

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. BCD-11-439

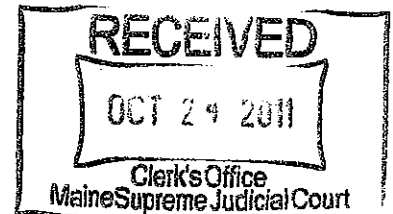
ANTHEM HEALTH PLANS OF MAINE, INC.,
d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD

Petitioner-Appellant

v.

SUPERINTENDENT OF INSURANCE, *ET AL.*

Respondents-Appellees



ON APPEAL FROM THE SUPERIOR COURT (SAGADAHOC COUNTY),
BUSINESS AND CONSUMER DOCKET

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
IN SUPPORT OF SUPERINTENDENT OF INSURANCE

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IDENTITY OF AMICUS CURIAE

The National Association of Insurance Commissioners (“NAIC”) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

The NAIC’s purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In addition, the federal Patient Protection and Affordable Care Act assigned several responsibilities to the NAIC affecting health insurers.¹ The NAIC also manages and coordinates the accreditation

¹ 42 U.S.C. § 300gg-15 (2010); 42 U.S.C. § 300gg-18 (2010); 42 U.S.C. § 300gg-19 (2010); 42 U.S.C. § 300gg-94 (2010); 42 U.S.C. § 300gg (2010); 42 U.S.C. § 13031 (2010); 42 U.S.C. § 18041 (2010); 42

review of insurance departments as well as maintains regulatory and financial databases of insurance company financial data.

INTEREST OF AMICUS CURIAE

The interest of the NAIC in this case arises from each member's interest in promoting the dual and often competing objectives of consumer protection while simultaneously protecting insurers' solvency. The NAIC has a strong interest in ensuring that regulators retain the necessary discretion to balance all relevant considerations when making the expert decisions that are required. Individually and collectively, the NAIC members and the state agencies over which they preside have a wealth of experience in the regulation of insurance. The NAIC members understand the interests of insurance consumers and work daily to protect those interests. The NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

The NAIC also has an interest in the interpretation of its model laws and regulations and in promoting the uniformity of these laws and regulations among the states. The Maine statute which provides that rates must not be "excessive, inadequate, or unfairly discriminatory" is based on language contained in NAIC models and guidelines concerning review of insurance rates.² 24-A M.R.S.A. § 2736 (2010).

More than sixty years ago, the NAIC promulgated the first of its model laws and guidelines on rate review that contained provisions that rates shall not be "excessive,

U.S.C. § 18043 (2010); 42 U.S.C. § 18053 (2010); 42 U.S.C. § 18061 (2010); 42 U.S.C. § 18063 (2010); 42 U.S.C. § 30011-9 (2010); 42 U.S.C. 300gg-91 (2010); 29 U.S.C. § 1134 (2010).

² See, e.g., *Property and Casualty Model Rating Law (File and Use Version)*, NAIC Model Laws, Regulations and Guidelines, pp. 1775-1 (2009); *Property and Casualty Model Rate and Policy Form Law Guideline*, NAIC Model Laws, Regulations and Guidelines, pp. 1776-1 (2010); *Property and Casualty Model Rating Law (Prior Approval Version)*, NAIC Model Laws, Regulations and Guidelines, pp. 1780-1 (2009).

inadequate, or unfairly discriminatory.” See *Proc. of the Nat’l Ass’n of Ins. Comm’rs* 396, 397-422 (1946) (adopting the *Fire, Marine and Inland Rate Regulatory Bill* and the *Casualty and Surety Rate Regulatory Bill*). While the NAIC’s earliest models only addressed property and casualty filings, various iterations of these models have been developed over the years with their primary purpose to promote the public welfare by regulating insurance rates of all insurers so they are not excessive nor insufficient to allow for full payment of claims and maintenance of insurer solvency. The NAIC has a significant interest in the outcome of this matter given the continued role of its members in regulating health insurance rates.

The NAIC supports the brief of the Appellee Maine Superintendent of Insurance (“Superintendent”). The NAIC appears before the Court to support the discretion of the Superintendent to make a decision on the Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield (“Anthem”) rate filing and not to opine on the rate itself. We seek to aid this Court by offering the legal position and public policy perspectives of our Association and the NAIC member states.

STATEMENT OF THE FACTS

Amicus, the NAIC, agrees with the facts set forth in the brief submitted by the Appellee and respectfully incorporates by reference the Appellee’s Statement of Facts.

SUMMARY OF THE ARGUMENT

Maine’s statute requiring prior approval of individual health insurance policy rates prohibits rates that are excessive, inadequate or unfairly discriminatory, and grants the Superintendent the discretion to determine whether rates violate this standard. 24-A M.R.S.A. § 2736 (2010). Pursuant to this authority, the Superintendent conducted a

thorough analysis of the proposed 2011 rate filing. After considering all relevant factors, including projected costs for this line of business and Anthem's overall financial health, reserves and profitability, the Superintendent denied Anthem's request and approved revised rates that she determined were sufficient to cover anticipated claims and expenses and allowed a 1% additional margin for profit and risk.

The Superintendent's decision that the rate increase for a period of one year was not "inadequate" should be affirmed. While the statute does not explicitly define inadequate, relying on the general interpretation of the word as well as the definition of "inadequate" in similar Maine rating statutes and with national standards for rate approval, it is clear the Superintendent acted within the scope of her discretion in determining the one year rate increase she approved was not inadequate. Accordingly, the Superintendent's reasoned decision should not be overturned.

ARGUMENT

As early as 1946, the NAIC developed model laws on rate regulation of the property and casualty industry. The models provided that rates shall not be "excessive, inadequate, or unfairly discriminatory." See *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 396, 397-422 (1946). Over the years, the NAIC has adopted various versions of these models and additional models regulating rate review of other insurance lines.³ In 1980, the NAIC adopted extensive guidelines, including actuarial standards, for filing rates of individual health insurance forms. I *Proc. of the Nat'l Ass'n of Ins. Comm'rs* 1980-4 N.A.I.C. Proc.

³ See, e.g., *Property and Casualty Model Rating Law (File and Use Version)*, NAIC Model Laws, Regulations and Guidelines, pp. 1775-1 (2009); *Property and Casualty Model Rate and Policy Form Law Guideline*, NAIC Model Laws, Regulations and Guidelines, pp. 1776-1 (2010); *Property and Casualty Model Rating Law (Prior Approval Version)*, NAIC Model Laws, Regulations and Guidelines, pp. 1780-1 (2009); *Guidelines for Filing of Rates for Individual Health Insurance Forms*, NAIC Model Laws, Regulations and Guidelines, pp. 134-1 (1983).

408, 416-425. Maine's requirement that rates not be "excessive, inadequate, or unfairly discriminatory" mirrors the language of the NAIC property and casualty rating models and guidelines which were in effect in 1969 when Maine recodified its individual health rate filing requirements. 24-A M.R.S.A. § 2736 (2010) (enacted in 1969). The individual health rate filing guidelines were adopted by the NAIC more than ten years after the Maine legislature had already enacted its rate filing guidelines.

The NAIC is now undertaking an effort to update the *Guidelines for Filing of Rates for Individual Health Insurance Forms*. In 2010 the NAIC Individual Health Rate Filing Subgroup was charged with developing amended guidelines. The purpose of the revised draft is to "ensure that consumers do not pay premium rates for health insurance coverage that is unreasonable because the rates are unjust, inequitable, excessive, inadequate or unfairly discriminatory or the level of increase in the rates is excessive." 2010 NAIC Proc. 1st Qtr. p. 13-1, 2010 WL 2075985 (N.A.I.C.). Although the revised guideline is still in the drafting stage, it provides in Section 4, "[t]he commissioner shall disapprove rates if he concludes from the evidence available to him that they are unjust, unreasonable, inequitable, excessive, inadequate, or unfairly discriminatory." 2010 NAIC Proc. 1st Qtr. p. 13-296, 2010 WL 2075985 (N.A.I.C.). This language is substantially similar to the Maine statute regarding rate regulation; therefore, the NAIC has significant interest in ensuring that the Maine statute is interpreted consistent with the NAIC guidelines and models.

- I. **THE SUPERINTENDENT RELIED UPON HER EXPERTISE TO DETERMINE THAT APPELLANT'S 2011 RATE FILING WAS NOT "EXCESSIVE, INADEQUATE, OR UNFAIRLY DISCRIMINATORY" AND WAS ACTING WITHIN HER AUTHORITY AND DISCRETION TO APPROVE RATES.**

Insurance regulators are statutorily charged with protecting consumers in a number of ways: overseeing the solvency of insurance companies; licensing insurance companies and producers who solicit the purchase of insurance; reviewing and approving insurance products sold to consumers; and investigating and examining the market practices of insurance companies. *See* 24-A M.R.S.A. §§ 221 to 228; 1420-1420-P; 2736 (2010). These Maine statutes are merely a sample of the features of the comprehensive statutory framework in place nationwide to carry out the twin purposes of consumer protection and marketplace solvency.

A key aspect of the regulatory responsibility delegated to the Maine Superintendent of Insurance is to review and approve insurance products sold to consumers and the rate at which these products are made available to consumers. 24-A M.R.S.A. §§ 601, 2412, 2736, 2839 (2010). The law affords the Superintendent full discretion to ensure that product rate filings are not “excessive, inadequate, or unfairly discriminatory.” 24-A M.R.S.A. § 2736 (2010). This type of discretionary authority is in place in many states.⁴

The regulatory review and approval of insurance filings is within the province of dedicated professional personnel in each state insurance department, who are trained to apply the specific product requirements set forth in statute and administrative regulation.⁵

These professionals also have the expertise to identify and evaluate potential areas of

⁴ *See, e.g.*, COLO. REV. STAT. § 10-16-107 (2010); CONN. GEN. STAT. § 38a-481 (2010); DEL. CODE ANN. tit. 18 § 2503 (2010); HAW. REV. STAT. § 431:14-108 (2010); KY. REV. STAT. § 304.17A-095 (2009); 24-A M.R.S.A. § 2736 (2010); MD. ANN. CODE INS. § 11-201 (2010); MINN. STAT. § 62A.02 (2010); NEB. REV. STAT. § 44-32,149 (2010); N.J. STAT. ANN. § 17B:27A(2010); N.Y. INS. LAW § 3231 (2010); OR. REV. STAT. § 743.018 (2010); 40 PA. CONS. STAT. § 477a (2010).

⁵ Illustrative of the workload and complexity inherent in the rate filing review and approval function is the fact that insurance departments across the country employed almost 1,200 individuals to support the actuarial and analytical aspects of form review and approval in 2010. NAIC, 2010 INSURANCE DEPARTMENT RESOURCES REPORT (2011).

ambiguity within a particular filing. This ability is developed through experience in reviewing and comparing countless insurance policies and understanding market trends.

Moreover, courts have long recognized and deferred to the discretion of the insurance commissioner to analyze and regulate insurance rates. “Due to its complexity. . . rate-making is left to the discretion of the insurance commissioner who is a specialist in the field and upon whose expertise we must rely.” *Insurance Services Office v. Whaland*, 378 A.2d 743, 746 (N.H. 1977) (citing *Travelers Indemnity Co. v. Williams*, 190 So.2d 27, 29 (Fla. Dist. Ct. App. 1966); *Md. Fire U.W. v. Ins. Comm’r*, 272 A.2d 24, 28 (Md. 1971)). See also *Mass. Auto Rating Accident Prevention Bureau v. Comm’r of Ins.*, 453 N.E.2d 381, 385 (Mass. 1983) (Courts give “due weight to the Commissioner’s experience, technical competence, and specialized knowledge as well as the discretionary authority vested in the Commissioner by the Legislature”).

It is well established that courts should defer to regulatory agencies regarding the interpretation of laws those agencies enforce. *Dep’t of Corr. v. PUC*, 2009 ME 40, ¶8, 968 A.2d 1047, 1050 (quoting *Competitive Energy Servs. LLC v. Pub. Utils. Comm’n*, 2003 ME 12, ¶15, 818 A.2d 1039, 1046. This deference is afforded to agencies in part because “rates which are adequate and not excessive and/or discriminatory cannot be determined with mathematical precision.” *Conn. Blue Cross, Inc. v. White*, 328 A.2d 442, 446 (Conn. Super. 1974). The Superintendent’s decision should not be overturned unless it is found to contain errors of law, findings not supported by substantial evidence in the record, or it is found to be an abuse of discretion.

The NAIC as *amicus curiae* fully supports the Superintendent’s administrative discretion to interpret the statutes she is charged with enforcing and to review and

approve rates for insurance products sold to Maine's consumers. The Superintendent properly exercised this discretion when she determined that Anthem's 2011 proposed filing with an average 5.2% rate increase for one year was not inadequate. This Court should defer to the Superintendent's discretion and reasoned analysis of information gathered from many sources, in approving the revised filing of the rate increase. If this Court holds that the Superintendent does not have the discretion to balance all relevant factors in determining whether rates are excessive, inadequate or unfairly discriminatory, it has the potential to destabilize a key aspect of insurance regulation and will have far reaching effects impacting all states.

II. THE SUPERINTENDENT'S DETERMINATION THAT ANTHEM'S 2011 RATE INCREASE WAS NOT INADEQUATE IS SUPPORTED BY A WELL RECOGNIZED INTERPRETATION OF "INADEQUATE" RATES AND IS THEREFORE NOT AN ABUSE OF DISCRETION.

The Superintendent's determination that Anthem's revised rates were not inadequate follows the established regulatory interpretation of this term and the Superintendent did not abuse her discretion in making the determination. For many years, various NAIC Models and Guidelines have provided guidance that rates shall not be inadequate. Several states, including Maine, have adopted the "not inadequate" standard in their individual health rate review statutes and regulations.⁶ Although the term inadequate is sometimes precisely defined in state law or regulation, when the term is not statutorily defined, it is generally interpreted as:

⁶ See COLO. REV. STAT. § 10-16-107 (2010); CONN. GEN. STAT. § 38a-481 (2010); DEL. CODE ANN. tit. 18 § 2503 (2010); 24-A M.R.S.A. § 2736 (2010); MD. ANN. CODE INS. § 11-201 (2010); N.J. STAT. ANN. § 17B:27A-25.8 (2010); N.Y. INS. LAW § 3231 (2010); OR. REV. STAT. § 743.018 (2010).

“Inadequate” means the rates are too low, or that the rates are such that a company could not sustain these rates for a long period of time without threatening solvency.⁷

Although Maine’s individual health rate filing statute does not define the term inadequate, Maine does have other rate filing laws which do define the term:

A rate is not inadequate unless insufficient to sustain projected losses and expenses and the use of the rate has had a tendency to create a monopoly or, if continued, will tend to create a monopoly in the market or will cause financial harm to the insurer.

24-A M.R.S.A. § 2382 (2010).

The above definition is very similar to the definition that was adopted unanimously by the NAIC and included in the NAIC *Product Filing Review Handbook*. The Superior Court’s reasoning regarding the meaning of the term “inadequate” is persuasive and serves to further validate the Superintendent’s exercise of her discretion in this case.⁸

It is clear that the Superintendent’s approval of Anthem’s revised rate increase request does not constitute an abuse of the discretion afforded to the Superintendent to determine what is “inadequate.” Inadequate rates are rates so low insurers are not allowed to use them because they could result in anticompetitive practices or financial harm to the insurer. Superintendent Kofman conducted a thorough review of the submitted rate and the financial strength of the company and did not find the rate “inadequate.” This Court should defer to the discretionary decision of the Superintendent and affirm her approval of the 5.2% rate increase for one year.

⁷ NAIC Product Filing Review Handbook (2010), available at http://www.naic.org/store_publications/supplementary.htm#pfrh and Supplemental Appendix, at 13.

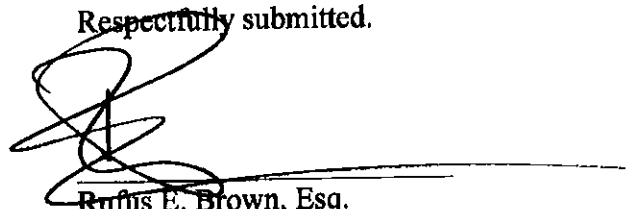
⁸ See also <http://www.merriam-webster.com/dictionary/adequate> (defining “adequate” to mean, *inter alia*, “sufficient for a specific requirement,” “barely sufficient or satisfactory” and “lawfully and reasonably sufficient for a specific requirement”) (last visited Oct. 17, 2011).

CONCLUSION

For all of the foregoing reasons, the Superior Court's decision should be affirmed.

Respectfully submitted.

Dated: October 24, 2011



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I HEREBY CERTIFY that I have this 24th day of October, 2011 mailed two (2) copies of the foregoing Amicus Brief to the following parties:

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