



**Consumers for
AFFORDABLE
Health Care
FOUNDATION**

*Advocating the right to health care
for every man, woman and child.*

39 Green Street
Post Office Box 2490
Augusta, ME 04338-2490

Tel: 207 / 622 – 7083
Fax: 207 / 622 – 7077
E: consumerhealth@mainecahc.org
Web: www.mainecahc.org

HAND-DELIVERED

March 6, 2007

Nancy Desjardins, Clerk
Kennebec County Superior Court
95 State Street
Augusta, Maine 04330

RE: Consumers for Affordable Health Care v. Superintendent of Insurance

Dear Ms. Desjardins:

Enclosed please find for filing in the above-captioned matter the following:

1. Coversheet to Consumers for Affordable Health Care's Motion for Stay
2. Consumers for Affordable Health Care's Motion for Stay
3. Exhibits in support of Consumers for Affordable Health Care's Motion for Stay

Thank you for your attention in this matter.

Sincerely,

/s/ Joseph Ditré
Joseph P. Ditré, Bar No. 3719

Enclosures

Cc: Thomas Sturtevant, Esq.
Jennifer Willis, Esq.
Christopher Roach, Esq.

**STATE OF MAINE
KENNEBEC, SS**

**SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-18**

CONSUMERS FOR AFFORDABLE)
HEALTH CARE)
)
Petitioner)
)
)
v.)
)
SUPERINTENDENT OF INSURANCE)
)
Respondent)
)
)
and)
)
ANTHEM HEALTH PLANS OF MAINE)
)
Party in Interest)

PETITIONER CONSUMERS FOR
AFFORDABLE HEALTH CARE

MOTION FOR STAY AND REQUEST
FOR EXPEDITED HEARING SCHEDULE
AND INCORPORATED MEMORANDUM
OF LAW

NOW COMES the Petitioner, Consumers for Affordable Health Care (hereafter “Consumers”), by and through its undersigned counsel, and pursuant to 5 M.R.S.A. §11004, and M.R.Civ.P. 80C(b), requests stay and expedited hearing schedule and pleads as follows:

1. Petitioners Consumers adopt and incorporate by reference their complaint filed on February 5, 2007 with the court.
2. On February 2, 2007, Consumers filed a request to reopen, reconsider, and stay (See Exhibit A attached) the Superintendent of Insurance’s (hereafter “Superintendent”) January 5, 2007 decision and order.
3. On February 5, 2007, Consumers filed a request to amend their request for stay in order to provide affidavits of affected DirigoChoice enrollees and CAHC program personnel. See Exhibit B attached.

4. On February 5, 2007, the Superintendent issued a decision denying CAHC's request for reopening and reconsideration and also denying CAHC's request for a stay. See Exhibit C attached (*Order on Consumers for Affordable Health Care's Request for Reopening, Reconsideration, and Stay*, Docket No. INS-06-1030)

A. CONSUMERS' MEMBERS, WHO ARE DIRIGOCHOICE INDIVIDUAL AND SELF-EMPLOYED ENROLLEES, HAVE BEEN AND WILL BE IRREPARABLY HARMED AS THEY SEEK RENEWAL.

5. Consumers' members include individual and sole proprietor enrollees of DirigoChoice. Each month over the course of calendar year 2007 these members/enrollees will seek renewal of their coverage.
6. DirigoChoice enrollees with household incomes below 300 percent of the federal poverty level qualify for and receive subsidies that enable them to participate in DirigoChoice.
7. Almost sixty two percent (61.8%) of all individual and self-employed enrollees in the DirigoChoice product are in category B. (Record ANDC 000275) Roughly an additional fourteen percent (13.8%) of individual and self-employed enrollees are in the next lowest income category, category C. (Record ANDC 000275)
8. As of September 2006, the time of the rate filing, there were 7,826 individual and self-employed members. (Record ANDC 000273) Based on the distribution of DirigoChoice enrollees by income category in paragraph 7 above, there were an estimated 2,990 individuals and self-employed enrollees in category B and about 1,080 were in category C.
9. Enrollees in category B must meet eligibility criteria of the program. To be eligible for category B, and the highest level of subsidy, an applicant's household income must be between 100% – 150% of the federal poverty level. For a single person household that

- is an amount between \$9,804 and \$14,706 and for a family of three that is an amount between \$16,608 and \$24,912 per year.
10. Enrollees in category C must meet eligibility criteria of the program, which requires a household income above 150% and below 200% of the federal poverty level. For a single person household that is an amount above \$14,706 and below \$19,608 and for a family of three that is an amount above \$24,912 and below \$33,216 per year.
 11. Affiants Patricia Berger (see Exhibit D, Affidavit of Patricia Berger) and Michael McDonald (see Exhibit E, Affidavit of Michael McDonald) have household incomes that fall in the lowest income category, category B, and therefore qualify for and receive the highest level of subsidy offered by the DirigoChoice product.
 12. Affiants Berger and McDonald have stated that they will have to drop their health coverage if the approved rates are allowed to go into effect. Lack of health coverage substantially increases the likelihood of medical bankruptcy and financial ruin if affiants incurred medical care, in particular, hospital care without a means of payment.
 13. As affiant Berger stated, DirigoChoice is the first time she has had coverage since she began her business eight years ago. Without it, she will be medically uninsured and unable to pay for medical services. In short, her loss is more than simply financial since she is losing unique medical coverage that provides subsidies without which she would be unable to obtain replacement coverage.
 14. Termination of benefits that causes individuals to forgo necessary medical care is clearly irreparable injury. *Massachusetts Association of Older Americans v. Sharp*, 700 F.2d 749 (1st Cir. 1983) citing *Becker v. Toia*, 439 F.Supp. 324 (S.D.N.Y. 1977); *Bass v. Richardson*, 338 F.Supp. 478 (S.D.N.Y. 1971) While DirigoChoice is not an entitlement program as is Medicaid in the above cited case, affiants have indicated that

it is the increased rates that have put them into a position of having to drop their coverage.

15. The vast majority (almost 76%) of enrollees are in the lowest income categories B and C. At the time of the filing of the rates in September 2006, 2,990 individual and self-employed enrollees, like affiants Berger and McDonald, were in category B. Due to their very low incomes, they are likely to be in the position represented by affiants Berger and McDonald of having to drop their health coverage due to their inability to afford such large increases in premium and out-of-pocket costs.

B. THERE WILL BE NO SUBSTANTIAL HARM TO THE SUPERINTENDENT OR ANTHEM AS A PARTY IN INTEREST.

16. The rates approved by the Superintendent became effective on Thursday, March 1, 2007. Neither the Superintendent nor Anthem will be substantially harmed by the issuance of a stay. In his *Order on Consumers for Affordable Health Care's Request for Reopening, Reconsideration, and Stay*, Docket No. INS-06-1030, February 5, 2007, the Superintendent identified no harm to himself or his agency.
17. On November 21, 2006, the Superintendent issued an order (see Exhibit F, *Order Regarding Renewal and New Coverage And Requiring An Amended Filing*, Docket No. *INS-06-1030*) that delayed the initially requested implementation date for the proposed rates from January 1, 2007 to "until the 2007 DirigoChoice Individual Rates become effective," which he later set as March 1, 2007. His order stated in relevant part:

By reason of the foregoing, the Superintendent ORDERS as follows:

1. Any new or renewal individual and sole proprietor DirigoChoice coverage provided by Anthem beginning January 1, 2007 and until 2007 DirigoChoice Individual Rates become effective and are implemented must be pursuant to the applicable (most recently filed) fourth quarter 2006 DirigoChoice Rates.

2. Anthem shall amend its filing and otherwise clarify for the record that the approval being sought in this proceeding is of revised rates for individual and sole proprietor coverage under the single DirigoChoice group policy.
18. The Superintendent's order and Anthem's response to it (see Exhibit G, Applicant's Response To Orders Issued By The Superintendent, December 1, 2006) illustrate that Anthem was not harmed by delaying the proposed January 1, 2007 implementation date, nor did it assert such harm. Nor would Anthem be harmed by staying the implementation of the approved rates herein until the matter at hand is resolved. As previously permitted by the Superintendent, Anthem could collect the approved rates in a shorter time period by taking the enrollee's annual premium amount and dividing it by a number of months fewer than 12 that represents the remaining months in the coverage year. Of course, since renewals and new purchases occur on a monthly basis over the course of the coverage year, a stay issued until the matter herein is resolved would have an effect limited to those renewing or newly covered enrollees until the matter is resolved. Any potential harm to Anthem is greatly outweighed by the serious and immediate harm to the DirigoChoice enrollees who have dropped or will be forced to drop their health coverage due to their inability to afford it.
19. Any harm to Anthem would be economic in nature, and as such, is quantifiable and can be remedied. See, e.g., *Clemente v. Pearle Vision, Inc.*, 762 F. Supp. 1518 (D. Me. 1991) (allegations of economic harm insufficient to establish irreparable harm for purposes of temporary restraining order; preliminary injunction available only when there is no adequate remedy at law); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 70 (D. Me. 1988) (economic harm alone itself not sufficient to constitute irreparable harm). Moreover, the harm that Anthem may encounter is that

of taking the necessary steps to comply now rather than later with the state law requirements for rate setting for DirigoChoice as an “other group.”

20. No harm will occur to the general public. The minimal costs to the taxpayer of having the office of the attorney general represent the Superintendent in this litigation is far outweighed by the benefit of affordable health coverage to uninsured members of the public and reduced cost shifting onto insured members of the general public through the maintenance of coverage by currently covered DirigoChoice enrollees.
21. In fact, since about ten (10) percent of the general public in Maine are medically uninsured, and since according to the 2002 USM Muskie Household Survey of Health Insurance Coverage in Maine found that the vast majority of uninsured Mainers have household incomes at or below 250% of the federal poverty level, the public may be benefited by a stay in two ways. More individual and sole proprietors covered by DirigoChoice will be able to retain their coverage and, thereby, reduce cost shifting that occurs when uninsured persons receive medical care and cannot pay. Such cost shifting occurs through the costs of bad debt and free care being passed onto other payers in Maine’s health care system. Second, more uninsured individual and self-employed Mainers, who are yet unaware of and unenrolled in DirigoChoice, may be able to buy the coverage at lower, statutorily permitted rates.

C. CONSUMERS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

22. Consumers assert a clear error of law in its Petition for Review of Final Agency Action. As stated therein, and incorporated by reference herein, the Superintendent had no discretion to permit Anthem to file separate rates for individual and sole proprietor certificate holders that excluded small group certificate holders.
23. The Dirigo Health Agency has published reports that show the medical loss ratio for

the combined group (individual, sole proprietor, and small group certificate holders) at or about 78%, meaning that for each dollar in premium payment, the agency expended only \$0.78 on medical claims. When separated, the medical loss ratio for the individual and sole proprietor certificate holders jumps to about \$1.02 (i.e., for each dollar in premium payment, the agency expends \$1.02 on medical claims). Whereas, the medical loss ratio for small group certificate holders is about \$0.64 (i.e., for each dollar in premium payment, the agency expends only \$0.64 on medical claims). Separating the individual and sole proprietor certificate holders from the overall group, in part, had the dramatic effect on the rates requested to support the costs of their medical claims.

24. Sections 2701 and 2808 of Title 24-A, which govern rates for “other groups” such as DirigoChoice, are mandatory and not discretionary.
25. Sections 2701 and 2808 of Title 24-A are plain and unambiguous.
26. Anthem’s actuary admitted in his Prefiled Testimony that Anthem’s rating methodology changed and that it did not rate the individuals and sole proprietors in a single group. William Whitmore stated in his December 1, 2006 Prefiled Testimony:

“As originally conceived and designed, all members of DirigoChoice were rated within a single group. A firm size factor was applied to all small groups, self-employed, and individuals. For the self-employed and individuals the firm size factor was combined with age and area factors and capped at a maximum of 1.20. This resulted in the impact of the firm size factor varying from no impact to the total value, depending on the individual’s age and area factor. Because the rates proposed in this filing include only individuals and self-employed employers, the methodology in this filing excludes a firm size factor. Therefore the impact of

excluding this factor results in a wider range of rate increases than if the size factor were applied.”

27. The Superintendent committed error of law by failing to require that Anthem meet statutory filing, notice, and rating requirements. The statute required that as a designated “other group,” DirigoChoice rates be filed and rated on a combined basis that would treat all individual, sole proprietors, and small group certificate holders as members of one group as was done in the first two years of the contract.
28. The Superintendent’s error of law resulted in an approved average rate increase to individuals and self-employed certificate holders of 13.4% that was *more than double* the average approved rate increase for small group certificate holders of 5.5%.
29. In part, as a result of the Superintendent’s error of law, exorbitant net profits achieved by Anthem from the small group DirigoChoice product certificate holders were not considered or taken into account in setting the rates for the individual and sole proprietor certificate holders, and hence, resulted in a much larger rate increase to the individuals and sole proprietor certificate holders.

For all of the above reasons, Consumers requests that its motion to stay and request for expedited schedule be GRANTED.

DATED: March 6, 2007

/s/ Joseph Ditré
Joseph P. Ditré, Bar No. 3719
Counsel to Petitioners
Consumers for Affordable Health Care
P.O. Box 2490, 39 Green Street
Augusta, Maine 04338-2490
Ph: 207-622-7045, Fx: 207-622-7077
jditre@mainecahc.org

IMPORTANT NOTICE

PURSUANT TO RULE 7(c) OF THE MAINE RULES OF CIVIL PROCEDURE, YOU MUST FILE ANY OPPOSITION TO THIS MOTION WITHIN **21 DAYS** AFTER THE DATE OF THE FILING OF THIS MOTION UNLESS ANOTHER TIME IS SET BY THE COURT. FAILURE TO FILE A TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THIS MOTION, WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-18

CONSUMERS FOR AFFORDABLE)
HEALTH CARE)
)
Petitioner)
)
v.)
)
SUPERINTENDENT OF INSURANCE)
)
Respondent)
)
)
and)
)
ANTHEM HEALTH PLANS OF MAINE)
)
Party in Interest)

ORDER GRANTING PETITIONER'S

MOTION FOR STAY AND REQUEST
FOR EXPEDITED HEARING SCHEDULE

ORDER

The Petitioner's Motion for Stay is hereby GRANTED/DENIED. The Petitioner's Request for An Expedited Hearing Scheduled is hereby GRANTED/DENIED. Hearing on the Motion is set for _____, 2007.

DATED: _____

Justice, Superior Court

Certificate of Service

I, Joseph P. Ditré, Esq., certify that the foregoing **Motion for Stay and all attachments in docket number AP-07-18** were served this day upon the following parties via Overnight-Delivery—U.S. Mail and electronic mail.

Thomas Sturtevant, Esquire
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Jennifer Willis, Esquire
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Christopher T. Roach, Esquire
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101

Dated: Tuesday, March 06, 2007

/s/ Joseph Ditré
Joseph P. Ditré, Esq.
Bar Number 3719

Counsel to
Consumers for Affordable Health Care
P.O. Box 2490, 39 Green Street
Augusta, Maine 04338-2490
Ph: 207-622-7045
Fx: 207-622-7077
Email: jditre@mainecahc.org