

October 23, 2005

Via in-hand delivery & email

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon, Docket No. INS-05-700
Bureau of Insurance
Maine Department of Professional and Financial Regulation
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Re: Review of Aggregate Measurable Cost Savings Determined by Dirigo Health for the First Assessment Year, Docket No. INS-05-700

Dear Superintendent Iuppa:

Please find enclosed the following:

1. Filing Cover Sheet.
2. Two hard copies of Pre-Hearing Brief

Thank you for your assistance with this matter.

Yours very truly,

/s/William H. Laubenstein, III

William H. Laubenstein, III
Assistant Attorney General

WHL/elf

Enclosures

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

IN RE: REVIEW OF AGGREGATE)
MEASURABLE COST SAVINGS)
DETERMINED BY DIRIGO) FILING COVER SHEET
HEALTH FOR THE FIRST)
ASSESSMENT YEAR)
)
)
Docket No. INS-05-700)

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

Date Filed: October 23, 2005
Name of Party: Dirigo Health Board of Directors
Document Title: Pre-Hearing Brief
Document Type: Brief
Confidential: No

Dated: October 23, 2005

Respectfully submitted,

/s/William H. Laubenstein, III

William H. Laubenstein, III
Assistant Attorney General

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

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

Introduction

The Dirigo Health Act, P.L. 2003, ch. 469, § A-8, as amended by P.L. 2005, ch. 400, § B-2 (the “Act”) tasked the Board of Directors Dirigo Health (“Board”) with annually determining the aggregate measurable cost savings as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility. 24-A M.R.S.A. § 6913 (1). For the first year determination, the Legislature put into place a process that included establishment of a working group to make recommendations, no later than September 20, 2005, on the methodology for calculating aggregate measurable cost savings. P.L. 2005, ch. 400, § B-1. The working group reported to the Board on August 29, 2005 that it could not reach consensus and presented two methodologies for consideration, one by the Payor Group and one by the Dirigo Group. After consideration of the methodologies presented, the Board, working from the methodology presented by the Dirigo Group, determined aggregate measurable cost savings for the first assessment year to be \$ 136.8 million.¹

¹ This number was adjusted down to \$127.8 million as a result of a revision to Appendix F of the Mercer Report.

On September 19, 2005, the Board, as required by Chapter 400, submitted its determination of aggregate measurable cost savings to the Superintendent of Insurance. The Superintendent is to decide whether the Board's determination of aggregate measurable cost savings is "reasonably supported by the evidence in the record." P. L., ch. 400, § B-2 (2) (B).

Standard of Review

Section B-2 (2) (B) grants the Superintendent the authority to issue an order "approving, in whole or in part, or disapproving the filing" made by the Board on September 19, 2005 and establishes the standard to govern the Superintendent's decision. After a question was raised by the intervenors in this proceeding as to the standard to be applied by the Superintendent, he directed the parties to submit their positions on the standard. In his Second Procedural Order, the Superintendent stated:

The Superintendent interprets "reasonably supported by the evidence" to refer to the totality of the evidence and not to any part of the evidence taken out of context. However, "reasonably supported" is not a preponderance-of-the-evidence standard. If more than one alternative for determining aggregate measurable cost savings could be reasonably supported by the evidence, Dirigo does not have to prove that its chosen alternative is more reasonable or better supported than another alternative.

The Board pointed out in its memorandum on the standard of review that the threshold for satisfying a "reasonableness" standard is quite low and the burden on parties seeking to persuade the Superintendent that the Dirigo determination is unreasonable is, conversely, quite high. The Maine Law Court has indicated that an agency decision is unreasonable if it is arbitrary or capricious.

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. Hollon v. Pierce, 1968, 257 Cal.App.2d 468, 64 Cal.Rptr. 808, 815; Olson v. Rothwell, 1965, 28 Wis.2d 233, 137 N.W.2d 86, 89.

The party asserting arbitrariness and unreasonableness of action in the exercise by administrative officials of the police power of the State under a statute valid on its face has the burden of establishing the invalidity of the administrative action. Regularity is presumed. All legal intendments are in its favor. Its decision will be assumed to have been taken with full knowledge of material facts and in justification thereof. Milwaukie Company of Jehovah's Witnesses v. Mullen, 1958, 214 Or. 281, 330 P.2d 5, 11.

Central Maine Power Company v. Waterville Urban Renewal Authority, 281 A.2d 233, 242 (Me. 1971); cited with approval in *Help-U-Sell, Inc. v. Maine Real Estate Commission*, 611 A.2d 981 (Me. 1992).

Argument

1. The determination of the Board is reasonably supported by the evidence.

Any consideration of the reasonableness of the determination made by the Board must take into account the unique approach taken by the State of Maine in addressing the issue of the rapid rate of growth of costs for health care and health coverage in the state. This approach, incorporated into the Dirigo Health Act, is characterized by cooperation and a sharing of the burden of the growth in health care costs. Thus, health care practitioners, hospitals and health insurance carriers are all to contribute to generating savings in the health care system. The Legislature, however, has not mandated that the stakeholders take action to limit growth and generate savings but has only asked that the stakeholders voluntarily participate. Certain savings determined the Board have been

realized as a result of such voluntary participation. It was the expectation of the Legislature that these savings would be passed on to consumers through the operation of the market.

The filing made by the Board on September 19, 2005 amply demonstrates that the determination made by the Board was reasonable. The determination was made using the methodology developed by the Mercer Government Human Services Consulting group. This methodology was based on standards that included: actuarial science best practice; reasonableness of the assumptions used in the calculations; reasonableness of the calculations; credible and readily replicable calculations; and readily validated terms and data.² See Final Report: Dirigo Health Savings Offset Payment (SOP): Methodology and Calculations, p. 2, included in the Board's filing as Attachment 11 ("Mercer Report"). The data used by Mercer in its calculations is readily available, accepted by the health industry and relied upon by the health industry. No credible argument can be made that this methodology is unreasonable, arbitrary or capricious.

2. The savings initiatives are attributable to Dirigo.

The intervenors can be expected to argue that the savings included in the Board's determination of aggregate measurable cost savings are not the result of the operation of Dirigo Health. This argument must be rejected for two reasons. First, the initiatives upon which the determination was based are found in the Act. As explained more fully in the Mercer Report, the Act asked health care practitioners to limit for a one year period (July 1, 2003 to June 30, 2004) the growth of net revenue of the practitioner's practice to 3%; hospitals to hold consolidated operating margins for that period to no more than 3% and

² The Commission to study Maine's Hospitals discussed two of the initiatives included in the methodology, cost per case mixed adjusted discharge and consolidated operating margin, and came to agreement on the measures to be used and the limits of the aggregate calculations. See Attachment 15 to the Dirigo filing.

to restrain cost increases to no more than 3.5% as measured by expenses per case mix adjusted discharge (“CMAD”); and health insurance carriers to limit for that period the pricing of products sold in Maine to a level that supported no more than a 3% underwriting gain less federal taxes. P.L. 2003, ch. 469, § F-1.

Second, Mercer used a global approach to measuring cost savings. It did not tie one particular savings amount to each initiative and attribute it to Dirigo. This is not a reasonable approach to any analysis of the health care system. The health care system is incredibly complex, with many factors at work. In this system it is not possible to establish a control group or controlled environment to reliably isolate the impact of any one program or initiative in the absence of all other changes. The global approach recognizes Dirigo as the primary driver of efforts to reduce the rate of growth of health care costs in Maine, which is a proposition that the working group established by the Act agreed with. Further, Mercer took a conservative approach to measuring the impact of each initiative. Its methodology was structured such that it could be clearly supported by available data and information. This approach resulted in savings amounts that were at the lower bound of reasonable limits.

3. Dirigo has not increased the cost of health care.

A major criticism of the methodology adopted by the Board is that it does not net increases in the health care system against the savings identified. This criticism fails because it disregards the legislative history of the Act and its adoption would increase the error of estimation in calculating the impact of Dirigo cost savings.

During the Legislature’s consideration of the Act, an attempt was made to amend LD 1577 that would have used the term “net savings” with regard to the determination of

aggregate measurable cost savings. The amendment, submitted as the minority report, which was rejected, would have inserted the words “net savings” in front of the phrase “from increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2005.” The amendment, however, did not propose netting savings with regard to the other components of aggregate measurable cost savings. This shows that the Legislature was fully aware of the netting concept and chose not to adopt it, either with regard to aggregate measurable cost savings or to the subcomponent of increased enrollment in MaineCare.

Throughout the discussions of the work group there was general agreement that there were not any increases in the costs in the health care system as a result of the operation of Dirigo. Nevertheless, the intervenors are expected to argue that any methodology should take into account increased costs as well as savings. The Board agrees that its methodology should offset against savings from the operation of Dirigo increases in costs resulting from the operation of Dirigo Health. The Board does not agree that it should offset cost increases not attributable to Dirigo.

The Board interprets the phrase “aggregate measurable cost savings” to mean that it is to consider the total of all savings resulting from the operation of Dirigo. The Board is aware that there are many factors that impact health care costs and that data accuracy in any methodology must be taken into consideration. Nevertheless, the introduction into the calculation of cost savings of cost increases not attributable to Dirigo Health would reduce the accuracy of measurement and thus increase the error of estimation in calculating the impact of Dirigo Health.

4. Aggregate measurable cost saving includes all Dirigo initiatives

In their pre-filed testimony intervenors argue that the Legislature limited aggregate measurable cost savings to “reduction or avoidance of bad debt and charity care costs” and “any increased MaineCare enrollment due to an expansion in MaineCare eligibility.” This argument ignores the plain meaning of the statutory language and the context in which the language appears. See, *City of Rockland v. Doud*, 1998 ME 238, ¶5, 721 A. 2d 981, 982 (in interpreting a statute a court looks to the plain meaning of the language and considers the context of the statutory scheme to give effect to legislative intent). Section 6913 directs the Board to determine “aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State...and any increased MaineCare enrollment due to an expansion in MaineCare eligibility.” 24-A M. R. S. A. § 6913 (1) (A) (emphasis added). This language does not limit aggregate measurable cost savings to reduction in bad debt and charity care and increased enrollment in MaineCare; and is in the context of savings initiatives designed to reduce the rate of growth of health care costs in Maine. *Home Builders Association of Maine, Inc. v. Town of Eliot*, 2000 ME 82, ¶14, 750 A. 2d 566, 571 (meaning of statute to be construed in light of the subject matter and the Legislature’s stated goals and objectives).

Conclusion

The methodology adopted by the Board closely tracks the savings initiatives set forth in the Act. The methodology is based on sound standards and the data used is readily available, verifiable and reliable. The filing made by the Board amply

demonstrates that its determination was reasonable and should be approved by the Superintendent.

Dated: October 23, 2005

Respectfully submitted,

/s/ William H. Laubenstein, III

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Assistant Attorney General

CERTIFICATE OF SERVICE

I, William H. Laubenstein, III, Assistant Attorney General for DIRIGO Health, do hereby certify that on this date the foregoing document was served on all counsel of record in hand and electronic mail as follows:

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