2010 WL 7359165 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

ANTHEM HEALTH PLANS OF MAINE, INC., d/b/a/Anthem Blue Cross and Blue Shield, Appellant,

v.

SUPERINTENDENT OF INSURANCE and Attorney General of the State of Maine, Appellees.

No. BCD-10-255.
September 8, 2010.

On Appeal from the Sagadahoc County Superior Court (Business and Consumer Docket)

Brief of Amicus Curiae Maine State Chamber of Commerce

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P.L. 2003, ch. 469, § F-1(1)(C) 16
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 137 (2010) (codified at 42 U.S.C.A. § 300gg-18(b)(1)(A)(i) (2010) 10
OTHER AUTHORITIES
AHIP Center for Policy and Research, Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability and Benefits (2009), *available at* http:// www.ahipresearch.org/ pdfs/2009IndividualMarketSurveyFinalReport.pd 6
April 25, 2009 Testimony of Superintendent Kofman on L.D. 1205 10
Bela Gorman & Don Gorman, Gorman Actuarial, LLC, Elizabeth Kilbreth et al., University of Southern Maine 85 Richard Diamond, State of Maine Bureau of Insurance, Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of 6

Insurance (2007), *available at* http:// www.maine.gov/pfr/insurance/reports/ reform_options_individual_health_ market.doc .....
Conrad F. Meier, *Maine Health Insurance: Out of the Frying Pan, Into the Fire*, Health Care News, Oct. 1, 2004, *available at* http:// healthinsurance.insurancebrochure.com/health_insurance_articles/ health_ insurance_reform_in_rnaine.htm 8
David Silvernail, **Finance** Authority of Maine & Brianne Woodard, Center for Education Policy, Applied Research, and Evaluation, University of Southern Maine, Maine's College Graduates: Where They Go and Why (Revisited) (2006), *available at* http://www.famemaine.com/files/Content/ Publications/where_they_go_ and_why_2.pdf 15
***iii** David Silvernail, **Finance** Authority of Maine & Greg Gollihur, Center for Education Policy, Applied Research, and Evaluation, University of Southern Maine, Maine's College Graduates: Where They Go and Why (2003), *available at* http://www.famemaine.com/files/Content/Publications/ req201-wheretheygoandwhyreportwithcover.pdf 15
In re: Anthem Blue Cross and Blue Shield 2005 Individual Rate Filing For Healthchoice, Healthchoice Standard and Basic, Docket No. INS-04-610, Prefiled Testimony of William Whitmore 9
In re: Anthem Blue Cross and Blue Shield 2008 Individual Rate Filing For Healthchoice, Healthchoice Standard and Basic, Docket No. INS-07-1000, Prefiled Testimony of George Siriotis 9
In re: Anthem Blue Cross and Blue Shield 2010 Individual Rate Filing for Healthchoice, Healthchoice Standard and Basic, and Lumenos, Docket No. INS-10-1000, Prefiled Testimony of Jennie Casaday 11
In re: Anthem Blue Cross and Blue Shield 2010 Individual Rate Filing For Healthchoice, Healthchoice Standard and Basic, and Lumenos, Docket No. INS-10-1000, Prefiled Testimony of Patrick Quirk 18
insweb.com, The Importance of Preventive Health Care, http:// www.insweb.com/health-insurance/preventive-care-health-insurance.html (last visited Sep. 1, 2010) 15
Karen Bender & Beth Fritchen, Mercer Oliver Wyman, Impact of Prior Approval Requirements for Rate Changes of Small Employer Group and Individual Health Policies (2004) ..... passim
Letter from Superintendent Kofman to Honorable Kathleen Sebelius, dated July 1, 2010 13
Maine State Chamber of Commerce & Maine Development Foundation, Making Maine Work: Critical Investments for the Maine Economy (2010), *available at* http:// www.mainechamber.org/mx/hm.asp?id=MakingMaineWork 1
Maine State Chamber of Commerce, Where We Stand (2009-2010), *available at* http://www.mainechamber.org/mx/hm.asp?id=WhereWeStand . 2, 4, 19
Mike Clark & Ginny Wilson, Legislative Research Commission, Research Memorandum No. 480: Status of the Health Insurance Market in Kentucky (1998), *available at* http://www.lrc.state.ky.us/lrcpubs/Rm480.pdf 9
***iv** Public Broadcasting Service, Healthcare Crisis: Who's At Risk? The Uninsured, *http://www.pbs.org/healthcarecrisis/uninsured.html* (last visited Sep. 1, 2010) 15
Rebekah Metzler, *Hospitals Report on Costs to Lawmakers*, Sun Journal, Mar. 24, 2010, *available at* http://www.sunjournal.com/node/818395 17
Scott Serota, *The Individual Market: A Delicate Balance*, Health Affairs, Oct. 23, 2002, *available at* http:// content.healthaffairs.org/cgi/content/full/ hlthaff.w2.377v1/DCl#5 8
Staff of the Maine Bureau of Insurance, Maine's Individual Health Insurance Market (2001), available at http:// www.maine.gov/pfr/ legislative/documents/indiv_health_2001.doc 6, 7, 8, 17

State of Maine Bureau of Insurance, Consumer Guide to Individual Health Insurance, *http://www.maine.gov/pfr/insurance/consumer/indhlth.htm* (last visited Aug. 31, 2010) 5
State of Maine Bureau of Insurance, Market Snapshot - Small Group Health, http://www.maine.gov/pfr/insurance/employer/snapshot_small_group.htm (last visited Sep. 1, 2010) 18
The Commonwealth Fund, Insurance Coverage and Receipt of Preventive Care, http://www.commonwealthfund.org/Content/Performance-Snapshots/**Financial**-and-Structural-Access-to-Care/Insurance-Coverage-and-Receipt-of-Preventive-Care.aspx (last visited Aug. 31, 2010) 14
The Governor's Office of Health Policy and **Finance** & the Advisory Council on Health Systems Development, 2010-2012 Maine State Health Plan (2010), *available at* http://www.maine.gov/tools/whatsnew/attach.php?id=105356&an=l 5
The Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits: 2009 Summary of Findings (2009), *available* at http:// ehbs.kff.org/pdf/2009/7937.pdf 19
The Kaiser Family Foundation, Average Single Premium per Enrolled Employee For Employer-Based Health Insurance 2009, http:// www.statehealthfacts.org/comparetable.jsp?typ=4&ind=270&cat=5&sub=67 (last visited Aug. 31, 2010) 1
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*1 STATEMENT OF INTEREST

The Maine State Chamber of Commerce (the Maine Chamber) is a statewide not-for-profit organization that represents businesses of all sizes, including sole proprietors, small businesses and large corporations. As the state's most influential business advocate, the Chamber works to promote a business climate in which Maine companies, large and small, can compete successfully in the local, regional, national, and world marketplaces.

The Chamber advocates on behalf of its members' interests before the Legislature and regulatory agencies, and educates its members through conferences, seminars, and affiliated programs. Its advocacy efforts focus on a number of issues of importance to the business community, including taxation and spending, health care, workers' compensation, economic development, education, and environmental issues.

Health care constitutes one of the Chamber's priorities because of its substantial impact on the Maine economy. A recent survey of business leaders by the Maine State Chamber of Commerce and the Maine Development Foundation cited the cost of health insurance as the highest priority for the next Governor and Legislature. [1] Maine's health insurance premiums are among the highest in the country. [2] Increases in those premiums and health ***2** care costs continue to outpace economic growth, forcing many employers to make choices among salary increases, job growth, or providing health insurance. [3] The cost has become prohibitive for many other employers and their employees.

As discussed below, the Superintendent of Insurance's failure to allow Anthem Health Plans of Maine, Inc. (“Anthem”) any margin for risk and profit in its individual insurance products will not improve, but rather exacerbate this situation. It will not lower costs, but raise them. It will drive away the younger, healthier self-employed and increase group insurance costs, causing more employers and employees to drop that coverage, or be forced to pay higher amounts for that coverage instead of investing in Maine's economic future. The Superintendent's decision is bad for competition, bad for our members who will pay for the shortfall, bad policy and, overall, bad for the State of Maine.

SUMMARY OF ARGUMENT

Superintendent Kofman disallowed any risk or profit margin for Anthem in the Maine individual health insurance market, apparently concluding that Anthem (and its parent WellPoint) makes enough money elsewhere and should subsidize the individual market through its earnings in the group market or insurance markets outside Maine.

Anthem explains in its Brief why this decision was contrary to law. In the instant Brief, the Chamber explains why the decision makes no sense from ***3** an economic perspective, and will have obvious and potentially severe adverse practical consequences.

Put simply, if a business is not allowed to make a profit in a market, the logical reaction - in fact, the prudent business reaction - is to withdraw from that market. This is precisely what virtually every other insurer that once provided individual health insurance in Maine has done since 1993, when their ability to earn a profit was eliminated through cost increases affected by state regulation. If Anthem also were to withdraw from the unsubsidized individual health insurance market, exactly one private insurer, which currently insures far fewer individuals than Anthem, would remain. That insurer, Mega Life and Health ("Mega"), does not provide major medical coverage now, and has warned that it also will leave the market entirely absent a waiver from a new federal regulation - leaving no private health insurers in the unsubsidized individual market. The only remaining insurance option for individuals would be the Dirigo Health Program, which is subsidized to a significant degree by an assessment paid by health insurers based on their paid claims and which only opened for limited new enrollment on August 1 of this year, after having been closed to new individual enrollment since August 2007. Participation in the subsidized program is subject to strict income guidelines, but even if individuals qualify based on income, only 50% of the total number of enrollees in Dirigo may be individuals; the remainder must be small groups. This, of necessity, will impose an additional constraint on an individual's ability to obtain insurance through the Dirigo program.

***4** Individuals unable to obtain group insurance or coverage by Medicaid or Medicare will either have to pay their own health care costs or receive uncompensated care (often referred to as bad debt and charity care, "BDCC"). If the former, many will avoid seeking care, increasing health costs overall. If the latter, the costs of services rendered by the hospital do not evaporate if the patient does not pay. Rather, those unpaid costs are added to the hospital charges for their patients who are insured. As a result, group health insurance costs, a significant expense for Maine businesses, go up. This decreases these businesses' ability to compete in the interstate and international marketplace, and further compels them to (1) cease offering group insurance, thus adding to the legions of uninsured, (2) reduce the benefits offered by the group plan, (3) increase the amount paid by each employee toward the cost of the group plan, (4) sacrifice expanding the business and hiring new employees, (5) forego employee pay increases or (6) some combination of the above.[4]

In short, the costs of health care and insurance, particularly in the individual market, are already high. Those current costs are frustrating to the business community and apparently to Superintendent Kofman, too. But her solution - to disallow any profit for one of the only insurers in the individual market - is no answer. It will not keep health care or health insurance costs for Maine employers and employees down, but rather will have the opposite effect. Maine employers and employees cannot afford the consequences of the Superintendent's decision.

*5 ARGUMENT

I. The current Maine individual health insurance market lacks participants.

Maine, with a population of 1.3 million, has a high percentage of rural, poor, **elderly** and sick.[5] Unless they have group insurance through an employer, individuals must resort to their own resources; if eligible, Medicare or Medicaid; and/or individual health insurance.

At present, there are only two carriers in the unsubsidized individual health insurance market: Anthem, which currently has 18,000 individual insureds and pays out claims of $60 million a year; and Mega, which currently has 13,000 individual insureds and does not provide major medical coverage, but rather offers cafeteria-style plans that contain pre-established limits for particular services. [6] A third carrier also provides only a limited offering. Harvard Pilgrim underwrites the DirigoChoice product offered through the Dirigo Health Program, the purchase of which is heavily subsidized by an assessment paid by health insurers based on their paid claims. DirigoChoice was only opened for new enrollment on August 1 of this year, after having been closed to new individual enrollment since August 2007, and Harvard Pilgrim does not actively market any other products in the individual market in Maine.

***6** The reason why there are so few individual health insurers in the Maine market - and why the cost of the plans they offer are so high [7] - is simple: that market is dysfunctional and currently in what is known as a death spiral.

This conclusion is not arguable. A 2007 study prepared for the Bureau of Insurance by Gorman Actuarial and the Muskie School of Public Service explained the phenomenon, [8] as did a 2001 White Paper prepared by the Bureau of Insurance itself. [9]

Insurance death spirals occur when regulation requires insurers to provide mandatory coverage that increases the cost of that coverage, increasing the premium cost. When those costs go up, healthy people choose not to buy insurance, which leaves a smaller and sicker pool of insureds to pay those costs, which causes the premiums for the remainder to go up, which in turn further causes the healthier to drop coverage, and so on. [10]

***7** The Maine death spiral began in 1993, after the Legislature enacted laws requiring community rating, guaranteed issue and guaranteed renewal, and limiting pre-existing exclusion provisions. [11] While in the short term these reforms benefitted those in need of significant medical services, over the long term it has caused the deterioration of the individual market. With the insurers prohibited from underwriting and thereby charging members more closely in accordance with their costs, healthy insureds - unwilling or unable to pay for the costs of those using significant medical services - have left the individual market in droves. [12]

***8** The natural result of a death spiral caused by regulatory mandates increasing costs and eroding profit opportunities is the exit of market providers. Prior to 1993, the individual health insurance market in Maine was robust, with eleven carriers offering indemnity products and seven offering HMO products, covering a total of approximately 90,000 subscribers. [13] Now there are only two private carriers in the unsubsidized individual insurance market in Maine: Anthem and Mega, insuring only 1/3 that number and only 18,000 with major medical coverage. [14]

In 2000, when Anthem acquired the former Blue Cross Blue Shield of Maine, Anthem tried to reinvigorate the individual market by offering its HealthChoice products, which were similar in design to products offered in ***9** other states in which Anthem affiliates were operating. At its peak, there were 35,000 HealthChoice members and the average deductible level was under $5,000. [15] But costs kept rising and the spiral continued, with healthy members leaving, leading to higher costs for those remaining, and so on. Based on its last filing, the number of HealthChoice (and now Lumenos) members has been cut in half, and the second most popular deductible selected by members is $15,000, a level not even offered by Anthem in most other states. [16]

In sum, in such a spiral of fewer, sicker subscribers, insurers leave the market. [17] There is no logical reason why any new insurer would be attracted to the current Maine individual health insurance market. By showing a ***10** willingness to prohibit carriers from making any return on their investment, the Superintendent has put the nail in the coffin of any new entrants. [18]

Moreover, the only insurer other than Anthem, Mega, may be on the verge of exiting. The new federal healthcare reform includes, among other things, an 80% minimum medical loss ratio ("MLR") effective January 1, 2011, unless the State's request

for a waiver until January 1, 2014 is granted. [19] Because Mega would find it difficult, if not impossible, to achieve that MLR, it has indicated that absent a waiver of this requirement, it will be unable to continue to participate in the Maine individual market.

In sum, the current individual health insurance market in Maine continues to deteriorate, with most of the former participants having exited and Mega poised to do so, leaving only Anthem, with no incentive to stay.

We need only look to the Superintendent's own words to bring this last point home. *See* April 25, 2009 Testimony of Superintendent Kofman on L.D. 1205 ("If the intent of this provision is to allow rates to be deemed excessive based on the overall profitability of the carrier, whether or not the rates are sufficient to make the product self-supporting, it could have the unintended consequence of encouraging carriers to withdraw from the individual market entirely, and concentrate on more profitable group markets."). The ***11** Superintendent's testimony demonstrates the fallacy of suggesting that any carrier should - or would - remain in a market segment when the opportunity to earn any return has been eliminated. Thus, recitation of the **financial** performance of Anthem's other un-regulated lines or of out of state WellPoint affiliates - the rates for which are not established by the Maine Superintendent of Insurance - is a red herring. It is the **financial** performance of the individual products that matters to a company's determination of whether to remain in that market.

Anthem has reported significant losses in the individual market from 2005 to the present. [20] Considering that the bulk of these losses occurred with rates that were designed to include a 3% margin, it seems self-evident that the risk of providing individual insurance is materially larger than the 3% margin. That is, the cost of providing the insurance (*i.e.*, paying member medical claims) has proven to be materially higher than projected by the Superintendent's actuaries to the point that all of the 3% margin (and then some) has been used to cover the risk of providing the insurance, leaving negative "profits." Unless it is a legitimate exercise of regulatory authority to mandate charitable status, the imposition of a 0% margin is moving in the wrong direction.

***12** If a business cannot or is *not* allowed to make money in a market, it will leave that market, absent some other countervailing benefit to remaining. [21] No such countervailing benefit appears to exist with respect to Anthem. If Anthem is not allowed to make a profit in the individual health insurance market, there is no apparent logical reason for it to stay in that market.

II. Anthem's exit would have serious adverse consequences on the Maine business climate and the Maine economy.

Is the exit of one of the two remaining insurers from Maine's individual health insurance market necessarily a bad thing? Again, we need only look to Superintendent Kofman's position on this point.

Superintendent Kofman was so concerned about the potential loss of Mega, serving far fewer in the individual market than Anthem and not providing major medical coverage, that she wrote to Secretary of Health and ***13** Human Services Sebelius on July 1, 2010 requesting a waiver for it of the new MLR regulation. Her words were appropriately alarming about the effects of the loss of a carrier in the individual market in Maine:

> [A]bsent a waiver, I believe that the federal MLR standard may disrupt our individual health insurance market. There are two insurers selling coverage. Although a third insurer sells through a public-private partnership (Dirigo Health), enrollment in that program is currently closed to new individual enrollees. Loss of one of the two insurers would have a serious destabilizing effect in our individual market. [22]

Given that Anthem insures far more members than Mega and is the only carrier offering major medical policies (as opposed to the catastrophic plans offered by Mega), the loss of Anthem as a carrier in the individual market would certainly have at least an equally - if not more - serious destabilizing effect on the Maine individual insurance market.

Why does Superintendent Kofman care if Mega leaves? Why is it bad to seriously de-stabilize the already in peril individual health insurance market in Maine? Why is a healthy, or even any, individual health insurance market important?

To answer these questions, one must identify what happens in the absence of a viable health insurance market. At least three things occur when someone cannot obtain health insurance.

First, if people are uninsured, they are less likely to seek preventative care or address health situations when they first arise. Instead, they will wait ***14** until the situation is in crisis.[23] In addition to it being bad public health policy to discourage preventative care, generally speaking, it costs more to treat a serious crisis health condition than one just arising.[24] Lowering cholesterol ***15** through prescription drugs, for example, is cheaper than treating a heart attack. So the second result of a de-stabilized or non-existent individual health insurance market is higher overall health costs.

Second, because people want health insurance to feel secure in their **finances**, individuals who cannot get it where they are now located, but could get it elsewhere, have a compelling reason to leave where they are. So the people who will leave Maine for this reason will be the responsible self-employed who have the option of doing so - contributing to the Maine brain drain.[25] This is another cost driving the next generations away from Maine, already with the oldest population in the country, adding further to the health care costs for those who stay. Given the unpredictable and potentially ***16** catastrophic nature of health costs, this should be a particularly serious factor for anyone not covered by group insurance in deciding whether to live and work in Maine.

Third, someone has to pay the health costs of the uninsured. People who lack insurance still get sick.

If the uninsured have the individual resources to pay for medical services, then they do so - draining their bank accounts and preventing them from spending that money in ways productive to the local economy.

If they lack the resources to pay, they are still treated. Maine's 39 hospitals are all non-profit entities. They require a positive margin to maintain healthy operating cash flows and to fund capital improvements.[26] Maine's nonprofit hospitals do not turn away those in need of care based on the patient's ability to pay. Medicare and Medicaid do not reimburse hospitals for the full cost of the care provided, and those without insurance often pay only a portion of the cost or do not pay at all.[27] In both instances, the failure to reimburse ***17** the hospital for the cost of the service it provides increases that hospital's BDCC costs.

A hospital has two choices with respect to these uncollectible BDCC costs. It can absorb the cost, in which case it will go out of business, or it can transfer those costs to its insured customers. We do not have to speculate on how Maine hospitals actually operate: given that Maine's non-profit hospitals target a positive operating margin, we know BDCC costs are passed on to those with private health insurance.[28]

In short, who ultimately pays when there is no individual insurance market? The remaining group insurance market. So the cost of group health insurance will go up even more.

Current BDCC costs in Maine resulting from those who have no or insufficient insurance (the un- and underinsured, respectively) are not insignificant, estimated at nearly $300 million in 2008.[29] To **finance** Dirigo, ***18** serving 12,000 customers, the state had to impose a tax that added $40 million to the costs of group insurance. Last year, Anthem paid $60 million in individual health claims for its 19,000 members.[30] De-stabilizing or eliminating the individual insurance market would simply - and substantially -- increase the costs already being borne by private group insurers and, through premiums, their insureds. While it is unknowable whether the amount of the premium increase would be more or less than the $60 million that Anthem currently pays for medical claims each year, it is irrefutable that the amount of the increase would be substantial. Maine employers and employees already pay over $40 million each year for the Dirigo subsidies and untold millions to make

up for the reduced Medicare and Medicaid reimbursements. Placing another $60 million burden on Maine employers is not a recipe for the economic growth that is desperately needed in our struggling Maine economy.

From 2005-2009, the average premium paid by small businesses in Maine rose 81%.[31] They have become an increasingly larger portion of each employer's expense budget, resulting in increased **financial** hardship on Maine businesses; reducing the amounts employers can subsidize employee ***19** contributions, reducing benefits or both. A biennial survey of Maine State Chamber of Commerce members revealed that 62% of the businesses surveyed had or would consider requiring employees to pay a greater share of premium and 69% had or would consider increasing deductibles.[32] Health insurance premiums are a significant drag on economic growth in Maine. Maine employers cannot, and should not, be required to pay additional premiums to subsidize the healthcare costs of the uninsured.

In sum, the net result of a prohibition on making a profit in the individual health insurance market, aside from contributing to the Maine brain drain and increasing overall health costs in Maine, is an increase in the costs of the group insurance market. This result, in turn, has a cascading effect on Maine businesses - driving up their costs, making them less competitive in the national marketplace and pressuring them to eliminate, or substantially reduce the benefits offered by, their group insurance. This last consequence creates a ***20** larger pool of uninsured and drives good employees elsewhere. In short, the death spiral spreads to the group market and Maine businesses suffer.

III. Even if Anthem for some reason did not exit the individual health insurance market because of the Superintendent's decision disallowing it any profit, the adverse economic consequences of that decision would still be substantial.

Even if *one* assumed that for some unknown reason, Anthem would not leave the individual health insurance market despite the disallowance of any profit, the results of the disallowance would be adverse to the Maine economy.

Here, we can look to the words of Superintendent Kofman's predecessor, Alessandro Iuppa, who warned of the dangers of requiring subsidization of the individual market by the group market:

> [I]t would not be proper or prudent for the Superintendent to require Anthem to write its non-group business at a loss .... [R]equiring the subsidy to come only from Anthem would put the Company at a competitive disadvantage in the group market.[33]

It is not proper or prudent because it is not fair, and a distorted and inequitable market is bad for a state's economy.

One important purpose of regulation is to establish a transparently level playing field to encourage entrants into the market, creating competition and driving costs down. Announcing a policy of prohibiting one of the few existing participants in the market from making a profit has the opposite effect. Given all the challenges and disincentives for entry into the individual health insurance market in the first place, announcing further disincentives acts only to injure that market further.

***21** Placing Anthem at a competitive disadvantage will harm Anthem directly, but will also harm the Chamber's members as Maine employers rely upon a competitive group insurance market to keep their insurance costs as low as possible, Affected employers will have the unenviable choices of (1) absorbing these costs rather than using those funds for additional investment in their business or to hire new employees, (2) passing the additional costs on to their employees, (3) reducing the benefits offered under their health plan to reduce premium costs, or (4) some combination of the above. Hindering a major carrier's ability to compete or asking Maine employers to shoulder this burden would be unfair, unwarranted and will have significant effects on the employer group participants.

The high cost of health care is a national problem. The current individual health insurance market in Maine faces particular challenges because the costs of such insurance are higher than the average. Forbidding one of the few remaining insurers in that market from making any profit is not the answer to this situation. To the contrary, it will simply destroy what is already an anemic market, and raise costs in the group market, to the detriment of Maine businesses and its employees.

CONCLUSION

Health costs are already crippling Maine business. Whether by driving Anthem out of the individual market or by making Anthem less competitive in the group market, the Superintendent's decision will further increase health insurance costs for Maine employers and employees. In an economic ***22** recession, and with all the other current pressures on the Maine economy, adding to their costs will have a particularly profound, adverse effect. The Superintendent's decision should be vacated and rates established that are designed to include a fair rate of return for the carrier providing the coverage.

Appendix not available.

Footnotes

1 Maine State Chamber of Commerce & Maine Development Foundation, Making Maine Work: Critical Investments for the Maine Economy 6 tbl.7 (2010), *available at* http://www.mainechajnber.org/mx/hm.asp?id=MakingMaineWork.

2 The Kaiser Family Foundation, Average Single Premium per Enrolled Employee For Employer-Based Health Insurance 2009, http://www.statehealthfacts.org/comparetable.jsp?typ=4&ind=270&cat=5&sub=67 (last visited Aug. 31, 2010).

3 Maine State Chamber of Commerce, Where We Stand 6 (2009-2010), *available at* http://www.mainechamber.org/mx/hm.asp?id=WhereWeStand.

4 Maine State Chamber of Commerce, Where We Stand 6 & 34 (2009-2010), *available at* http://www.mainecharnber.org/mx/hm.asp?id=WhereWeStand.

5 The Governor's Office of Health Policy and **Finance** & the Advisory Council on Health Systems Development, 2010-2012 Maine State Health Plan ii (2010), *available at* http://www.maine.gov/tools/whatsnew/attach.php? id=105356&an=l.

6 State of Maine Bureau of Insurance, Consumer Guide to Individual Health Insurance, http://www.maine.gov/pfr/insurance/consumer/indhlth.htm (last visited Aug. 31, 2010).

7 Maine individual health care premiums are among the country's highest. Maine's 2009 individual market premiums are on average the fourth highest individual premiums in the country. AHIP Center for Policy and Research, Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability and Benefits 6 (2009), *available at* http:// www.ahipresearch.org/pdfs/2009IndividualMarketSurveyFinalReport.pd.

8 Bela Gorman 8s Don Gorman, Gorman actuarial, LLC, Elizabeth Kilbreth et al., University of Southern Maine & Richard Diamond, State of Maine Bureau of Insurance, Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of Insurance 6 (2007) (hereafter "2007 Study"), *available at* http://www.maine.gov/pfr/insurance/reports/reform_options_individual_health_market.doc.

9 Staff of the Maine Bureau of Insurance, Maine's Individual Health Insurance Market 4-5, 10 (2001) (hereafter "2001 White Paper"), *available at* http://www.maine.gov/pfr/legislative/documents/indiv_health_2001.doc.

10 As the 2007 Study states: "This cycle of an accelerated rate increase followed by further deterioration of the risk pool is known as a 'death spiral' and, if not addressed, will lead to the total demise of the individual insurance market." 2007 Study, at 6. Similarly, the 2001 White Paper stated:

> [T]he future viability of the individual health insurance market in Maine is uncertain. Rates have risen steeply in the past two years, making coverage unaffordable for many. This not only results in more people becoming uninsured, it also can cause a deterioration of the average health of the remaining pool of risks. This is because those who have health problems and utilize their insurance benefits are much less likely to drop coverage than are healthy individuals. In turn, deterioration of the risk pool could lead to further rate increases, causing more people to drop coverage. If this cycle were to continue, it could lead to a collapse of the individual health insurance market. This phenomenon of a shrinking pool of risks and higher insurance rates is sometimes referred to as a "death spiral." ... In the year since this white paper was originally prepared, another carrier has ceased offering individual indemnity coverage, leaving Anthem Health Plans of Maine (formerly Blue Cross Blue Shield of Maine) as the only carrier offering indemnity coverage. ... It is now [January, 2001] clear that the future viability of the individual health insurance market in Maine is at serious risk.

2001 White Paper, at 1.

11 24-A M.R.S. § 2736-C.

12 The fact that tightening regulation aimed at lowering premiums has the opposite effect is no anomaly. When Kentucky, New York and Washington attempted similar reforms, the results were equally disastrous:

FN• An implosion of the individual market occurred. At one time, there were no insuring entities accepting new business in the individual market in some counties in Washington.

FN• The rate approval process became long and expensive. The system added costs, not value.

FN• There was a decrease in the purchase of individual insurance contributing to an increase in the uninsured population.

FN• As a result of the events above, premium rates for health insurance increased.

Karen Bender & Beth Fritchen, Mercer Oliver Wyman, Impact of Prior Approval Requirements for Rate Changes of Small Employer Group and Individual Health Policies 19 (2004) (hereafter "Bender & Fritchen, Impact of Prior Approval Requirements"), attached hereto as Addendum 2.

13 *See* 2001 White Paper, at 1; Conrad F. Meier, *Maine Health Insurance: Out of the Frying Pan, Into the Fire*, Health Care News, Oct. 1, 2004 (stating that in 1993, there were 90,000 consumers with individual health coverage but by 2004, there were approximately 30,000), *available at* http:// healthinsurance.insurancebrochure.com/health_insurance_articles/health_insurance_reform_in_maine.htm; *see also* Scott Serota, *The Individual Market: A Delicate Balance*, Health Affairs, Oct. 23, 2002 ("For example, during the 1990s Maine, New Jersey, and Washington State implemented rules that required insurers to guarantee the issuance of coverage to all persons, with very strict rating rules that precluded lower rates for low-risk people. The results were problematic. Coverage in Maine's individual market plummeted, from 88,548 in 1992 to 37, 618 in 2000. Most significantly, because of the high premiums, the Maine market lost approximately 90 percent of enrollees in the age 25-29 category"), *available at* http:// content.healthaffairs.org/cgi/content/full/hithaff.w2.377v1/DCL#5.

14 Harvard Pilgrim Health Plans administers the Dirigo Health Program. Premiums for this product are subsidized by the Health Access Charge, a 2.14% assessment on premiums paid by those with private insurance. 24-A M.R.S. § 6917.

15 *See, e.g., In re: Anthem Blue Cross and Blue Shield 2008 Individual Rate Filing For HealthChoice, Healthchoice Standard and Basic*, Docket No. INS-07-1000, Prefiled Testimony of George Siriotis (hereafter "Siriotis Prefiled"), at 1 (35,000 members at its peak); *In re: Anthem Blue Cross and Blue Shield 2005 Individual Rate Filing For Healthchoice, Healthchoice Standard and Basic*, Docket No. INS-04-610, Prefiled Testimony of William Whitmore, at 8 (most popular deductible option in 2004 was $5,000).

16 Siriotis Prefiled, at 2.

17 There is nothing unique to Maine about this cause-and-effect. Kentucky enacted similar mandates in 1994 and 1996. By 1998, more than 40 insurers left the market. *See* Mike Clark & Ginny Wilson, Legislative Research Commission, Research Memorandum No. 480: Status of the Health Insurance Market in Kentucky 6 (1998), *available at* http:// www.lrc.state.ky.us/lrcpubs/Rm480.pdf. It repealed the reforms. New Hampshire enacted similar reforms in 1994; after only two out-of-state insurers were left in the market in 2000, it repealed the reforms. Washington state enacted similar legislation in 1993. In the late 1990's, the three largest carriers closed their individual blocks to new business and smaller carriers left the market. Washington repealed most of the reforms in 1995 and 2000. *See also* Bender & Fritchen, Impact of Prior Approval Requirements, at 3 (extensive regulation of Kentucky, Washington and New York individual health insurance market resulted in an exodus of carriers willing to offer coverage, reduced competition, higher costs, and an increased number of uninsured); *id*. at 7 (removal of regulation in South Carolina and Illinois resulted in increased competition, increased numbers of new entrants into the market, correspondingly more choices for consumers and lower premium rates).

18 *See* Bender & Fritchen, Impact of Prior Approval Requirements, at 5 (Developing rates that provide lower underwriting profits and less than fair returns on equity "has been problematic for insurers because investors will not put money into insurance operations that return less than market levels. In the long run, the lack of investment in systems and product development results in prices and products inadequate to meet consumers' needs.").

19 *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 137 (2010) (codified at 42 U.S.C.A. § 300gg-18(b)(1)(A)(i) (2010)).

20 *See In re: Anthem Blue Cross and Blue Shield 2010 Individual Rate Filing for Healthchoice, Healthchoice Standard and Basic, and Lumenos*, Docket No. INS-10-1000, Prefiled Testimony of Jennie Casaday, at 3 (reflecting that losses from 2005 to year-end 2009 exceeded $7.5 million).

21 Experience in Massachusetts demonstrates this point:

An overly burdensome regulatory environment acts as a detriment to effective public policy. On a micro scale companies need to generate profits in order to fund beneficial capital investments. For example, **financing** improvements to information technology ultimately increases efficiencies, which results in cost savings to consumers. More globally, inadequate premiums make companies unprofitable. Carriers which had significant portions of premium in Massachusetts earned lower rates of return on equity (ROE) than average. Thus, unable to earn a sustainable return on capital, and particularly vulnerable to spikes in loss cycles, many insurers have

responded to the Massachusetts' regulatory environment by forming single-state companies. This attempt to protect policyholders in other states, however, just exacerbates the problem in Massachusetts: single state insurers often face higher insolvency risk due to lower capitalization and less geographic diversification of risk, resulting in a higher cost of capital. Ultimately, then, the aggressive rate regulation in Massachusetts, which is designed to help consumers, exposes them to the greatest danger that can befall policyholders -- the risk that their company will fold and be unable to pay claims.

Bender & Fritchen, Impact of Prior Approval Requirements, at 30-31; *see also id*. at 31-32 ("Companies have fled the New Jersey market following the draconian rate rollbacks of 1998, leaving drivers of more than 1.7 million insured cars to seek coverage from a small and further shrinking pool of available coverage.").

22 Letter from Superintendent Kofman to Honorable Kathleen Sebelius, dated July 1, 2010, attached hereto as Addendum 1.

23 *See* The Commonwealth Fund, Insurance Coverage and Receipt of Preventive Care, http://www.commonwealthfund.org/Content/Performance-Snapshots/**Financial**-and-Structural-Access-to-Care/Insurance-Coverage-and-Receipt-of-Preventive-Care.aspx (last visited Aug. 31, 2010) (Research demonstrates that those "without health insurance were less likely than those with coverage to receive preventive care services at appropriate ages.").

24 Data reported by The Commonwealth Fund demonstrates this point:

Individuals without health insurance or who experience gaps in coverage have generally worse self-reported access to care and quality of care compared with those who are continuously insured In particular, they are:

FN• less likely to have a regular care provider;

FN• more likely to delay or forgo needed medical care, preventive services, and prescription drugs;

FN• more likely to have poor health outcomes; and

FN• less likely to rate the quality of their care as good or excellent.

The Commonwealth Fund, Insurance Coverage and Receipt of Preventive Care, http://www.commonwealthfund.org/Content/Performance-Snapshots/**Financial**-and-Structural-Access-to-Care/Insurance-Coverage-and-Receipt-of-Preventive-Care.aspx (citations omitted) (last visited Aug. 31, 2010). Similarly, others have observed:

Having no health insurance also often means that people will postpone necessary care and forego preventive care - such as childhood immunizations and routine check-ups-completely. Because the uninsured usually have no regular doctor and limited access to prescription medications, they are more likely to be hospitalized for health conditions that could have been avoided.

Delaying care for fear of medical bills is a downward spiral that leads to ultimately higher health care costs for all of us. More than one third of uninsured adults reported they have problems paying their bills, which helps explain why many of the uninsured don't seek out the care they need until the last minute. But when an uninsured person is in crisis and cannot pay, that burden falls upon the insured population, the hospitals, the doctors and the government. And these billions of dollars of "uncompensated care" drive up health insurance premiums for everyone.

> "The people who are most at risk today are those who have no health insurance at all. They're at risk of not getting regular care when they need it. They're at risk of not catching real problems before they get serious enough to not be treatable."

Public Broadcasting Service, Healthcare Crisis: Who's At Risk? The Uninsured, http://www.pbs.org/healthcarecrisis/uninsured.html (last visited Sep. 1, 2010) (quoting Sherry Glied, PhD, Associate Professor of Public Health, Columbia University). *See also* insweb.com, The Importance of Preventive Health Care, http://www.insweb.com/health-insurance/preventive-care-health-insurance.html (last visited Sep. 1, 2010) ("Uninsured citizens are three times less likely to receive medical care as insured persons. So it's no surprise that the uninsured receive less preventive care and have higher mortality rates than those with coverage. By the time they begin to show symptoms and visit a doctor, their condition is often far more difficult (and expensive) to treat.").

25 *See, e.g.*, David Silvernail, **Finance** Authority of Maine & Brianne Woodard, Center for Education Policy, Applied Research, and Evaluation, University of Southern Maine, Maine's College Graduates: Where They Go and Why (Revisited) 1-2 (2006) (noting the considerable concern that Maine's "best and brightest" leave the state in favor of better career opportunities elsewhere), *available at* http://www.famemaine.com/files/Content/Publications/where_they_go_ and_why_2.pdf. See *also* David Silvernail, **Finance** Authority of Maine & Greg Gollihur, Center for Education Policy, Applied Research, and Evaluation, University of Southern Maine, Maine's College Graduates: Where They Go and Why 1-2 (2003), *available at* http:// www.famemaine.com/files/Content/Publications/req201-wheretheygoandwhyreportwithcover.pdf.

26 Notably, when the Maine Legislature passed the Dirigo Health Act and, among other things, called upon Maine hospitals to reduce their charges for medical services to the bare bone, they did so by requesting that these hospitals maintain operating margins no greater than 3%, an explicit recognition that even non-profit entities require a rate of return even when the very goal of the legislation was to reduce the cost of healthcare. P.L. 2003, ch. 469, § F-1(1)(C) (requesting that healthcare insurers limit the pricing of products to include a 3% underwriting gain).

27 Bender & Fritchen, Impact of Prior Approval Requirements, at 25 (low reimbursement rates provided by government results in higher premiums) & 27 ("Pressures on Federal and state budgets have resulted in very low, if any, reimbursement increases to nursing homes. In order to make up the difference, providers charge individuals who are not eligible for either Medicare or Medicaid significantly higher rates. The difference in rates is often referred to as "cost shifting" to make up the shortfall.").

28 The Bureau of Insurance has recognized that this cost shifting indeed occurs:
Different payors pay different prices to hospitals and other health care providers. Government programs such as Medicare and Medicaid pay according to formulas established by law. Managed care plans pay based on contracts entered into with providers. Since in the aggregate, the provider needs a certain amount of revenue, lower payments by some payors can result in costs being shifted to other payors. In particular, recent changes in Medicare reduced the amounts that would otherwise have been payable to hospitals and other providers for services to Medicare beneficiaries. This may have resulted in providers being less willing to accept contracts with managed care plans without higher reimbursement levels, and in higher charges to those who are not subject to contracted fees. 2001 White Paper, at 9 (footnote omitted).

29 *See* Rebekah Metzler, *Hospitals Report on Costs to Lawmakers*, Sun Journal, Mar. 24, 2010 ("Uncompensated care totaled about $296 million in 2008, up from about $249 million in 2007. [David Winslow, vice president of **financial** policy at the Maine Hospital Association] said the economic recession was a factor and would likely drive up the volume of uncompensated care in the future."), *available at* http://www.sunjournal.com/node/818395.

30 *See In re: Anthem Blue Cross and Blue Shield 2010 Individual Rate Filing For Healthchoice, Healthchoice Standard and Basic, and Lumenos*, Docket No. INS-10-1000, Prefiled Testimony of Patrick Quirk, at 1 (membership was approximately 19,000 as of January, 2010); *id.*, Exhibit IX (reflecting projected incurred claims of $61 million for 2009).

31 State of Maine Bureau of Insurance, Market Snapshot - Small Group Health, http://vvrww.maine.gov/pfr/insurance/employer/snapshot_srnall_ group.htm (last visited Sep. 1, 2010).

32 Maine State Chamber of Commerce, Where We Stand 34 (2009-2010), *available at* http://www.mainecham.ber.org/mx/hm.asp?id=WhereWeStand. *See also* The Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits: 2009 Summary of Findings 1, 7 (2009) (stating that the average annual health insurance premiums paid by employers have risen 131% in the last decade and that employees now must cover more of the cost when using services and further stating that "[a]mong those that offer benefits, large percentages of firms report that in the next year they are very or somewhat likely to increase the amount workers contribute to premiums (42%), increase deductible amounts (36%), increase office visit cost sharing (39%), or increase the amount that employees have to pay for prescription drugs (37%)"), *available at http:// ehbs.kff.org/pdf/2009/7937.pdf*; BENDER & Fritchen, Impact of Prior Approval Requirements, at 14 ("The critical issue facing employers and employees is the affordability of health insurance premiums.... A January 2003 survey revealed that nearly 25% of small employers believe they would change coverage if premiums increased by five percent or more. Of those firms that make a change, nearly two-thirds increased the employees' co-payments or deductibles, about 30% increased the percentage of premiums the employee pays and nearly 30% cut back on the scope of benefits offered.").

33 *In re: Anthem BCBS 2003 Individual Rate Filing*, Docket No. INS-02-785, Decision and Order dated November 8, 2002.

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