

STATE OF MAINE
CUMBERLAND, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-_____

MAINE ASSOCIATION OF)
HEALTH PLANS)
)
Plaintiff/Petitioner,)
)
v.)
)
SUPERINTENDENT, BUREAU OF)
INSURANCE, DEPARTMENT OF)
PROFESSIONAL AND FINANCIAL)
REGULATION, STATE OF MAINE,)
)
and)
DIRIGO HEALTH AGENCY,)
)
Defendants/Respondents.)

PETITION FOR REVIEW OF FINAL
AGENCY ACTION
(M.R.Civ.P. 80C)
and
INDEPENDENT CLAIMS FOR RELIEF
FROM GOVERNMENTAL ACTION
(M.R.Civ.P. 80C(i))

DECLARATORY AND INJUNCTIVE
RELIEF REQUESTED

JURISDICTION AND VENUE

1. Pursuant to M.R.Civ.P. 80C, the Maine Association of Health Plans (“MEAHP”) seeks judicial review of the October 29, 2005 Decision and Order of the Superintendent of the Maine Bureau of Insurance (the “Decision”), in which the Superintendent approved in part the determination by the Dirigo Health Agency (“DHA”) of aggregate measurable cost savings for the first assessment year.
2. The Superintendent’s Decision is a final agency action within the meaning of M.R.Civ.P. 80C(a) and 5 M.R.S.A. §11001 *et seq.*
3. Venue is proper pursuant to 5 M.R.S.A. §11002(1)(A) because the Plaintiff/Petitioner has its principal place of business in Cumberland, Cumberland County,

Maine.

PARTIES

4. MEAHP is an incorporated association of health plans whose members are entities licensed by the Superintendent of Insurance, including health insurers, health maintenance organizations and third-party administrators of self-insured plans (“TPAs”).

5. Defendant/Respondent Dirigo Health Agency is a state agency organized pursuant to the Dirigo Act, 24-A M.R.S.A. § 6904, and charged with, *inter alia*, making an annual determination of “aggregate measurable cost savings” as well as the amount of the “savings offset payment.”

6. Defendant/Respondent Bureau of Insurance is a state agency organized within the State of Maine Department of Professional and Financial Regulation.

7. Defendant/Respondent Superintendent of Insurance, Alessandro A. Iuppa, (“the Superintendent”) is named in his official capacity, and is charged with presiding over an adjudicatory hearing to determine whether DHA’s determination of “aggregate measurable cost savings” is reasonably supported by evidence in the record.

ALLEGATIONS COMMON TO ALL COUNTS

8. In 2003, the Dirigo Health Act was enacted to attempt to control the rapid rate of increase in health care costs in Maine and to expand access to health insurance for the uninsured. 2003 Pub. Law Ch. 451.

9. The Dirigo Act was enacted on the theoretical premise that by reducing the amount of bad debt and charity care costs to providers of health care as well as by increasing Maine Care enrollment through expanded eligibility after June 30, 2004, insurance carriers,

employers, and individual Mainers enrolled in fully-insured or self-funded plans would pay less as a result of reduced cost shifting by providers.

10. A second theoretical premise of the Dirigo Act was that by creating a subsidized health insurance program, Dirigo Health, uninsured and underinsured Mainers would be able to afford coverage, thereby reducing the amount of cost-shifting.

11. A third theoretical premise of the Dirigo Act was that by reducing the amount of cost-shifting, health insurance carriers and TPAs, as well as their respective members, would pay less for health care coverage; this lesser amount paid for health care coverage would constitute “savings” under the Dirigo Act.

12. These “savings” would be used as the basis for assessing a charge against carriers, TPAs, and their members in order to provide subsidies for enrollees in Dirigo Health, and to fund the operations of the Maine Quality Forum; in the first assessment year, however, the Dirigo Act provided that “savings” would not be used to fund general administrative expenses of Dirigo Health. The operations of Dirigo Health in its first year of operation, the year prior to the first assessment year, were funded by a \$53 million grant from the federal government. The balance is available to fund Dirigo operations in the first assessment year.

13. In theory, the “savings” would be offset by the “savings offset payments,” such that the carriers, TPAs and their members would pay no more than they would absent the Dirigo Act.

14. The Dirigo Act provides that the DHA Board is to determine annually the “aggregate measurable cost 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 enrollment due to an expansion in Maine Care eligibility occurring after June 30, 2004.”

15. On September 19, 2005, the DHA Board submitted its determination of \$136.8 million in aggregate measurable cost savings for the first assessment year to the Superintendent of Insurance.

16. The Superintendent held an adjudicatory hearing on October 24 and 27 to determine whether the Board’s determination was reasonably supported by the evidence in the record.

17. MEAHP was an intervenor in the adjudicatory hearing held by the Superintendent.

18. On October 29, 2005, the Superintendent issued a decision approving, in part, the Board’s determination of aggregate measurable cost savings, and holding that \$43.7 million of aggregate measurable cost savings determined by the Board was reasonably supported by the evidence in the record.

19. The Dirigo Board met on November 10, 2005 and November 22, 2005, and has determined, pursuant to 2005 Pub. Law Chapter 400, the amount of the “savings offset payment” to be \$43.7 million.

20. Pursuant to the Dirigo Act, beginning on April 1, 2006, each of the member companies in the MEAHP is required to make payments on claims paid after January 1, 2006, in a percentage amount according to the “savings offset payment” as assessed by the Dirigo Board.

21. The Dirigo Board made its assessment of the “savings offset payment” using the methodology for determining “aggregate measurable cost savings” which was approved in part by the Superintendent.

22. The Dirigo Act also requires that the “savings offset payment” amount not exceed the “aggregate measurable cost savings,” as determined by the Board and approved by the Superintendent.

23. MEAHP’s member companies are aggrieved by the Superintendent’s Decision and Order approving in part the Dirigo Board’s determination of “aggregate measurable cost savings,” insofar as that Decision and Order provides a foundation for the Dirigo Board’s assessment of a “savings offset payment” to be charged against them.

24. MEAHP’s member companies are aggrieved by the Dirigo Board’s assessment of a “savings offset payment” insofar as that assessment is being charged against them.

COUNT I

APPEAL OF THE SUPERINTENDENT’S DECISION

25. MEAHP repeats and reasserts all of the factual allegations recited in all of the preceding paragraphs.

26. The Superintendent’s Decision is reviewable as a final agency action according to M.R.Civ.P. 80C(a) and 5 M.R.S.A. §11001 *et seq.*

27. The Superintendent’s Decision should be reversed pursuant to 5 M.R.S.A. § 11007 because it is: (1) in violation of constitutional or statutory provisions; (2) in excess of statutory authority; (3) made upon unlawful procedure; (4) affected by bias or error of law; (5) unsupported by substantial evidence on the whole record; and (6) arbitrary or capricious or characterized by abuse of discretion.

28. The reasons why the Superintendent’s Decision should be reversed include, but are expressly not limited to, the following:

- a. The Dirigo Act contains no reasonable and intelligible standards or criteria to guide the Superintendent in determining “aggregate measurable cost savings”; therefore, the Dirigo Act is void because it is unconstitutionally vague, meaning the Superintendent’s determination of “aggregate measurable cost savings” is in excess of the statutory authority and is affected by an error of law.
- b. In reaching his determination of “aggregate measurable cost savings,” the Superintendent expressly declined to interpret relevant language of the Dirigo Act, and instead deferred to the Dirigo Board’s interpretation of the statute; therefore, the Superintendent’s Decision is made upon unlawful procedure, is affected by an error of law, is arbitrary and capricious, and is characterized by an abuse of discretion.
- c. In reaching his determination of “aggregate measurable cost savings,” the Superintendent included “cost savings” relating to the CMAD and hospital/physician payment initiatives that were not the “result of the operations of Dirigo Health” as the Act requires; therefore, the Superintendent’s Decision is affected by an error of law, is arbitrary and capricious, and is characterized by an abuse of discretion.
- d. In reaching his determination of “aggregate measurable cost savings,” the Superintendent adopted the Dirigo Board’s methodology for calculating \$33.7 million in hospital “savings” under the so-called cost per case mix adjusted discharge (“CMAD”) measure even though (i) DHA’s own

witness testified that the Dirigo Board’s methodology could not identify any cost savings due to the operations of Dirigo Health as opposed to a variety of other external factors, and (ii) the Dirigo Act contains a provision employing the CMAD measure as a target for hospitals’ voluntary restraint on costs, but contains no provision authorizing the use of the CMAD measure as a methodology for measuring “savings”; therefore, any finding of “cost savings” related to CMAD is in excess of statutory authority, is affected by an error of law, is unsupported by substantial evidence, is arbitrary and capricious, and is characterized by an abuse of discretion.

- e. In reaching his determination of “aggregate measurable cost savings,” the Superintendent included \$2.7 million in “savings” for uninsured initiatives (i) on the erroneous assumption that providers will reduce the amount of cost-shifting, dollar for dollar, to carriers and TPAs, based upon additional revenue from recently enrolled individuals, (ii) on the erroneous assumption that such “savings” should be based on provider charges rather than the actual cost of care, and (iii) even though the Dirigo Act does not specify how “savings” for uninsured initiatives are to be calculated; therefore, the finding of \$2.7 million in “savings” for uninsured initiatives is affected by error of law, is unsupported by substantial evidence, is arbitrary and capricious, and is characterized by an abuse of discretion.

- f. In reaching his determination of “aggregate measurable cost savings,” the Superintendent included \$7.3 million in “savings” for payments to health care providers even though (i) it is not a category of “savings” identified in the Dirigo Act, (ii) the Dirigo Act contains no methodology for calculating such “savings,” and (iii) any such savings are not the result of the operations of Dirigo Health; therefore, the finding of \$7.3 million in “savings” for payments to health care providers is affected by error of law, is unsupported by substantial evidence, is arbitrary and capricious, and is characterized by an abuse of discretion.
- g. In reaching his determination of “aggregate measurable cost savings,” the Superintendent failed to determine whether the “savings” had been realized by payors via lower rates charged by providers, as required by the Dirigo Act; therefore, the Superintendent’s Decision is in excess of statutory authority, is affected by an error of law, is unsupported by substantial evidence, is arbitrary and capricious, and is characterized by abuse of discretion.

WHEREFORE, the MEAHP requests that this Court reverse the Superintendent’s Decision because it is: (1) in violation of constitutional or statutory provisions; (2) in excess of statutory authority; (3) made upon unlawful procedure; (4) affected by bias or error of law; (5) unsupported by substantial evidence on the whole record; and (6) arbitrary or capricious or characterized by abuse of discretion. Additionally, the MEAHP requests such other legal and equitable relief as this Court deems necessary and prudent.

COUNT II

DECLARATORY RELIEF

29. MEAHP repeats and reasserts all of the factual allegations recited in all of the preceding paragraphs.

30. MEAHP seeks a declaration that the sections of the Dirigo Act relating to the determination of “aggregate measurable cost savings” and “savings offset payments” are unconstitutionally vague, and therefore void and of no effect, because they do not set forth any reasonable and intelligible standards and criteria for making such determinations.

31. MEAHP seeks a declaration that the sections of the Dirigo Act relating to the determination of “aggregate measurable cost savings” and “savings offset payments” constitute an unauthorized delegation of the Legislator’s power of taxation, to wit:

- a. The Dirigo Act allows the Dirigo Board to charge a tax, called a “savings offset payment,” against health insurance carriers, TPAs, and their members in order to raise general revenue to support state programs.
- b. The Dirigo Act does not provide any reasonable standards or criteria for determining the amount of the tax.
- c. Any such tax is discriminatory because it is assessed against only health insurance carriers, TPAs, and their members.
- d. The Maine Constitution declares that “[t]he Legislature shall never, in any manner, suspend or surrender the power of taxation.” Art. IX, sec. 9.

32. MEAHP seeks a declaration that relevant portions of the Dirigo Act are pre-empted by federal law, specifically by the Employee Retirement and Income Security

Act (“ERISA”), 29 U.S.C. § 1144.

WHEREFORE, MEAHP requests that this Court

1. declare that sections of the Dirigo Act relating to the determination of “aggregate measurable cost savings” and “savings offset payments” are unconstitutionally vague, and therefore void and of no effect, because they do not set forth any reasonable and intelligible standards and criteria for making such determinations;
2. declare invalid the Superintendent’s Decision because it is based on unconstitutional sections of the Dirigo Act;
3. declare that sections of the Dirigo Act relating to the determination of “aggregate measurable cost savings” and “savings offset payments” are unconstitutional as an unlawful delegation of taxing authority by the Legislature to the Dirigo Board;
4. declare invalid the Dirigo Board’s assessment of a tax in the name of a “savings offset payment” because it is based on unconstitutional sections of the Dirigo Act;
5. declare that relevant portions of the Dirigo Act are pre-empted by ERISA; and
6. issue such other legal and equitable relief as this Court deems necessary and prudent.

COUNT III

INJUNCTIVE RELIEF

32. MEAHP repeats and reasserts all of the factual allegations recited in all of the preceding paragraphs.

33. MEAHP seeks an injunction restraining the Dirigo Board from using, for purposes of calculating the amount of the savings offset payment, the Superintendent's determination of "aggregate measurable cost savings" and the methodologies approved by the Superintendent in reaching his determination, because the Superintendent's Decision is based upon the Dirigo Act, which provides no reasonable standards or criteria for determining "aggregate measurable cost savings."

34. MEAHP also seeks an injunction restraining the Dirigo Board from assessing a tax in the name of a "savings offset payment" against only health insurance carriers, TPAs, and their members, because such a tax is discriminatory and an unconstitutional delegation of taxing authority.

35. Absent an injunction, an unconstitutional tax calculated using flawed and nonexistent methodologies will be assessed against health insurance carriers, TPAs, and their members in this and future years.

36. MEAHP and its member companies will be irreparably harmed if an injunction is not granted because (a) customers of MEAHP companies, businesses and employers, will be required to make savings offset payments, which will cause some of them to reduce or eliminate coverage, thereby causing MEAHP's member companies to lose business; (b) MEAHP's member companies will be forced to develop internal systems for accounting for and paying the new "savings offset payment" tax and for billing its members, (c) once MEAHP prevails on its appeal, MEAHP and its member companies will be forced to unravel all of the internal systems,

data and financial accounting undertaken to comply with the Dirigo Act, the Superintendent's Decision, and the Dirigo Board's assessment, (d) if the appeal is not decided by March 1, 2006, there is a strong likelihood that the same methodology will be used to calculate the SOP assessment in Dirigo assessment year two, and (e) in that case, two years' worth of systems, data and billing will need to be de-constructed and reconstituted.

37. For the reasons set forth in all of the preceding paragraphs, MEAHP has a strong likelihood of success on the merits of its claims that sections of the Dirigo Act are unconstitutional, that the Superintendent's Decision should be reversed, and that the Dirigo Board's assessment should be reversed.

38. There will be no substantial harm to the general public or adverse parties if an injunction is granted; rather, an injunction would simply maintain the status quo under which Dirigo Health currently operates.

39. On November 28, 2005 MEAHP requested a stay of the Superintendent's Decision and is awaiting a decision from the Superintendent.

WHEREFORE, MEAHP prays for relief as follows:

1. An injunction restraining the Dirigo Board from using the Superintendent's determination of "aggregate measurable cost savings" and the methodologies approved by the Superintendent in reaching his determination to calculate the "savings offset payment" tax for this and future years;
2. An injunction restraining the Dirigo Board from assessing a tax in the name of a "savings offset payment" against only health insurance

carriers, TPAs, and their members;

3. Such further legal and equitable relief as may be necessary to effectuate the Court's decision herein.

Dated: November 28, 2005

Respectfully submitted,



D. Michael Frink (Bar No. 2637)

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