

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

IN RE: REVIEW OF AGGREGATE )  
MEASURABLE COST SAVINGS )  
DETERMINED BY DIRIGO )  
HEALTH FOR THE FIRST ) ORDER ON REQUEST FOR STAY  
ASSESSMENT YEAR )  
)  
)  
Docket No. INS-05-700 )

By correspondence dated November 28, 2005, the Maine Association of Health Plans ("MEAHP"):

- (a) advised the Superintendent of Insurance that MEAHP had decided to appeal the Superintendent's October 29, 2005 Decision and Order (the "Decision") in the above-captioned proceeding<sup>1</sup>; and
- (b) requested pursuant to 5 M.R.S.A. § 11004 that the Superintendent grant a stay of the Decision pending the final outcome of the appeal.

The provisions of section 11004 establish that an agency "may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public." 5 M.R.S.A. § 11004 (emphasis added). This three-part test is written in the conjunctive, and MEAHP must satisfy each criterion to obtain a stay. The Superintendent does not find that MEAHP has made sufficient showings for satisfying the statutory standard pursuant to which the stay of an agency decision may (in the agency's discretion) be granted.

Before addressing the statutory criteria for the granting of a stay under section 11004, the Superintendent clarifies for the parties the exact scope of his Decision. On September 19, 2005, the Board of Directors of the Dirigo Health Agency (the "Board" or "Dirigo") filed with the Superintendent its determination of cost savings (the "Dirigo Filing").<sup>2</sup> The Legislature directed

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<sup>1</sup> On November 28, 2005, MEAHP filed a petition for review of final agency action, independent claims for relief from governmental action, and declaratory and injunctive relief in Superior Court (Cumberland County), Docket No. AP-05-90. Also on November 28, 2005, the Maine Automobile Dealers Association Insurance Trust, *et al.*, filed a petition for review of final agency action in Superior Court (Kennebec County), Docket No. AP-05-74, and the Maine State Chamber of Commerce filed a petition for review of final agency action in Superior Court (Kennebec County), Docket No. AP-05-75.

<sup>2</sup> The provisions of P.L. 2005, ch. 400, § B-2(2)(A) require the Board to file with the Superintendent: its determination as to the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care cost to health care providers as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004 as well as the supporting information for that determination.

that “the superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.” P.L. 2005, ch. 400, § B-2(2)(B). The Superintendent’s authority was to “issue an order approving, in whole or in part, or disapproving” the Dirigo Filing. *Id.* Given this statutory framework, the Superintendent’s Decision approved in part the Dirigo Filing on the finding that \$43.7 million of aggregate measurable cost savings determined by the Board was reasonably supported by the evidence in the record.

Turning to the three-part test under section 11004, MEAHP must show among other criteria that it has “a strong likelihood of success on the merits.” 5 M.R.S.A. § 11004. The Superintendent found that Dirigo’s determination of \$43.7 million of aggregate measurable cost savings was reasonably supported by the evidence in the record. By its appeal, MEAHP seeks among other relief a complete reversal of the Decision pursuant to 5 M.R.S.A. § 11007(4)(C). As explained, the Superintendent is required by law to approve the Dirigo Filing, in whole or in part, if it is reasonably supported by the evidence in the record. P.L. 2005, ch. 400, § B-2(2)(B). The Superintendent found that part of the Board’s determination of aggregate measurable cost savings was reasonably supported by the evidence in the record, thereby requiring approval under Maine law. MEAHP has not met its burden of showing a strong likelihood of success that the Superintendent’s Decision in this regard will be reversed on appeal.

As to MEAHP’s arguments of unconstitutionality of the Dirigo law, enactments of the Legislature are presumed to be constitutional. *Fredette v. Secretary of State*, 1997 ME 105, ¶ 6, 693 A.2d 1146, 1148; *Union Mut. Life Ins. Co. v. Emerson*, 345 A.2d 504, 507 (Me. 1975); *State v. Rush*, 324 A.2d 748, 753 (Me. 1974); *Baxter v. Waterville Sewerage Dist.*, 79 A.2d 585, 587 (Me. 1951) (and this is “a presumption of great strength”). Statutes challenged on constitutionality grounds will be invalidated “only if there is a clear showing by ‘strong and convincing reasons’ that it conflicts with the Constitution.” *Fredette, id.*, citing *State v. McGillicuddy*, 646 A.2d 354, 355 (Me. 1994) (quoting *Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993)). MEAHP bears the burden of overcoming the presumption of constitutionality of the Dirigo law. *Id.* The Superintendent finds that MEAHP has not met its burden of showing a strong likelihood of success on its constitutionality challenges to the Dirigo law for purposes of section 11004.

With respect to “irreparable injury” under section 11004, MEAHP argues in essence that the association’s member companies will suffer various forms of economic harm if the Decision is not stayed pending appeal. On this point, the courts have long recognized that economic harm does not constitute irreparable injury. Thus, by definition, money damages are quantifiable and, therefore, an adequate remedy at law exists for their reparation. *See, e.g., Clemente v. Pearle Vision, Inc.*, 762 F. Supp. 1518, 1519 (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 injury); *Maine C. R. Co. v. Brotherhood of Maintenance of Way Employees*, 646 F. Supp. 367, 371 (D. Me. 1986) (economic injury standing alone generally will not constitute irreparable injury). Notwithstanding the foregoing, the Superintendent acknowledges that it is possible in a given circumstance for one’s monetary situation to justify a

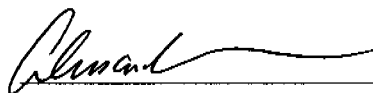
finding of irreparable injury where, for example, the economic injury is financially ruinous and tantamount to the total destruction of an ongoing business (not just a partial loss, hardship, or disruption). *See, e.g., Augusta News Co. v. News America Pub., Inc.*, 750 F. Supp. 28, 32 (D. Me. 1990) (plaintiff has burden of establishing that it will suffer the destruction of its business in order to justify the issuance of a preliminary injunction based on irreparable injury). MEAHP, however, has not made a showing that the denial of the stay will result in the complete destruction of its member's businesses. The Superintendent finds that MEAHP has not met its burden of showing irreparable injury for purposes of satisfying section 11004.

As to the required showing of "no substantial harm to adverse parties or the general public" under section 11004, the Superintendent is not persuaded by MEAHP's arguments. The facts regarding this part of the statutory standard are reasonably subject to dispute and, therefore, "shall be supported by affidavits." 5 M.R.S.A. § 11004. MEAHP does not support its factual allegations with affidavits but, instead, makes conclusory arguments and attaches an "Exhibit A" which has not been admitted into the record of this proceeding. Furthermore, MEAHP explains that granting a stay will preserve the *status quo* pending final resolution of the appeal. The argument for preservation of the *status quo* speaks against a stay rather than in its favor. The *status quo* is that Dirigo Health exists and has a funding mechanism in place which will start operation in a month. There is a good faith dispute over the amount of the funding, but it's inappropriate to call zero the *status quo*. Besides, the presumption in favor of maintaining the *status quo* is only a strong one before some sort of decision has been made. Once a decision has been made, the presumption is that the decision is valid. The Superintendent finds that MEAHP has not met its burden of showing that there will be no substantial harm to adverse parties or the general public if the Decision is stayed for purposes of satisfying section 11004.

By reason of the foregoing, the Superintendent DENIES the request for stay of the Decision and Order, dated October 29, 2005, made by the Maine Association of Health Plans.

PER ORDER OF THE SUPERINTENDENT

Dated: November 30, 2005



ALESSANDRO A. IUPPA  
Superintendent of Insurance