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October 7, 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. Memorandum of Law of Consumers for Affordable Health Care on the Standard of Review

Thank you for your attention to this matter.

Sincerely yours,

  
Rufus E. Brown

REB/new  
Enclosures  
cc: Service List (by e-mail and U.S. 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 7, 2005

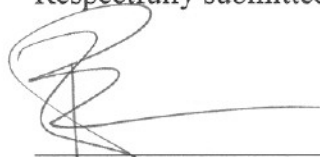
Name of Party: Consumers for Affordable Health Care

Document Title: Memorandum of Law of Consumers for Affordable Health Care  
On the Standard of Review

Document Type: Memorandum

Confidential: No

Respectfully submitted.



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

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

Intervenor Consumers for Affordable Health Care (“CAHC”) submits its position on the standard of review that should be used by the Superintendent of Insurance (the “Superintendent”) in his review of the filing of the Board of Directors of Dirigo (“Dirigo”) on the aggregate measurable costs savings as follows:

The standard of review is set forth by statute. P.L. 400, Part B, Sec. B-2.2.B provides, in relevant part, that:

Following a public hearing ...the Superintendent of Insurance shall issue an order approving, in whole or in part, or disapproving the filing made made [by Dirigo]. .... 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.

Under this statute the Superintendent cannot make independent findings on any aspect of the aggregate measurable cost savings. He can approve the entire findings of Dirigo, and he can disapprove the entire findings of Dirigo, or he can approve some of the findings and disapprove others. What he cannot do is make his own determination of what aggregate measurable cost savings were. If he disapproves of any part of the Dirigo filing, the only further action he can take is to remand the matter back to Dirigo to for

new findings. His role is limited to a review of the Board's determination, based on the filing of Dirigo and the record in these proceedings, to determine whether or the extent to which the Board's findings are "reasonably supported by the record." Under this statute, the Superintendent is required to act in an appellate capacity.

The standard for appellate review of administrative agency action is set forth in the Maine Administrative Procedure Act, 5 M.R.S.A. §8001 (the "Maine APA"), which provides, in the case of rulemaking, that judicial review should be limited to whether a rule is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Section 8058.1. In the case of agency adjudication, the standard of judicial review under the Maine APA is whether the agency action is "unsupported by substantial evidence on the whole record; or [a]rbitrary or capricious or characterized by abuse of discretion." Section 11007.4.C(5) and (6).

Several decisions have interpreted these appellate standards, focusing on the "arbitrary and capricious" standard as embodying the essence of appellant review of agency action. Administrative "[a]ction lacking in reasonableness may be characterized as arbitrary...." *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971). "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence." *Id.* See also, *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 916 (Me. 1984) and *Help-U-Sell, Inc. v. Maine Real Estate Commission*, 611 A.2d 981,984 (Me. 1992)("We have previously defined arbitrary and capricious conduct by an administrative agency as "willful and unreasoning action, without consideration of the

facts and circumstances," citing *Central Maine Power*). See also, *Kroeger v. Dept. of Environmental Protection*, 2005 ME 50, \_\_A.2d \_\_\_, at ¶8 ("We do not find that an administrative agency has acted arbitrarily or capriciously unless its action is 'willful and unreasoning' and 'without consideration of facts or circumstances,'" quoting *Central Maine Power Co.*, *supra*. Given the appellate capacity in which the Legislature has placed the Superintendent and given the wording of the statute requiring the Superintendent to limit his review to a determination of whether the Board's findings are "reasonably supported by the evidence in the record," it is clear that the Superintendent should approve the Dirigo findings unless he finds them arbitrary and capricious as defined by Maine case law under the Maine APA.

The fact that the statute allows for the Superintendent to take additional evidence in an adjudicatory proceeding does not alter the Superintendent's limited appellate review. The Maine Law Court addressed this very issue years ago in the case of *Frank v. Assessors of Skowhegan*, 329 A.2d 167 (Me. 1974), where the Superior Court took evidence to create a record of the action of the Assessors of Skowhegan and then reviewed the decision of the Assessor. The Law Court explained the standard of review in these circumstances to be exactly the same, once the evidence was taken, as it would be if the entire record were created at the agency level:

[W]here there was no record of the administrative proceedings, the review was 'de novo' in the sense that the court may hear new evidence. However, such evidence which is adduced must relate to the limited issue of the reasonableness of the administrative decision.

329 A.2d at 171. *Accord, Parkinson v. State*, 558 A.2d 361 (Me. 1989). This used to be the rule for appeals to the Superior Court from tax assessments under 36 M.R.S.A. 151. *See, Jackson Advertising Corp. v. State Tax Assessor*, 551 A.2d 1365, 1366 (Me. 1988) (“Although 36 M.R.S.A. §151 permits a *de novo* hearing for the purposes of providing a substituted record for judicial review, a *de novo* determination ... is not authorized. Even with a *de novo* hearing under section 151, judicial review is confined to a ‘complete review of questions of law and to limited review of questions of fact only to test the reasonableness of the conclusions reached’” quoting *Frank v. Assessors of Skowhegan, supra.*) Subsequently 36 M.R.S.A. § 151 was amended to allow the Superior Court to make a *de novo* determination as well as a *de novo* record.

Another consequence of the appellate capacity in which the Superintendent is placed in these proceedings is that deference should be given to Dirigo’s findings. As recently explained in *Conservation Law v. Dept. of Environmental Protection*, 823 A.2d 551, 2003 ME 62, ¶23 “we defer to the interpretation of a statutory scheme by the agency charged with its implementation as long as the agency’s construction is reasonable.” *See also, York Ins. of Maine, Inc. v. Maine Superintendent of Ins.*, 2004 ME 45 at ¶13; *Seider v. Board of Examiners of Psychologists*, 2000 ME 206, 762 A.2d 551, 561; *Green v. Comm’r of Mental health, Mental Retardation and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612, 615.

In summary, the Superintendent’s role in these proceedings is a limited to the kind of appellate review that the Superior Court traditionally gives to agency action, giving deference to Dirigo’s findings

Dated: October 7, 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 7, 2005, a copy of Memorandum of Law of Consumers for Affordable Health Care on the Standard of Review was served electronic and US mail on each of the persons listed below:

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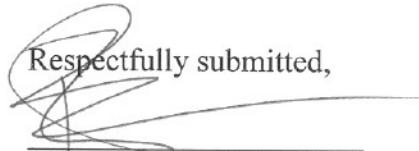
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DATED: October 7, 2005

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