantial evidence in the record.

COUNT IV

42. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 41 above as if fully set forth herein.

43. The Superintendent’s conclusion that the DHA could satisfy its burden of proof by establishing the existence of cost savings to the health care system as a whole, without regard for whether those savings had actually been passed on to payors in the form of reduced fees and charges, constitutes an error of law, abuse of discretion, and/or a finding not supported by substantial evidence in the record


RELIEF REQUESTED

WHEREFORE, the Petitioners request that the Court enter a judgment:

- a. Vacating the Superintendent's Decision dated October 29, 2005; and
- b. Awarding them such further relief as the Court deems just and proper.

Dated: November 28, 2005

Respectfully submitted,



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