

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-10-255

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.

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

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

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INTRODUCTION

This is a petition for review of a decision and order of the Superintendent of Insurance (“Superintendent”) rejecting the inclusion of **any** margin for risk and profit in the HealthChoice and Lumenos products (the “Individual Insurance Products”) of Anthem Health Plans of Maine, Inc. (“Anthem”) for rates effective July 1, 2009. The articulated bases for this rejection were that the economic downturn in 2008 created hardship for subscribers and that, overall, Anthem and its parent are financially sound, and, therefore, can sustain a “break-even” rate for its Individual Insurance Products.

The decision and order violates fundamental ratemaking principles reflected both in the Maine Insurance Code and the Maine and United States Constitutions. Anthem is entitled to the opportunity to earn a fair and reasonable rate of return on its Individual Insurance Products offered within this State. The Superintendent eliminated that opportunity by imposing a zero percent risk and profit margin. Substantial precedent mandates that the Superintendent not set Anthem’s rates for its Individual Insurance Products so as to subsidize the lack of any profit for Anthem on those products from unregulated earnings from its other products offered within Maine or the extraterritorial businesses of its parent.

The Court should therefore vacate the judgment of the Superior Court and direct the Superior Court to remand this matter to the Superintendent to calculate premium rates for Anthem’s Individual Insurance Products that cover all costs and allow for a fair and reasonable rate of return for those products.

FACTS

The material facts are not in dispute.

I. The Superintendent regulates the rates for Anthem's in-state individual health insurance products.

Anthem offers both group health insurance (*i.e.*, insurance policies issued to employers to cover a group of employees) and individual health insurance (*i.e.*, policies issued directly to individuals) within the State of Maine. The rates for individual health insurance products in Maine are regulated under 24-A M.R.S. § 2736. Specifically, Section 2736(1) provides that “[e]very insurer shall file with the superintendent every rate, rating formula, classification of risks and every modification of any formula or classification that it proposes to use in connection with individual health insurance policies.” 24-A M.R.S. § 2736(1). The Superintendent then reviews the filing “to determine whether [it] meets the requirements that rates not be excessive, inadequate or unfairly discriminatory.” *Id.* § 2736(2).

Because the individual rating laws do not apply to group insurance products, the Superintendent does not establish rates in the group insurance market in Maine. *See* 24-A M.R.S. §§ 2701 & 2736; *see also* App. 87 (Superintendent’s acknowledgement in brief to Superior Court that “[t]he rating of large group health plans is not regulated by the Superintendent.”). Rather, pricing for group products is whatever the competitive market will bear.¹

¹ In addition to selling to large group customers, Anthem participates in the small group (defined as groups of 50 or fewer persons) market. Community rating formulas are used for small groups and rates must be designed to achieve a minimum loss ratio

Maine's individual rating laws also do not apply to insurance products sold outside of Maine. Thus, while WellPoint, Inc. is the parent company of numerous subsidiaries across the country, including Anthem, the Maine Superintendent does not set premium rates for any of the products WellPoint's subsidiaries sell outside of Maine.

II. The Superintendent has historically acknowledged that Maine law does not allow cross-subsidization.

Anthem filed proposed revised rates for its Individual Insurance Products on December 22, 2008. The components for the proposed premium rates included in the rate filing were as follows:

- Medical claims paid by Anthem for members: 87.7 cents of each \$1.00 of premium (R. 187);
- Premium Tax: 2 cents of each \$1.00 of premium (App. 57);
- Costs to deliver and administer the insurance product (including commissions): 7.3 cents of each \$1.00 of premium (*id.* at 56);
- Risk and Profit: 3 cents of each \$1.00 of pre-tax premium (approximately 2 cents of post-tax premium) (*id.* at 57).

Consistent with 24-A M.R.S. § 2736, the actuarial analysis used by Anthem to develop the proposed rates was based solely on the cost components of the Individual Insurance Products at issue in the rate filing. (*See* App. 54-66).

During recent testimony concerning L.D. 1205, a proposed amendment to Section 2736, the Superintendent noted, with approval, that existing law limited her inquiry to the financial results for the applicable regulated product(s):

of 75%. *See* 24-A M.R.S. § 2808-B(2-B). As used herein, "group" means Anthem's large groups, the rates for which are established in the competitive market.

Part D [of L.D. 1205] would make various changes to the health insurance rate filing laws, including . . . requiring the Superintendent to “consider revenues and expenses from all line segments of the filing insurer,” rather than limiting the inquiry to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product. 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.

(Testimony of Superintendent Mila Kofman submitted to the Joint Standing Committee on Insurance and Financial Services concerning L.D. 1205, dated April 13, 2009, attached hereto as Addendum A (emphasis added)). L.D. 1205 was not adopted, so the operative language of Section 2736 remains as it was on the day of her testimony.

Superintendent Kofman’s interpretation is consistent with rulings from prior superintendents that setting Anthem’s rates for Individual Insurance Products at an inadequate level would lead to inappropriate subsidization of the individual insurance business, placing Anthem at a competitive disadvantage in the group insurance market. *See In re: Anthem BCBS 2003 Individual Rate Filing*, Docket No. INS-02-785, Decision and Order dated November 8, 2002 (“[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.”).²

III. The Superintendent has historically approved a positive risk and profit margin for individual health insurance in Maine.

In each year’s rate proceeding since Anthem acquired the former Blue Cross Blue Shield of Maine prior to 2009, the Superintendent has approved rates including a positive margin for risk and profit for Anthem’s Individual Insurance Products as meeting the adequacy standard of 24-A M.R.S. § 2736(2).³ This is consistent with the Superintendent’s treatment of other insurers. For example, for 2009, the Superintendent approved of a 3% risk and profit margin for Mega Life and Health Insurance Company for its individual health insurance product rates, *see In re: Mega Life and Health Insurance Company Rates for Individual Health Products*, Docket No. INS-08-1000, Decision and Order dated December 1, 2008, and a .5% risk margin for non-profit Harvard Pilgrim’s individual health insurance product rates.

² All of the Bureau of Insurance decisions cited herein are available at http://www.maine.gov/pfr/insurance/hearing_decisions/index.htm.

³ *See In re: Anthem BCBS 2002 Individual Rate Filing*, Docket No. INS-01-2532, Decision and Order dated December 4, 2001 (approving 4% margin for risk and profit); *In re: Anthem BCBS 2003 Individual Rate Filing*, Docket No. INS-02-785, Decision and Order dated November 8, 2002 (approving 3% margin); *In re: Anthem BCBS 2005 Individual Rate Filing*, Docket No. INS-04-610, Decision and Order dated December 16, 2004 (approving 3% margin); *In re: Anthem BCBS 2006 Individual Rate Filing*, Docket No. INS-05-820, Decision and Order dated December 19, 2005 (approving 3% margin); *In re: Anthem BCBS 2007 Individual Rate Filing*, Docket No. INS-06-1000, Decision and Order dated November 9, 2006 (approving 3% margin); *In re: Anthem BCBS 2008 Individual Rate Filing*, Docket No. INS-07-1000, Decision and Order dated November 13, 2007 (approving 3% margin).

IV. The 3% margin historically allowed by the Superintendent for Anthem's Individual Insurance Products has been insufficient to cover the financial and regulatory risks associated with providing individual health insurance in Maine.

There are significant financial risks associated with providing individual health insurance in Maine. In addition to having an older population, Maine has high incidences of chronic illnesses (such as asthma, heart disease, diabetes, etc.), high numbers of smokers, and a regulatory environment that imposes a number of mandated benefits and prohibits underwriting of any sort that would otherwise allow individuals to be rated in a way that is more reflective of their relative risks. (See R. 388-89 (describing the Maine insurance market)); *see also* 24-A M.R.S. § 2736-C(2) (delineating limits on rating of individual policies). Maine law also requires that policies must be issued and renewed to any consumer, irrespective of their medical condition or claims history. 24-A M.R.S. §§ 2736-C(3), 2850-B.

These risks have been reflected in Anthem's financial results for its Individual Insurance Products. Historically, when the Superintendent approved rates that contemplated a 3% profit margin as being adequate, Anthem has nevertheless not earned a 3% profit. In fact, Anthem achieved a 3% profit on its Individual Insurance Products only once since 2003, and in the aggregate has actually experienced a net loss of more than \$3.7 million since that time. (R. 144).

V. The Superintendent rejected any margin for risk and profit for Anthem's Individual Insurance Products in 2009.

Notwithstanding the requirement that rates must be adequate and Anthem's prior losses with a 3% risk and profit margin, the Superintendent, in her May 18, 2009 decision, ordered Anthem to use a **zero** percent margin for risk and profit in its 2009 rates. The Superintendent's stated reasoning was as follows:

The Attorney General recommended allowing no margin, citing "(1) a unique economic situation resulting in extreme financial hardship for subscribers, and (2) the extreme financial health of the company." The large number of policyholders who testified at the public hearings and sent written comments provides ample evidence of the first point and Anthem's financial statements provide ample evidence of the second. Under these circumstances, it is reasonable to allow no profit and risk margin this year.

(App. 49 (emphasis added)).

In so ruling, the Superintendent designed Anthem's rates for its Individual Insurance Products to eliminate the opportunity for it to earn a fair – indeed any – rate of return. Nor did the Superintendent base her decision to order a zero percent risk and profit margin exclusively on the financial performance of the Individual Insurance Products (which have resulted in the losses described above). Instead – contrary to her own almost contemporaneous testimony before the Legislature concerning existing Maine law – the Superintendent based her decision on Anthem's (indeed, Wellpoint's) overall financial health and, in so doing, on the financial performance of product lines and entities outside of the Superintendent's regulatory rate-setting control. *See id.*

The Superintendent offered no explanation for this departure; nor did she acknowledge the undisputed testimony in the record reflecting that rates must cover all costs plus include a positive margin that will cover risk and allow for a reasonable return so that the Individual Insurance Products will contribute to the surplus of the company. (See R. 1584, 1602 (acknowledgement from Attorney General's actuarial witness that rates must cover all costs plus provide for a reasonable return to contribute to the surplus of the company)).

On Anthem's petition for review to the Superior Court, the Superintendent argued (1) that "the adequacy standard under section 2736 is a solvency test and no more" (see App. 87, 93), and (2) that Anthem, and its parent WellPoint, Inc., are profitable and not in jeopardy of insolvency (see *id.* 70 - 75 (noting Anthem's total revenues, credit rating and executive salaries and that "[t]ogether with Anthem, there are approximately 45 health insurance subsidiaries of WellPoint with total annual net income (profit) averaging nearly \$2.6 billion throughout the five-year period 2004-2008.")). Thus, the Superintendent made clear that her decision to allow for no profit on Anthem's Individual Insurance Products was based on her perception of the overall financial health of Anthem and its parent from its unregulated and out-of-state earnings.

By decision and order dated April 21, 2010, the Superior Court (Humphrey, J.) affirmed the Superintendent's determination. Anthem timely appealed.

ISSUE PRESENTED

May the Superintendent of Insurance set premium rates for Anthem's Individual Insurance Products that are designed to deprive Anthem of any rate of return?

Anthem respectfully submits that the answer to this question is no.

STANDARD OF REVIEW

This Court reviews the decision of a state administrative agency directly, with no deference to the ruling of the Superior Court. *Anderson v. Me. Pub. Employees Retirement Sys.*, 2009 ME 134, ¶ 2, 985 A.2d 501, 502 (“[W]e review directly the original decision of the fact-finding agency, without deference to the ruling . . . by the court from which the appeal is taken.”); *Kelley v. Me. Pub. Employees Retirement Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676, 682.

When construing the meaning of a statute, the Court's purpose is to give effect to the Legislature's intent. *Buckley v. S.D. Warren Co.*, 2010 ME 53, ¶ 7, __ A.2d __; see *Mahaney v. State*, 610 A.2d 738, 741 (Me. 1992) (“Such interpretation of the words used will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute.”). In so construing, the Court looks first to the plain meaning of the statutory language. *Buckley*, 2010 ME 53, ¶ 7, __ A.2d __. The plain meaning of the language is determined in context. *Id.* (“In addition to examining the plain language, [the Court] considers the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.” (internal quotation marks omitted)).

If a statute is unambiguous, this Court interprets it directly, notwithstanding any interpretation provided by the administering state agency. *Costain v. Sunbury Primary Care, P.A.*, 2008 ME 142, ¶ 5, 954 A.2d 1051, 1053; *see also Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶ 22, 895 A.2d 309, 315. Even if the statute would otherwise be susceptible to more than one interpretation and thus ambiguous, the statute must be read to comport with constitutional requirements. *See State v. Haskell*, 2001 ME 154, ¶ 4, 784 A.2d 4, 7 (courts “must assume that the Legislature acted in accord with constitutional requirements if the statute can reasonably be read in such a way, notwithstanding other possible unconstitutional interpretations of the same statute”); *State v. Copley*, 544 A.2d 302, 304 (Me.1988) (“[T]his Court is bound to avoid an unconstitutional interpretation of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements.” (citing *Bossie v. State*, 488 A.2d 477, 479 (Me.1985))).

SUMMARY OF THE ARGUMENT

The Superintendent designed rates that explicitly eliminate the opportunity for Anthem to earn a fair and reasonable – indeed **any** – rate of return on its Individual Insurance Products. No matter through what lens it is viewed, that decision was statutorily and constitutionally impermissible.

Rates for regulated products (including regulated insurance products) must be non-confiscatory, *i.e.*, they must cover all costs plus allow for a fair and reasonable rate of return. Rates designed to be “break-even,” *i.e.*, allowing zero percent return, do not satisfy this black letter rule and are, accordingly,

confiscatory on their face. Interpreting the “adequacy” requirement of Section 2736 to allow a zero percent margin, and thus no rate of return, is statutorily and constitutionally impermissible.

It is no answer to suggest that profits generated from unregulated products or business conducted outside of Maine can substitute for the constitutionally required fair and reasonable return. Just as it is black letter law that regulated rates must provide a fair rate of return, it is equally black letter law that such cross-subsidization exceeds the Superintendent’s jurisdictional reach and violates fundamental rate-setting principles and constitutional requirements.

Anthem was, and is, entitled to rates that are designed to achieve a fair and reasonable rate of return on its Individual Insurance Products. The Superintendent’s decision and order expressly eliminating that return is therefore unlawful.

ARGUMENT

- I. **In accordance with the Constitution, 24-A M.R.S. § 2736 unambiguously requires that rates be designed to include the opportunity to earn a fair and reasonable rate of return.**
 - A. **The statutory scheme requiring that rates not be “excessive” or “inadequate” protects consumers from rates that are too high and insurers from rates that do not provide a fair and reasonable rate of return.**

The Superintendent’s charge is to review Anthem’s proposed rates for its Individual Insurance Products to ensure that they are not “excessive, inadequate, or unfairly discriminatory.” 24-A M.R.S. § 2736(2). Although the terms “excessive” and “inadequate” are not defined within the statute, when viewed in context, these terms set the boundaries within which rates must be set: not so high that they are excessive with respect to customers, and not so low that they are inadequate to provide a fair and reasonable rate of return to insurers.

Those courts that have defined “inadequate” in the insurance rate setting context have long held that the term is meant to protect insurers by ensuring a fair and reasonable rate of return. *See, e.g., Mass. Bonding & Ins. Co. v. Comm’r of Ins.*, 107 N.E.2d 807, 811 (Mass. 1952) (the Commissioner of Insurance’s duty to establish “‘adequate, just, [and] reasonable’ premium charges” means “fixing a rate that lies somewhere between the lowest rate that is not confiscatory and the highest rate that is not excessive or extortionate”); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256-57 (Cal. 1989) (holding that a provision stating “‘no rate shall be approved or remain in effect which is excessive [or] inadequate’ . . . requires rates . . . which can be described as fair

and reasonable and prohibits approval or maintenance of confiscatory rates”); *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 284 S.E.2d 339, 342 (N.C. App. 1981) (“[T]he term ‘inadequate’ operates to protect the interest of insurance companies in achieving rate levels which are sufficient for them to earn a reasonable profit, while the term ‘excessive’ operates to protect the interest of consumers in being offered rates which will not enable insurance companies to earn unreasonable profits.”); *Fogel v. Farmers Group, Inc.*, 74 Cal. Rptr.3d 61, 74 (Cal. App. 2d Dist. 2008) (“[T]he purpose of the approval process is to examine and regulate the insurer’s expected profit to ensure a fair, rather than excessive, rate of return.”); 5 Couch on Insurance 3D § 69.12, at 69-28 (2005) (“The rates must neither be excessive, so as to be unfair to insurance consumers, nor inadequate, so as to deny the insurers the right to a reasonable profit.”); 44 C.J.S. Insurance § 98 (“Although an insurance commissioner must give due consideration to various factors in setting rates, the ultimate question the commissioner must determine is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave a fair and reasonable profit.”).

Consistent with this established law, in all rate proceedings since Anthem acquired the former non-profit Blue Cross Blue Shield of Maine until the order at issue here, the Superintendent has approved rates that include a positive margin for risk and profit. *See* n.3, *supra*.

The plain language of Section 2736, when viewed in the context of long-standing usage in the rate-making arena, as well as the Superintendent’s

consistent prior interpretations, establishes that rates must be designed to provide a fair and reasonable rate of return. *See State v. Ray*, 1999 ME 167, ¶ 7, 741 A.2d 455, 457 (meaning of statute “must be construed in the light of the subject matter, the purpose of the statute, and the consequences of a particular interpretation.”); *Cobb v. Bd. of Counseling Prof’ls Licensure*, 2006 ME 48, ¶ 12, 896 A.2d 271, 275 (“[T]echnical or trade expressions should be given a meaning understood by the trade or profession.”). As such, the statute is unambiguous, and the Superintendent’s inconsistent interpretation of Section 2736 is not entitled to deference. *See Costain*, 2008 ME 142, ¶ 5, 954 A.2d at 1053; *Whitney*, 2006 ME 37, ¶ 22, 895 A.2d at 315.⁴

Even if the term “inadequate” were somehow ambiguous as to whether it requires inclusion of a fair and reasonable return, the Superintendent’s

⁴ The definition of “inadequate” under Maine’s worker’s compensation statute, cited below, is not helpful in determining the definition of “inadequate” under Section 2736, except to underscore its inapplicability here. The definition of “inadequate rates” contained in 24-A M.R.S. § 2382 only “appl[ies] to the making and the use of rates under this [Worker’s Compensation Rating] Act.” 24-A M.R.S. § 2382. Section 2701 explicitly distinguishes the laws regulating health insurance contracts from those regulating workers’ compensation. *Id.* § 2701 (nothing that “[n]othing in this chapter shall apply to or affect . . . any policy of liability or workers’ compensation insurance”). The fact that Section 2382 defines “inadequate” for purposes of the Worker’s Compensation Rating Act, while there is no comparable definition for Section 2736, suggests that the Legislature knew that it could alter the well-established definition of that term but chose not to do so in this context. *See Bernard v. Cives Corp.*, 395 A.2d 1141, 1147 (Me. 1978) (“[T]he Legislature must be deemed to have known how to achieve that result by appropriate language had such been its purpose. The Legislature had available to it the concrete example of other proposals for legislation, as well as actual legislation, so providing.”). Hence, inclusion of a specific definition in the worker’s compensation statute simply underscores deviation from the ordinary understanding of the term, as contained in Section 2736. Finally, even if the definition in Section 2382 could be deemed persuasive, it should not be adopted in this context because it is constitutionally unsound. *See Guaranty Nat’l Ins. Co. v. Gates*, 916 F.2d 508, 512-16 (9th Cir. 1990) ; *Calfarm*, 771 P.2d at 1252-54 (both discussed *infra*).

interpretation of Section 2736 would not be entitled to deference because she failed to acknowledge and explain her deviation from her prior interpretation that the term requires such a return. *See, e.g., Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (vacating decision upholding agency action due to agency's failure to provide rationale for change in policy). "[W]hen an administrative agency departs significantly from its own precedent, 'it must confront the issue squarely and explain why the departure is reasonable.'" *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 290 (1st Cir. 1995) (quoting *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)).

Finally, even if the Court determined that the term "inadequate" was ambiguous and, despite its well-established meaning within the ratemaking arena, susceptible to an interpretation other than protecting insurers from rates that do not provide for a fair rate of return, as explained below, any such construction of Section 2736 would be unconstitutional. *See Standard of Review, supra*, at 9-10 (citing *Haskell*, 2001 ME 154, ¶ 4, 784 A.2d at 7; *Cropley*, 544 A.2d at 304). Hence, whether a matter of statutory interpretation or constitutional mandate, the Superintendent cannot impose rates for the Individual Insurance Products that fail to provide an opportunity to earn a fair and reasonable rate of return.

B. The Constitutions of the United States and the State of Maine require that state-regulated insurance rates be designed to allow a fair and reasonable rate of return.

Under the Due Process Clause and Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution and their Maine counterparts, Art. 1, sections 6-A and 19, rates cannot be confiscatory. See, e.g., *Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 631 A.2d 57, 65 (Me. 1993) (recognizing that the Takings Clause protects regulated entities from rates “so ‘unjust’ as to be confiscatory” (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-10 (1989))); *City of Bangor v. Pub. Utils. Comm'n*, 156 Me. 455, 458, 167 A.2d 6, 9 (1960) (“[R]ates must not be confiscatory in violation of the due process clauses of the Constitution of the United States and of the State of Maine.” (citation omitted)). In order to avoid the prohibition against confiscatory rates, this Court has long held that the rates that a regulator sets must include a fair and reasonable profit margin. *Am. Ass’n of Retired Persons v. Pub. Utils. Comm’n*, 678 A.2d 1025, 1030-1031 (Me. 1996) (“The return on investment calculated by the Commission must not be so unreasonably low as to be confiscatory.” (citation omitted)); *New England Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 390 A.2d 8, 30 (Me. 1978) (“The Company is entitled to a fair return, and less than a fair return would be confiscatory.”)⁵

⁵ This Maine authority is consistent with Supreme Court jurisprudence in the rate-setting context, which sets forth the right of regulated companies to non-confiscatory rates generating “enough revenue not only for operating expenses but also for the capital costs of the business [including] service on debt and dividends on the stock.” *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); see also *Duquesne Light Co.*, 488 U.S. at 307 (“the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be

While Maine’s jurisprudence concerning the constitutional prohibition against confiscatory rates has developed primarily in the context of public utilities, this Court has recognized that the same principles apply to insurance rates. In *National Council on Compensation Insurance v. Superintendent of Insurance*, the Court stated that a rate set by the Superintendent of Insurance would amount to an unconstitutional confiscation if it did not provide an “opportunity to realize a reasonable return on their investment in Maine” and the insurer could prove that the “inadequate return results directly from the rate approval process and not from other causes.” 481 A.2d 775, 781-82 (Me. 1984) (citing *Mass. Auto. Rating and Accident Prevention Bureau v. Comm’r of Ins.*, 424 N.E.2d 1127, 1135 (Mass. 1981)). Here, with the Superintendent’s imposition of a zero percent margin, the opportunity to realize a reasonable return was explicitly and indisputably eliminated.

The concept that state insurance regulators cannot set confiscatory rates is not novel to Maine, but rather constitutes the general rule throughout the country. *See, e.g., Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 446-48 (1928) (dismissing writ of certiorari for lack of federal question, but recognizing that an individual insurer is entitled to have a state-made rate set aside as repugnant to the Due Process Clause of the Fourteenth Amendment if it can demonstrate that the rate established for it is confiscatory); *Aetna Cas. & Sur.*

confiscatory.”); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Tenoco Oil Co. v. Dep’t of Consumer Affairs*, 876 F.2d 1013, 1020 (1st Cir. 1989) (“To be just and reasonable, rates must provide not only for a company’s cost, but also for a fair return on investment Rates which fall below this standard are ‘confiscatory.’” (citations omitted)).

Co. v. Comm’r of Ins., 263 N.E.2d 698, 703 (Mass. 1970) (holding that insurance rates that would produce an underwriting loss in a single year were confiscatory and unconstitutional: “insurers . . . have a right to rates which are not confiscatory”); *Opinion of the Justices*, 147 N.E. 681, 700 (Mass. 1925) (stating that the “fundamental principle of rate making . . . that in general the rate so established must be sufficient to yield a fair return on the reasonable value of the property used or invested for doing the business after paying costs and carrying charges . . . is as applicable to insurance premiums as it is to rates of public utilities narrowly defined”); *Ohio Cas. Ins. Co. v. Ins. Dep’t of Com. of Pa.*, 585 A.2d 1160, 1164 (Pa. 1991) (insurers are “entitled to a fair and adequate rate of return, *i.e.*, one which is not confiscatory”).

In sum, the lowest rate constitutionally allowed for an insurer’s regulated products is one that is non-confiscatory, *i.e.*, designed to provide an opportunity to earn a fair and reasonable rate of return.

C. A zero percent risk and profit margin fails to satisfy the requirement of a fair and reasonable rate of return.

While in some instances there may be disagreement about what constitutes a fair and reasonable rate of return, there is no doubt that the zero percent risk and profit margin approved by the Superintendent runs afoul of this requirement. Multiple courts have struck down as unconstitutional statutes and regulations designed to provide “break even” rates rather than rates that allow the regulated entity an opportunity to achieve a fair and reasonable rate of return.

For example, in *Guaranty National Insurance Co. v. Gates*, the Ninth Circuit addressed the constitutionality of a Nevada insurance statute that, like Maine’s Section 2736, provided that “rates must not be excessive, inadequate or unfairly discriminatory.” 916 F.2d at 515. Unlike the Maine statute, which does not define the term “inadequate,” the Nevada Insurance Code stated: “[r]ates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business of which they apply.” *Id.* The Nevada definition thus preserved only the insurance companies’ ability to recoup the costs of their services. If projected losses and expenses were met, the rates would be deemed adequate. The Court of Appeals held that although the Nevada statute guaranteed that insurers would “break even . . . it does not guarantee the constitutionally required ‘fair and reasonable return.’” *Id.* (citing *Hope Natural Gas Co.*, 320 U.S. at 603). Accordingly, the statute was “constitutionally unacceptable” on its face. *Id.*

Similarly, the Sixth Circuit struck down a statute providing that “[a] rate is inadequate if it is less than the total service long run incremental cost of providing the service” – like in Nevada, allowing for no profit. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 -595 (6th Cir. 2001). The Sixth Circuit concluded that this statute was unconstitutional because it did “not guarantee a constitutionally adequate rate of return for regulated telephone service providers because it merely permits telephone service providers to cover costs, and does not ensure a fair and reasonable rate of return on investment.” *Id.*

In sum, read in the context of this constitutional mandate, Section 2736 plainly requires that the lowest authorized rate is one that is designed to provide the opportunity for the insurer to earn a reasonable profit – an opportunity the Superintendent’s Decision explicitly eliminated. Allowing a zero percent return is plainly confiscatory and therefore unconstitutional. As such, even if the statute did permit the Superintendent to impose a zero percent risk and profit margin (which it does not), the rate would nevertheless violate the Due Process Clause and Takings Clause of the United States Constitution, as well as the Maine Constitution.

Accordingly, the Court should vacate the Superior Court’s judgment and direct the Superior Court to remand to the Superintendent with instructions to establish rates for Anthem’s Individual Insurance Products that include a fair rate of return.

D. A “solvency” test fails to satisfy the requirement of a fair and reasonable rate of return.

In ruling that “break even” rates are acceptable, the Superintendent stated that “the adequacy standard under section 2736 is a solvency test and no more.” (*See App. 93*). Again, this fails to recognize the fundamental requirement that rates must provide for a fair rate of return.

In *Calfarm Ins. Co. v. Deukmejian*, the Supreme Court of California expressly rejected such a “solvency” standard. 771 P.2d at 1253-56. In that case, the Court examined the constitutionality of a statute which provided that the Insurance Commissioner could not approve a rate increase before the expiration of one year unless the insurer was “substantially threatened with

insolvency.” The Court held that “a rate may be confiscatory even though it does not threaten the insurer’s solvency.” *Id.* at 1253. While the Court acknowledged that “insolvency” has many meanings, none of them allowed for a construction of the statute which “conform[ed] to the constitutional standard of a fair and reasonable return.” *Id.*

The *Calfarm* Court reached this conclusion because an insolvency standard “refer[red] to the financial position of the company as a whole”: “[i]f an insurer had substantial net worth, or significant income from sources unregulated by Proposition 103, it might be able to sustain substantial and continuing losses on regulated insurance without danger of insolvency.” *Id.* at 1254. The Court found this limitation on rate increases “invalid under the due process clauses of the state and federal Constitutions.” *Id.* at 1256.

The same holds true in this case. The mere fact that the rates imposed by the Superintendent would not threaten the solvency of Anthem or Wellpoint does not satisfy the constitutional mandate that rates must provide for a fair and reasonable rate of return.

II. The Superintendent cannot excuse elimination of Anthem’s opportunity to earn a fair and reasonable rate of return on its Individual Insurance Products through cross-subsidization.

The Superintendent suggests that Anthem’s (and indeed WellPoint’s) overall financial health should act as a surrogate for the constitutional requirement that the rates for Anthem’s Individual Insurance Products must be designed to include a fair rate of return. This was error because: (A) the statutory structure of the Maine Insurance Code unambiguously requires that

the Superintendent consider rates in the context of the financial performance of only the carrier's Individual Insurance Products, not the financial performance and health of the carrier as a whole and/or other lines of insurance offered by the carrier or its parent; and (B) fundamental rate-making principles, again of constitutional import, prohibit designing rates based on cross-subsidization and consideration of financial returns from products not subject to rate regulation and products sold in non-domestic business. Each point is discussed in turn.

A. The statutory scheme plainly limits the rate-setting inquiry under Section 2736 to Anthem's Individual Insurance Products.

The statutory scheme directs the Superintendent to assess the "adequacy" of particular rates in light of the return from the Individual Insurance Products alone. *See generally Buckley*, 2010 ME 53, ¶ 7, __ A.2d __ (stating that a term is to be construed in light of the "whole statutory scheme"). Section 2736, viewed in light of the statutory structure of the Maine Insurance Code, regulates only Individual Insurance Products, and thus limits the rate-setting inquiry to Individual Insurance Products. Accordingly, the Superintendent's reliance on the overall financial health of Anthem – including Anthem's group insurance products – was improper.

The Maine Insurance Code distinguishes between individual and group insurance products for rate-setting purposes: rates for individual products are regulated, while rates for group products are not. Section 2736 expressly states that "[e]very insurer shall file for approval by the superintendent every

rate . . . that it proposes to use *in connection with individual health insurance policies* and certain group policies specified in section 2701.” 24-A M.R.S. § 2736 (emphasis added). In turn, Section 2701 excludes “[a]ny group or blanket policy” from the scope of Section 2736, except certain discrete group policies such as Medicare supplement policies and association and credit union groups. *Id.* § 2701. By its very structure, then, the Maine Insurance Code treats individual insurance products as a discrete line of products not encompassing group plans. The Superintendent has acknowledged as much. (See App. 87 (“The rating of large group health plans is not regulated by the Superintendent.”)).

This legislative distinction establishes that the “adequacy” of the rates designed by the Superintendent is to be measured solely by the return from Individual Insurance Products. A Massachusetts decision, *Aetna Casualty*, is instructive. There, as in this case, the insurance commissioner argued that he could determine the “adequacy of the rates for automobile property damage liability insurance” based on the insurance companies’ “overall” return rather than on the return on the single line of insurance at issue in the rate proceeding. 263 N.E.2d at 702. Based on the statutory scheme at issue, the court “[d]id not agree with this contention.” *Id.* The Court observed that – again, as in this case – the statutes governing insurance ratemaking “show[ed] a pattern of separate treatment of each type of coverage for rate purposes.” *Id.* According to the Court, there was “nothing in this statutory scheme of regulation of insurance rates which permits either the Commissioner or the

insurers to fix rates for any category of coverage at a level which is higher than otherwise permitted in order that such excess may offset or make up a constitutional inadequacy in the rates for another category of coverage.” *Id.* at 703. Therefore, the Court held that “each type of automobile liability insurance coverage [must] be considered and treated separately from all others for rate purposes.” *Id.*

Just as the statutory scheme in *Aetna Casualty* differentiated between types of automobile insurance coverage, thereby requiring the commissioner of insurance to consider each type of coverage separately, the Maine statutory scheme requires the Superintendent to treat individual and group insurance products separately because it distinguishes the two lines of products: one that has prices set through a regulated process by the Superintendent (individual rates) and one with prices that are not regulated and instead established by the competitive market (group rates).

Both current Superintendent Kofman and former Superintendent Iuppa have acknowledged the statutory distinction between individual and group products, as well as the necessary corollary that adequacy is determined with regard to the regulated products alone. As noted, immediately before issuing her decision on Anthem’s 2009 rates, Superintendent Kofman testified that Maine law “limit[s] the inquiry to whether the rates for *each product* are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with *that product* . . . [and may not be based] on the overall profitability of the carrier” (Addendum A (Superintendent Kofman

testifying against a proposed amendment that would “require[] the Superintendent to ‘consider revenues and expenses from all line segments of the filing insurer’” (emphasis added)).⁶ Similarly, former Superintendent Iuppa previously explained that setting Anthem’s individual insurance rates at an inadequate level would lead to inappropriate subsidization of the individual insurance business, stating that “it would not be proper . . . for the Superintendent to require Anthem to write its non-group business at a loss,” as that would “requir[e] individual products to be subsidized” and would “put the Company at a competitive disadvantage in the group market.” *See In re: Anthem BCBS 2003 Individual Rate Filing*, Docket No. INS-02-785, Decision and Order dated November 8, 2002.

Whether a regulator is rejecting a reasonable risk and profit margin on a regulated product based on an attempt to subsidize that product by customers from products not subject to rate control (*e.g.*, Anthem’s group business), or out of state customers (*e.g.*, other WellPoint affiliates), the resulting rate is fundamentally flawed and must be rejected.

B. Fundamental ratemaking principles recognized by this Court prohibit cross-subsidization.

The conclusion that Section 2736 unambiguously limits the Superintendent to considering the return from Anthem’s Individual Insurance Products alone – not Anthem’s overall financial health – is confirmed by well-

⁶ Significantly, the Legislature did not enact this provision of L.D. 1205. As such, the existing Maine law – which requires the Superintendent to consider the financial performance of each health insurance product when setting rates, not the “revenues and expenses from all line segments of the filing insurer” – remains unaltered.

established law regarding ratemaking. See *Ray*, 1999 ME 167, ¶ 7, 741 A.2d at 457 (meaning of statute “must be construed in the light of the subject matter”).

A “fundamental objective in utility ratemaking” is that “customers who benefit from a service should bear the costs of providing that service.” *Me. Water Co. v. Pub. Utils. Comm’n*, 482 A.2d 443, 455-56 (Me. 1984) (quoting *Ala. Gas Corp. v. Ala. Pub. Servs. Comm’n*, 425 So.2d 430, 438 (Ala. 1982)). A corollary to this principle “calls upon the ratemaking process to avoid ‘cross-subsidization,’ to ‘protect one class of customers from paying the costs attributable to another class.” *Id.* at 456 (quoting *El Paso Elec. Co. v. FERC*, 667 F.2d 462, 468 (5th Cir. 1982)). These “basic principles” mean that “one class of customers should be neither burdened by the losses from other service nor benefited from its profits.” *Id.* (citing *Smyth v. Ames*, 169 U.S. 466 (1898)). See *Pine Tree Tel.*, 631 A.2d at 66.

Applying the rule that one class should not be burdened by service provided to another class, this Court expressly held in *Maine Water Company* that the Public Utilities Commission violated the law by refusing to allow an increase in the rates of one division of the Maine Water Company when “the cost of service . . . within that division exceeded the revenue produced by its existing rates” and by putting the “excess cost of service . . . over onto the ratepayers of other divisions.” *Id.* at 455. The Court reasoned that because “[e]ach of Maine Water Company’s five divisions is physically and operationally independent” and because “[e]ach division’s costs are readily identifiable, and

in fact have been identified by the Commission,” each division’s rates must be considered independently and cross-subsidization avoided. *Id.* at 456. See *Millinocket Water Co. v. Pub. Utils. Comm’n*, 515 A.2d 749, 753 (Me. 1986) (noting that, in *Maine Water Company*, the Court “struck down an attempt by the Commission to effect a dollar-for-dollar ‘flowthrough’ of gains realized by Maine Water Company in selling [other] divisions”).

So it is in this case. Anthem’s business is divided into independent lines, involving Individual Insurance Products, where rates are set by the Superintendent, and group insurance products, which prices are unregulated and established by the competitive market. These independent lines have in fact been identified as such by the Superintendent. It follows that the Superintendent’s Decision, which requires Anthem to obtain the fair rate of return to which it is entitled on its Individual Insurance Products elsewhere, is unlawful under *Maine Water Company’s* prohibition on cross-subsidization.⁷

C. Precedent elsewhere prohibits cross-subsidization.

The rule against cross-subsidization applied in *Maine Water Company* is well-established. As the Fifth Circuit has observed, the controlling “principle . . . is that, with respect to ratemaking, each jurisdiction or class of customers should pay its own way.” *El Paso Elec. Co.*, 667 F.2d at 468.

⁷ The instant case is an even stronger case than that presented in *Maine Water Company*. While the divisibility of the businesses in that case was due in part to the vagaries of the business structure at issue, the division between individual insurance products and group insurance products is mandated by the statutory scheme created by the Legislature. Anthem’s rate filings are premised on the distinction between group and individual plans because the statutory scheme created by the Legislature requires Anthem to secure the Superintendent’s approval only for rates relating to its Individual Insurance Products.

In *Northern Pacific Railway Co. v. North Dakota*, the Supreme Court unequivocally held that intrastate rates fixed by a state for the transportation of coal were confiscatory where, taking into account the entire traffic to which such rates were applicable, they compelled the carrier to transport the commodity for less than cost, or without substantial compensation in addition to cost, although the returns of the carrier from its entire intrastate operations might be adequate. 236 U.S. 585, 604 (1915). The Court stated:

where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

Id.

By imposing a zero percent margin for risk and profit, that is precisely what the Superintendent did here: required Anthem to sell its Individual Insurance Products “at cost”, *i.e.*, break even,⁸ and thereby denied it any reasonable reward for providing that service. According to the *North Dakota* court, “[i]n such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.” *Id.* at 595-96. *See also Norfolk & W. R. Co. v. Conley*, 236 U.S. 605, 609 (1915) (the state could not justify setting a

⁸ The historical financial performance of the Individual Insurance Products with a 3% margin suggests that a zero percent margin is far more likely to produce a substantial loss than break even, but either way, designing rates that do not allow for any return is unlawful because the resulting rates are confiscatory.

rate for passengers below cost by setting higher rates for shipment of goods “in order to supply an adequate return for the carrier’s entire service”).

The Superintendent’s decision and order (and her attendant reading of Section 2736) run contrary to this well-established principle, and the numerous cases supporting it. See *In re Existing Rates of Shoreham Tel. Co.*, 915 A.2d 197, 202 (Vt. 2006) (noting with approval *Maine Water Company’s* reliance on the “fundamental principle . . . that one class of customers should neither be burdened by the losses nor benefited by the profits generated in connection with services accorded a different class of customers”); *Blue Cross of Kan., Inc. v. Bell*, 607 P.2d 498, 508 (Kan. 1980) (applying the “rule that one class of consumers shall not be burdened with costs created by another class” to health insurance); *Jones v. Kan. Gas & Elec. Co.*, 565 P.2d 597, 606 (Kan. 1977) (“The touchstone of public utility law is the rule that one class of consumer shall not be burdened with costs created by another class.”); *Ins. Rating Bd. v. Comm’r of Ins.*, 268 N.E.2d 144, 148 (Mass. 1971) (stating, in the insurance context, that “[a] rate which is otherwise inadequate cannot be justified on the ground that some or all companies make an offsetting profit on another coverage.”); *S. Freight Ass’n v. Mason*, 198 So.2d 317, 318-19 (Fla. 1967) (noting that “a reasonable return on total earnings of a carrier would not justify an order requiring it to carry one class of freight for less than a reasonable rate”). Thus, even if designing rates to eliminate any margin were otherwise permissible (and it is not), suggesting that Anthem look elsewhere for

the minimum fair return from the Individual Insurance Products to which it is entitled is impermissible.

D. Subsidization of regulated products through unregulated products is unconstitutional.

Cross-subsidization is not only contrary to basic rulemaking principles, but when the regulator looks to offsets outside its authority, unconstitutional.

A company may not be “required to subsidize their regulated services . . . with revenues generated from unregulated services.” *Mich. Bell Tel. Co.*, 257 F.3d at 594. The Supreme Court has considered and rejected subsidization of regulated lines by profits from unregulated lines. *See Brooks-Scanlon Co. v. R.R. Comm’n of La.*, 251 U.S. 396 (1920). There, the Court held that it was a “principle too well established to need further argument here” that, although the “plaintiff may be making money from its sawmill and lumber business,” which was not subject to state rates, “it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others.” *Id.* at 399; *see also Calfarm*, 771 P.2d at 1254 (refusing to consider the “significant income from sources unregulated by Proposition 103” in determining whether the “regulated rate constitutes a fair return” because “[t]he just compensation safeguarded . . . by the Fourteenth Amendment is a reasonable return *on the value of the property used*” rather than on the business as a whole (emphasis added)).

The reason why subsidization of regulated rates by unregulated earnings is not allowed is simple. The ratepayers never bore any risk with respect to the unregulated services or assets. Whatever profits or losses sustained by the

provider were at that provider's sole risk. *See Me. Water Co.*, 482 A.2d at 449-450 (discussing how the provider, not the ratepayer, retains any gain on property for which the ratepayer bears no risk). Just as the Superintendent could not raise the risk and profit margin on Anthem's regulated products based on any losses it might sustain on its group products, the prices for which are not regulated, so also the opposite is true. Absent such symmetry, the rate design inevitably results in confiscation.

The Supreme Court's decision in *Baltimore & Ohio R. Co. v. United States*, 345 U.S. 146 (1953), cited below, provides no support for the Superintendent's cross-subsidization. There, railroads challenged rates that had been set for transportation of certain kinds of vegetables. *Id.* at 147. The Court held that, "so long as rates as a whole afford railroads just compensation for their over-all services *to the public* the Due Process Clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served." *Id.* at 150 (emphasis added). As this express language indicated, the Court did not endorse subsidization of rate-regulated activities with activities not subject to rate regulation. To the contrary, the Court merely held that subsidization within a regulated line may occur without offending the Due Process Clause. Here, by contrast, the Superintendent plainly relied upon the financial performance of distinct lines of regulated *and* unregulated products when determining rates for Anthem's Individual Insurance Products. This form of cross-subsidization was unlawful. *See Brooks-Scanlon Co.*, 251 U.S. at 399; *Calfarm*, 771 P.2d at 1254.

E. Subsidization of regulated products through out-of-state products or services is also unlawful.

In her brief to the Superior Court, the Superintendent made clear that she considered not only unregulated earnings from Anthem's in-state group health insurance products, but also the financial performance of out-of-state entities not subject to rate regulation by the Superintendent. (*See, e.g.*, App. 71 (referencing WellPoint's 45 insurance subsidiaries averaging \$2.6 billion in net income as support for its zero percent margin for Anthem of Maine)). Just as the Superintendent cannot look to Anthem's unregulated earnings within Maine, so also she cannot rely of extraterritorial earnings, regulated or unregulated, for the same reason: the extraterritorial earnings, like unregulated intrastate earnings, are outside her authority, and the risks associated with such earnings have already been established either by the competitive market or other regulators.

This Court has explicitly rejected reliance on non-jurisdictional earnings in setting in-state rates. *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 148 Me. 374, 397, 94 A.2d 801, 813 (1953) (Maine PUC could not take into account interstate business earnings in setting in-state rates). The Court's language in *New England Telephone* is prescient:

Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed.

Id. at 400-01 (quoting *The Minn. Rate Cases*, 230 U.S. 352, 435 (1913)). In other words, according to this Court, “the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business.” *Id.*

As this Court noted, this was the same rule as was adopted in *Smyth v. Ames*, 169 U.S. 466 (1898). In *Smyth*, the seminal rate-setting case relied upon by this Court in both *New England Telephone* and *Maine Water Company*, the Supreme Court expressly rejected the argument that “the reasonableness of the rates established by the [state] statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration . . . the whole business of the company.” 169 U.S. at 540. According to the Court, “[t]he state cannot justify unreasonably low rates for the domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control.” *Id.* at 541. The state may consider only the return from the business over which the state has regulatory authority.

[D]omestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business.

Id. at 541-42.

The Superintendent used the reasoning rejected in *Smyth* when attempting to justify the zero percent margin. *Compare* App. 88 (“Anthem’s financial operations are managed on a company-wide basis, thereby demonstrating the relevance of Anthem’s overall financial health to the Superintendent’s rate review.”) *with Smyth*, 169 U.S. at 541-42 (“The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line.”); *El Paso Elec. Co.*, 667 F.2d at 468 (“In [*Smyth*], the court held that the rates for rail service within one state could not be justified by revenues received from other interstate or intrastate service, since one class of customers should be neither burdened by the losses from other service nor benefitted from non-jurisdictional profits.”). *See also Smith v. Ill. Bel Tel. Co.*, 282 U.S. 133, 148-49 (1930); *Chi., Milwaukee & St. Paul Ry. Co. v. Pub. Utils. Comm’n*, 274 U.S. 344, 350-51 (1927); *The Minn. Rate Cases*, 230 U.S. at 435; *Am. Ins. Ass’n v. Lewis*, 409 N.E.2d 828, 831 (N.Y. 1980) (“[T]he due process clause operates to restrain the State from fixing its talons on extraterritorial values.”).

CONCLUSION

No matter how it is viewed, the zero percent margin for risk and profit imposed by the Superintendent on Anthem's Individual Insurance Products is unlawful. By statute and constitution, Anthem is entitled to adequate rates that provide for a fair and reasonable rate of return. The rates provided by the Superintendent explicitly do not provide for any rate of return and, accordingly, are confiscatory. The bases articulated by the Superintendent for her decision – cross-subsidization from earnings from Anthem's other in-state products and the extraterritorial earnings of Anthem's parent – are statutorily and constitutionally impermissible.

For the reasons given above, the Court should vacate the judgment of the Superior Court with instructions to remand this matter to the Superintendent to design rates for Anthem's Individual Insurance Products that include a fair and reasonable rate of return.

DATED: July 21, 2010



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CERTIFICATE OF SERVICE

I, Lucas A. Ritchie, Esquire, hereby certify that two copies of this Appellant Brief were served upon counsel on July 21, 2001 by first-class mail, postage pre-paid, to their offices at the addresses set forth below.

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MILA KOFMAN
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**TESTIMONY OF MILA KOFMAN
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DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**

Neither For Nor Against L.D. 1205

“AN ACT to Establish a Health Care Bill of Rights”

Sponsored by Representative Sharon Treat

Before the Joint Standing Committee on Insurance and Financial Services

April 13, 2009 at 1:00 PM

Senator Bowman, Representative Treat, and members of the Committee, I am Superintendent of Insurance Mila Kofman. I am here today to testify neither for nor against L.D. 1205.

This bill has seven parts, each addressing a different aspect of Maine's health insurance laws. Most of Part A is substantially the same as L.D. 323, the Department's transparency bill (also Sponsored by Representative Treat), which requires health insurance carriers to post coverage information on their websites so that consumers have more accessible information about health insurance options available in Maine, to provide enrollees with up-to-date information about cancellation and reinstatement of their group health plans, and to provide clear and detailed explanations of benefits (EOBs) so that enrollees can understand how their claims have been paid. Part A also requires specific disclosure if recommended childhood immunizations are excluded from coverage. All of these provisions

address situations that the Bureau has observed in the marketplace. In all of these situations, the inadequate disclosure has left consumers confused about their benefits and coverage options. I support this Part of the bill.

Part B of the Bill would amend the reporting requirements of the Health Plan Improvement Act to require carriers to describe to prospective enrollees and participating providers any provider profiling programs they use to rate providers by quality or efficiency of care. It also amends the credentialing requirements to require carriers with profiling programs to disclose their methodologies and give providers an opportunity to correct errors or challenge the rating. I generally support these types of transparency measures as long as they are designed to provide consumers with additional information about the quality of providers, and ratings are not based on cost.

Part C requires health carriers' supplemental annual reports to include information on their standardized individual and small group plans and on their five most popular individual and small group product offerings,¹ in order to facilitate comparison shopping by consumers. Bureau of Insurance product guides and the new policy disclosure requirements proposed under L.D. 323 and Part A of this bill would seem to be a more useful mechanism for this kind of comparative information than the annual report.

Part D would make various changes to the health insurance rate filing laws, including extending the advance notice of a proposed rate increase to policyholders from 60 to 90 days and enhancing the content of the required notice,² requiring

¹ The cross-references for the standardized small group plans, 24-A M.R.S.A. §§ 2736-C(6)(A) and 2808-B(6)(A), should refer instead to 24-A M.R.S.A. §§ 2736-C(8) and 2808-B(8-A).

² This includes a requirement to include a statement that pending small group rate increases are subject to regulatory approval. This is not accurate if the carrier chooses the guaranteed loss ratio option, discussed below in connection with Part E, as carriers are currently doing for all small group products offered in Maine.

notice to the Attorney General and giving the Attorney General the right to a hearing if none has been scheduled, repealing the current trade secret balancing test and making all supporting information for rate filings public except for reimbursement provisions in contracts between insurers and providers or other third parties, and requiring the Superintendent to “consider revenues and expenses from all line segments of the filing insurer,” rather than limiting the inquiry to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product.³ 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.

In general, the provision making information in rate filings public would codify the standards the Bureau has applied in recent years. However, we believe that in addition to the contract exception, a further exception is needed for HIPAA-protected patient information. In the recent Anthem rate hearing, Anthem provided information concerning specific high-cost claimants. Although no names or other identifying information were provided, there was a possibility that someone might be able to identify them based on the type of treatment provided. That would violate state and federal privacy protections for patient information, so this information was held confidential in the hearing.

Part E would increase the minimum loss ratio (that is, the minimum percentage of premium that must be paid back as benefits) for both small group

³ For some of these initiatives, the provisions for the individual market are in Part D while their small group counterparts are in Part E. They will be discussed together in this section of the testimony.

and individual insurance. Currently, small group rates submitted to the Superintendent for prior approval must have an actuarially expected loss ratio of at least 75%, and small group rates put in place without prior approval must have a guaranteed loss ratio of at least 78%, with refunds if the average loss ratio over any three-year period falls short of that level. Prior approval is the only option for individual rates, and the expected loss ratio must be at least 65%. Under this bill, the minimum loss ratios would increase from 75/78 to 85/88 for small group, and from 65 to 85 for individual. In addition, all rates for individual health plans would be subject to both prior approval and a refund mechanism, rather than giving the carrier a choice between the two. Also, unlike the current small group refund mechanism, the proposed individual refund mechanism would apply to carriers even if they have very small amounts of business in Maine. This raises credibility issues. For example, a carrier covering only five people might have no claims in a given year and would have to refund all premiums.

Another bill raising the small group loss ratio standards, L.D. 859, is also under consideration by this Committee. That bill would increase the minimum loss ratios from 75/78 to 78/80, rather than to 85/88. As I testified with regard to L.D. 859, we believe increases of this magnitude will be beneficial to small employers, while larger increases could have the unintended consequence of causing carriers to consider leaving the small group market if it is not profitable enough. The same concerns apply to individual policies, which were not addressed by L.D. 859.

While it would be appropriate to mandate a more modest improvement in individual market loss ratios, a 20-point increase is substantial. There are reasons why individual policies have higher expenses than small group policies, and based on historic experience in the market, an 85% minimum loss ratio for individual business would be likely to give one carrier a monopoly in this market.

Part E also amends the law requiring carriers to provide loss reports to group policyholders.⁴ Currently, only large groups are entitled to these reports, while this bill would repeal the small group exception. This information is important for large employers because if they want to shop for better rates, the prospective carrier will need the experience data. The reason for the current exception is that small groups are community rated, which means that premium rates do not depend on claims experience. Therefore this information is not useful to small employers. Also, providing this data to very small employers could implicate confidentiality concerns, including inferences about personal health information.

Finally, Part E also authorizes the Superintendent to conduct rulemaking to establish one or more standardized small group health plans. A requirement to offer two standardized small group plans was previously imposed in the 1990s, but it was abandoned due to lack of interest in the marketplace. In principle, standardized plans can provide an easy-to-understand coverage option and a useful reference point for comparison shopping. However, these plans are only useful for that purpose if they reflect what consumers are actually buying. Since the repeal of the small group standardized plan requirement, the Bureau has collected rate information on certain "representative" plans, intended to reflect plans commonly sold to small employers. We publish this information in our small group health insurance brochure and make it available to small employers both online and in hard copy.

Part F requires the Superintendent to conduct market conduct examinations of health insurers every three years. Health insurers' market conduct is certainly a significant issue, and an ongoing concern to the Bureau. However, it must be kept

⁴ Part D includes a separate loss information statute for group HMO contracts, incorporating the proposed amendment. This is unnecessary because the existing law is already applicable to HMOs pursuant to

in mind that earmarking Bureau resources for one specific line of insurance, on an ongoing basis, could have the effect of impeding the ability to address other issues. If special requirements for health insurers are retained, the provision should be incorporated into the Insurance Code rather than being enacted as an unallocated session law; the law should clarify that the requirement can be satisfied by examinations targeting specific problem areas that have been identified as priorities; and the examination period should be extended from three years to five, consistent with the financial examination requirements.

Finally, Part G of the bill would provide a transition process for prescription drug coverage when coverage is replaced,⁵ requiring the new carrier to honor prescription authorizations made by the prior carrier until the new carrier conducts a review with the enrollee's prescribing provider. In general, I support these types of continuity of care provisions. However, if the committee goes forward with this provision I recommend additional clarification of the new carrier's responsibilities. First, I suggest adding a requirement that policies include a notice of the right to request a review with the enrollee's provider. Second, I suggest clarifying that the replacing carrier must honor the prior carrier's authorization if the enrollee provides evidence of the prior authorization and requests a review with his or her provider. This would supplement the requirements of 24-A § 4311, which already requires carriers to provide exceptions to a formulary limitation when a nonformulary alternative is medically necessary. In addition, it would be helpful to clarify that that the new carrier would not be required to provide benefits for conditions or services not otherwise covered under the new policy, and that cost

24-A M.R.S.A. § 4222-B(17).

⁵ The bill references 24-A M.R.S.A. § 2849-B, which addresses situations where an individual changes groups or moves between individual and group coverage. If the intent is to cover situations where a group changes carriers, a reference to 24-A M.R.S.A. § 2849 should be substituted or added.

sharing would be based on the copayments and coinsurance requirements of the new policy.

We would be happy to work with you on all of these.

Thank you. I would be happy to try to answer any questions now or at the work session.