

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

MAINE STATE CHAMBER)
OF COMMERCE)
)
Petitioner)
)
v.)
)
ALESSANDRO A. IUPPA,)
SUPERINTENDENT, BUREAU OF)
INSURANCE, DEPARTMENT OF)
PROFESSIONAL AND FINANCIAL)
REGULATION, STATE OF MAINE)
)
Respondent.)

**PETITION FOR REVIEW
OF FINAL AGENCY ACTION**

Pursuant to 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001 et seq., and M.R.Civ.P. 80C, the Maine State Chamber of Commerce brings this Petition for Review of Final Agency Action, and in support thereof states as follows:

THE PARTIES

(1) Petitioner Maine State Chamber of Commerce (“Petitioner” or the “Chamber”) is a Maine, non-profit corporation in good standing, with a principal place of business at 7 University Drive, Augusta, Maine. The Chamber is a statewide business association representing Maine businesses, both large and small, and its members include both businesses that provide group health coverage through self-funded plans and employers that provide coverage through the purchase of insured plans from health insurance carriers.

(2) Respondent Alessandro A. Iuppa is the Superintendent of the State of Maine Bureau of Insurance (“Respondent” or the “Superintendent”), with his principal office at 124 Northern Avenue, Gardiner, Maine.

(3) Pursuant to 5 M.R.S.A. § 11002 and M.R.Civ.P. 80C, jurisdiction and venue are properly with this Court, insofar as Kennebec County is home to both Petitioner and Respondent.

INTRODUCTION AND PROCEDURAL BACKGROUND

(4) This matter involves the determination of the so-called “aggregate measurable cost savings,” if any, as a result of the operation of Dirigo Health.¹ See 24-A M.R.S.A. § 6913(1)(A). The determination of aggregate measurable cost savings is important because ultimately it serves as a cap on an assessment that health insurance carriers, third party administrators, and employee benefit excess carriers must pay to fund the subsidies provided by Dirigo Health and to support the Maine Quality Forum. See 24-A M.R.S.A. § 6913(2)-(3).² The assessment is called a “savings offset payment.” Put simply, if there are no measurable cost savings, then there can be no assessment. 24-A M.R.S.A. § 6913(2)(C).

(5) The statutory framework for determining aggregate measurable cost savings sets forth a two-step process: First, the Dirigo Health Board of Directors³ (the “Board”) must annually determine aggregate measurable cost savings. See 24-A M.R.S.A. § 6913(1)(A); P.L. 2005, ch. 400, § B-2(2)(A). Then, the Board forwards this determination to the Superintendent for review. See 24-A M.R.S.A. § 6913(1)(B); P.L. 2005, ch. 400, § B-2(2)(B).

¹ Dirigo Health is an independent state agency, with limited authority to: (1) Arrange for the provision of comprehensive, affordable health care coverage to eligible small employers and certain individuals; and (2) Monitor and improve the quality of health care in this State. See 24-A M.R.S.A. § 6902.

² The first step is the determination of “aggregate measurable cost savings” as a result of Dirigo Health. See 24-A M.R.S.A. § 6913(1). The next step is the determination of the “savings offset amount,” which essentially is how much money Dirigo Health needs to continue to operate the subsidy program and the Maine Quality Forum. See 24-A M.R.S.A. § 6913(2)(D). The “savings offset amount must reflect and may not exceed aggregate measurable cost savings, as determined by the [Dirigo Health] board” 24-A M.R.S.A. § 6913(2)(C). The savings offset amount in turn drives the “savings offset payment,” which is the assessment on carriers and third party administrators.

³ Dirigo Health operates under the supervision of a Board of Directors established pursuant to 24-A M.R.S.A. § 6904.

(6) On September 14, 2005, by a vote of 3 to 1, the Board determined that the operation of Dirigo Health had resulted in over \$136 million in aggregate measurable cost savings, and filed that determination with the Superintendent on September 19, 2005.⁴

(7) The Superintendent then held an adjudicatory hearing to review the Board's filing, and by Decision and Order dated October 29, 2005, determined that in fact only \$43.7 million of aggregate measurable costs savings was reasonably supported by the evidence adduced at hearing. See Decision and Order attached hereto as **Exhibit A**. The Chamber hereby appeals the Superintendent's October 29, 2005 Decision and Order.

MANNER AGGRIEVED AND FINAL AGENCY ACTION APPEALED

I. The Superintendent Erred in his Order on the Chamber's Motion to Dismiss because the Board was Required to Hold an Adjudicatory Hearing and the Chamber did not Waive its Right to a Hearing

(8) The statute governing the determination of aggregate measurable cost savings states in relevant part:

After an opportunity for a hearing conducted pursuant to Title 5, Chapter 375, subchapter 4, the [Dirigo Health] board shall determine annually not later than April 1st 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 MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

24-A M.R.S.A. § 6913(1)(A) (emphasis added).

(9) Title 5, Chapter 375, subchapter 4, sets forth the framework for "Adjudicatory Proceedings." See 5 M.R.S.A. § 9051 et seq. Pursuant to this subchapter, when the applicable underlying statute or regulation requires "an opportunity for hearing," the agency must give notice to: (1) Persons whose legal rights, duties or privileges are at issue; and/or (2) The public,

⁴ Although the Board initially found \$136.8 million in savings, its experts later identified an error of \$10 million, and the Board subsequently amended its filing to reduce its determination to approximately \$126 million.

if the proceeding involves the determination of issues of substantial public interest. See 5 M.R.S.A. § 9052(1)(A)-(B). The determination of aggregate measurable cost savings meets both criteria for requiring notice to the Chamber.

(10) Once notice is given, if a hearing is requested by a person whose legal rights, duties or privileges are at issue, the agency must give notice of a hearing, and then hold an adjudicatory hearing pursuant to 5 M.R.S.A. § 9056.

(11) Dirigo Health failed to give notice of a hearing as required by 24-A M.R.S.A. § 6913(1)(A) and 5 M.R.S.A. § 9052(1)(A)-(B). Although Dirigo Health failed to provide the required notice, the Chamber nonetheless submitted a written request for the Board to hold an adjudicatory hearing pursuant to 24-A M.R.S.A. § 9052(1). See Copy of Chamber Request for Hearing attached hereto as **Exhibit B**. Dirigo Health steadfastly refused to hold an adjudicatory hearing, apparently relying on unallocated language in P.L. 2005, ch. 400 for the proposition that a hearing was no longer required.⁵ See P.L. 2005, ch. 400, § B-2(2) (stating that notwithstanding any deadlines (as compared to procedures) in 24-A M.R.S.A. § 6913, the Dirigo Health Board must file its determination with the Superintendent no later than the Act's effective date).

(12) The Chamber filed a Motion to Dismiss with the Superintendent, and joined intervenors Maine Automobile Dealers Association Insurance Trust and Bankers Health Trust (collectively, "the Trusts") in their motion to dismiss, because the Board failed to provide interested parties with the opportunity for an adjudicatory hearing on the Board's methodology as required by the express language of 24-A M.R.S.A. § 6913(1)(A). On the specific issue of notice, the Superintendent ruled:

⁵ The Board orally denied the Chamber's request for a hearing on September 14, 2005, and subsequently confirmed that denial in a letter dated October 3, 2005, attached hereto as **Exhibit C**.

Without addressing whether or not Dirigo complied with the notice provisions of 5 M.R.S.A. § 9052, the Superintendent finds that the Trusts and the Chamber had constructive notice of their legal rights but failed to timely act.

Superintendent's Order on Motions to Dismiss, attached hereto as **Exhibit D**. In a footnote, the Superintendent declined to resolve "the issue of whether or not the opportunity for a formal adjudicatory hearing before the Board was required in the first assessment year," which is exactly what the Chamber and the Trusts argued.

(13) Throughout the process before the Board, the Chamber and other interested parties made repeated requests for clarification regarding the procedure before the Board. There was apparent confusion, and even Board members initially understood they would be holding an adjudicatory hearing. Accordingly, interested parties presumed notice would be forthcoming. It did not become clear until September 2005 that the Board no longer intended to hold an adjudicatory hearing. Because the Board itself was unclear as to its procedure until well into the process, the Chamber cannot fairly be held to have been on "constructive notice" of its rights earlier than its September 13, 2005 request for a hearing. The legal fiction of constructive notice is inapplicable under the circumstances.

(14) Although P.L. 2005, ch. 400, § B-2(2) altered the deadlines related to the Board's determination of aggregate measurable cost savings, it did not alter the procedure. The Board was required to hold an adjudicatory hearing as part of the process for determining cost savings, and for the reasons set forth above, and in the Chamber's Motion to Dismiss before the Superintendent, the Board's September 19, 2005 filing with the Superintendent is invalid.

II. The Superintendent Erred in that a Number of "Savings Initiatives" Were Improperly Included as Components of the Aggregate Measurable Cost Savings as a Result of Dirigo Health

(15) The Board's methodology for determining aggregate measurable cost savings as a

result of Dirigo Health identified savings associated with thirteen (13) initiatives, including a purported \$83.8 million of cost savings related to the so-called Hospital Initiatives. The Hospital Initiatives include consolidated operating margin (“COM”) and cost per case mix adjusted discharge (“CMAD”) components. According to the Board, the COM and CMAD savings arise from voluntary limitations specified in Section F-1(B) of “An Act To Provide Affordable Health Insurance to Small Businesses and Individuals and to Control Health Care Costs,” P.L. 2003, ch. 469 (hereinafter the “Dirigo Legislation”), which reads as follows:

B. Each hospital ... is asked to voluntarily restrain cost increases, measured as expenses per case mix adjusted discharge, to no more than 3.5% for the hospital fiscal year beginning July 1, 2003 and ending June 30, 2004. Each hospital is asked to voluntarily hold hospital consolidated operating margins to no more than 3% for the hospital’s fiscal year beginning July 1, 2003 and ending June 30, 2004.

P.L. 2003, ch. 469, § F-1(B).

(16) COM and CMAD are not properly included as measures of aggregate measurable cost savings as a matter of law. P.L. 2003, ch. 469, § A-8 enacted Chapter 87, “Dirigo Health,” consisting of §§ 6901 to 6971.⁶ P.L. 2003, ch. 469, the entire Dirigo Legislation, is not the Dirigo Health Act, a lesser included part of the Dirigo Legislation. See Chamber’s Pre-Hearing Brief, attached hereto as **Exhibit E**. Although the unallocated language in P.L. 2003, ch. 469, Section F-1(B) does create voluntary limits that apply to hospitals, it does not follow that a hospital’s attempt to comply with these limits would produce “savings” to be measured under 24-A M.R.S.A. § 6913(1) (as amended). The plain language of Section 6913 refers to savings “as a result of the operations of Dirigo Health” -- not as a result of the implementation of the Dirigo Legislation. Dirigo Health was established “to arrange for the provision of comprehensive, affordable health care coverage” 24-A M.R.S.A. § 6902. The powers and

⁶ See also 24-A M.R.S.A. § 6901, defining Chapter 87 of Title 24-A as the Dirigo Health Act.

duties delegated by law to Dirigo Health reflect this purpose, and do not include monitoring or enforcing the voluntary limits on hospitals or other persons or entities. 24-A M.R.S.A. § 6908 (specifying the powers and duties of Dirigo Health).

(17) The Board also included so-called Budget Initiatives as cost savings. This included “savings” of \$14 million related to the Maine Department of Health and Human Service’s (the “Department”) decision to settle multiple MaineCare administrative appeals and lawsuits by 12 hospitals in exchange for a payment of approximately \$96.4 million dollars. In addition, the Board adopted “savings” of \$12.3 million related to the Department’s decision to increase MaineCare physician fee schedule payments by \$12.3 in SFY 2006 and 2007, and hospital periodic interim payments (“PIP”) for SFY 2006 and 2007. The Board’s justification for including these initiatives as Dirigo Health cost savings is simply because they were mentioned in the Report to the Legislature by the Commission to Study Maine’s Hospitals (the “Commission”), and the Commission was created as part of the Dirigo Legislation.

(18) Similar to the Hospital Initiatives, as a matter of law the Budget Initiatives are not properly included as measures of aggregate measurable cost savings. The law requires savings “as a result of the operations of Dirigo Health” -- not as a result of the Dirigo Legislation, the Commission to Study Maine Hospitals, MaineCare or the Department. See 24-A M.R.S.A. § 6913(1)(A). Likewise, the Chamber contends that the Certificate of Need/Capital Investment Fund Initiatives, Health Care Practitioner Initiatives, Carrier Voluntary Underwriting Gain Initiatives and the “Woodwork Enrollment”⁷ are not as a result of the operation of Dirigo Health and, therefore, not properly included as a component of aggregate measurable cost savings.

⁷ The so-called Woodwork Effect (“WW Effect”) measurement derives from enrollment in MaineCare, not the Dirigo Health insurance product. The Board’s WW Effect methodology is not limited to increased enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004. Rather, all MaineCare enrollment is considered in the calculation. This is inconsistent with the plain language of Dirigo Health. Although the

(19) On these purely legal issues, the Superintendent's Decision and Order states:

These decisions [of which cost savings initiatives are properly regarded as "a result of the operation of Dirigo Health"] were made by the Dirigo Board,^[8] and do not raise any factual disputes within the Superintendent's statutory jurisdiction.

See **Exhibit A**, Superintendent's Decision and Order at page 9. Thus, the Superintendent failed to rule on these "pure questions of law."

III. The Superintendent's Determination of Aggregate Measurable Cost Savings is in Violation of Constitutional and Statutory Provisions, in Excess of the Statutory Authority of the Bureau, Made Upon Unlawful Procedure, Affected by Error of Law, Unsupported by Substantial Evidence on the Whole Record, and is Arbitrary, Capricious or Characterized by an Abuse of Discretion

CMAD

(20) Regarding the Hospital Initiatives, the Superintendent deemed \$33.7 million of the Board's purported \$83.8 million reasonably supported by the evidence.

(21) For the CMAD component of the Hospital Initiatives, the Board compared two projected figures for 2004 cost per case mix adjusted discharge. The first was calculated "by applying the base line average rate of growth⁹ to the 2003 CMAD." The second was determined "by applying the difference between the target rate and the inflation rate to the 2003 CMAD." If the first projection exceeded the second, as it did for twenty-three (23) hospitals, the Board assumed that there were savings related to Dirigo Health. It then calculated the "savings" for these hospitals "by taking the difference between the two amounts and multiplying by the number of 2004 case-mix adjusted and outpatient adjusted discharges." The Board ignored the

Superintendent found no savings related to the WW Effect, the Chamber contends that the proposed method is invalid and, moreover, the WW Effect is not properly included as a component of aggregate measurable cost savings.

⁸ This demonstrates why it was important for the Board to hold a proper adjudicatory hearing as required by the plain language of 24-A M.R.S.A. § 6913(1) (as amended).

⁹ The base line average rate of growth is the rate of growth that exceeds the hospital market basket index ("HMBI").

cost “increases” experienced by the other thirteen (13) hospitals (as measured by the Board’s methodology).

(22) The Superintendent found the Board’s method to be unreasonable because CMAD for any hospital fluctuates from year to year for a wide variety of reasons, whereas the Board’s method assumed that any decrease in cost per case mix adjusted discharge was attributable only to the voluntary cost control provisions in the Dirigo Health Legislation. Specifically, the Superintendent states in part: “[I]t is unreasonable to assume that any decrease over the case period is due to the voluntary cost control while ignoring increases....” See Exhibit A, Superintendent’s Decision and Order at page 11. Rather, than reject the methodology out-of-hand, however, the Superintendent introduced a “fix” by also including increases in CMAD to help “cancel out the random fluctuations.”

(23) The Board’s methodology for determining savings related to Hospital Initiatives makes unreasonable assumptions that cannot be cured by simply including increases in CMAD. The Board’s methodology cannot distinguish whether the decreased growth rate is related to cost cutting measures implemented to meet the voluntary limit or simply a product of other influences, such as increased patient volume. In fact, at hearing none of the Board’s witnesses could attribute the CMAD or COM “savings” to the operation of Dirigo Health.

(24) It is not reasonable to assume that if a hospital’s historical growth rate slowed in the first Dirigo year, those reductions are automatically attributable to the operation of Dirigo Health, and including increases does nothing to address this problem. Indeed, the Superintendent’s decision on COM, which introduced the same fix, serves to illustrate this problem by resulting in “apparent negative savings.”

(25) Although the Superintendent determined that there were negative savings associated with the COM initiative, the Superintendent failed to net the negative savings associated with COM against the alleged savings associated with CMAD.

Uninsured Savings Initiatives

(26) The Superintendent deemed \$2.7 million reasonably supported by the evidence for Uninsured Savings Initiatives. Although the Superintendent recognized the flaw of measuring savings on a charge basis, as opposed to a cost basis, he recommended that the Board “correct this error in future filings.”

(27) The Board’s methodology for Uninsured Savings Initiatives is highly theoretical, with multiple assumptions that can not be verified. Despite the ready availability of data from reliable governmental sources to measure what actually happened to bad debt and charity care costs, the Board’s method does not compare its results to reported uncompensated care data to confirm the presumption that uncompensated care costs were actually reduced. Employing a highly theoretical method without any analysis of available data as to what actually happened is unreasonable, and produces an unreasonable result.

Health Care Provider Fee Savings Initiatives

(28) The Superintendent deemed \$7.3 million reasonably supported by the evidence for Health Care Provider Fee Savings Initiatives. In coming to this determination, the Superintendent made a number of adjustments to the Board’s original figure of \$26.3 million.

(29) Even with the Superintendent’s adjustments, the \$7.3 million purported savings is not supported by the evidence.

GROUND UPON WHICH RELIEF IS SOUGHT

(30) The plain language of 24-A M.R.S.A. § 6913(1) (as amended) required the Board to give notice and hold an adjudicatory hearing to determine aggregate measurable cost savings. The unallocated language at P.L. 2005, ch. 400, § B-2(2) altered the deadlines, but not the procedures the Board must follow. The Board failed to give notice and hold an adjudicatory hearing, a pre-condition to its filing of aggregate measurable cost savings with the Superintendent. As a result, the Board's filing of aggregate measurable cost savings was invalid, and the Superintendent lacked the authority to act on it. Therefore, the Superintendent's Decision and Order is in violation of constitutional and statutory provisions, in excess of the statutory authority of the Bureau, made upon unlawful procedure, affected by error of law, and is arbitrary, capricious or characterized by an abuse of discretion.

(31) 24-A M.R.S.A. § 6913(1)(A) requires any savings to be "as a result of the operations of Dirigo Health." The Board included many "savings initiatives" that cannot reasonably be "as a result of the operations of Dirigo Health." The Superintendent refused to rule on the purely legal issues of whether the Hospital Initiatives, Budget Initiatives, Certificate of Need/Capital Investment Fund, Health Care Practitioner, and Carrier initiatives are properly included as measures of aggregate measurable cost savings. The Superintendent's refusal to rule on these arguments and the resultant cost savings determination in the Decision and Order is in violation of constitutional and statutory provisions, in excess of the statutory authority of the Bureau, made upon unlawful procedure, affected by error of law, unsupported by substantial evidence on the whole record, and is arbitrary, capricious or characterized by an abuse of discretion.

(32) The Superintendent made a number of adjustments to the Board's methodology in attempts to make an unreasonable method reasonable. Although the Chamber appreciates the Superintendent's efforts, the adjustments do nothing to correct the basic flaws with the Board's methodology for determining cost savings. Therefore, even with the Superintendent's adjustments, the determination of savings related to CMAD, Uninsured Savings Initiatives, and Health Care Provider Fee Savings Initiatives is in violation of constitutional and statutory provisions, in excess of the statutory authority of the Bureau, made upon unlawful procedure, affected by error of law, unsupported by substantial evidence on the whole record, and is arbitrary, capricious or characterized by an abuse of discretion.

DEMAND FOR RELIEF

WHEREFORE, pursuant to 5 M.R.S.A. § 11001(1) et seq., Petitioner respectfully requests this Court to Vacate the Superintendent's Decision and Order and:

(1) Hold that the so-called Hospital Initiatives, Budget Initiatives, Certificate of Need/Capital Investment Fund Initiatives, Health Care Practitioner Initiatives, Carrier Initiatives, and WW Effect are not properly included as measures of aggregate measurable cost savings; and

(2) Remand this matter to the Superintendent with instructions to reject the Board's September 19, 2005 filing because it is not the product of an adjudicatory hearing on the methodology to determine aggregate measurable cost savings, as required by law; or in the alternative

(3) Remand this matter to the Superintendent with instructions to re-determine aggregate measurable cost savings consistent with the Court's holding concerning the proper initiatives to be included as measures of aggregate measurable cost savings; and

(4) Award such other and further relief as the Court may deem just and proper.

Dated: November 28, 2005



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