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

In re* CINERGY HEALTH, INC.,** **Maine License No. AGN144795** ***and **GUARANTEE TRUST LIFE INSURANCE COMPANY** **Maine License No. LHF191** **NAIC Code 64211** **DOCKET NOS. INS-10-221 & -10-224 (consolidated)**	**] DECISION AND ORDER**

The Staff of the Bureau of Insurance has requested that the Superintendent impose disciplinary sanctions on Cinergy Health, Inc. and Guarantee Trust Life Insurance Company (GTL) for deceptive practices and unlicensed activity in connection with the sale and administration of the Cinergy Health Preferred Insurance Plan. For the reasons set forth below, I have determined that Cinergy, acting on behalf of GTL, engaged in a pattern and practice of deception, and that both Respondents repeatedly violated Maine's licensing laws. Therefore, Cinergy's insurance producer license is revoked, Cinergy is ordered to pay a civil penalty of $650,000, and GTL is ordered to pay a civil penalty of $150,000. In addition, Cinergy is ordered to provide a full accounting of all funds collected from Maine consumers, so that all unlawful charges can be refunded with interest.

Procedural History

On July 14, 2010, the Staff filed Petitions for Enforcement against Cinergy, GTL, and Steven B. Trattner, the individual producer designated by Cinergy as responsible for its Maine operations pursuant to 24-A M.R.S.A. § 1413(3). The three petitions were consolidated by order of the Superintendent issued September 13, 2010, and were amended on December 15, 2010, by consent of all parties, to update and correct errors in the data tables.[1] A public adjudicatory hearing was held on December 17, 2010, and resumed on December 30, 2010, with the Staff participating pursuant to 5 M.R.S.A. § 9054(5). Mr. Trattner entered into a Consent Agreement which was approved by the Superintendent on December 30, 2010, and this proceeding has accordingly been dismissed as to Mr. Trattner. Additional documentation was submitted and entered

into the record on January 7 and 12, 2011, in response to information requests by the hearing panel. The record closed on January 21, 2011, with the submission of the parties' written closing arguments. An order extending the time for the issuance of a decision was entered on February 23, 2011.

[1] All references to the Petitions in this Decision and Order are to the Amended Petitions for Enforcement filed by the Staff on December 6, 2010.

Findings and Conclusions Relating to Cinergy

Background - The Cinergy Health Insurance Plan

Since 2007, Respondent Cinergy has marketed the "Cinergy Health Preferred Insurance Plan" on a nationwide basis. *(Staff Exh. 28, 33)*[2] Internal Cinergy documents also refer to the Plan as the "Mini-Med Insurance" plan. *(Staff Exh. 28b)* The Plan's Member Handbook describes it as "a Limited Medical Benefit Plan designed as an affordable alternative to higher-priced major medical plans." *(Staff Exh. 25c)* The Plan is offered under an agreement between Cinergy and the National Congress of Employers (NCE)*(Staff Exh. 33f),* incorporated in New York as a not-for-profit association. *(Staff Exh. 38)* On the first page of the Handbook, Cinergy explains that "This Plan is available to all members of the National Congress of Employers (NCE), of which you are a member .... This plan is offered through a membership and at the sole discretion of the National Congress of Employers and may vary by availability, vendor or member's state of residence." On the last page, the Handbook explains: "Your participation in the **Cinergy Health Preferred Plan** automatically enrolls you as a member of the National Congress of Employers (Association). In this regard, you appoint the Secretary of the Association at any particular time to receive notice of and attend all meetings and to vote on your behalf ...." *(Staff Exh. 25c)*

[2] Citations to the record, abbreviated as follows, are to the December 17 and December 30 hearing transcripts *(I and II Tr.);* to the exhibits offered by the Staff, GTL, and Cinergy and admitted at the hearing *(Staff, GTL, and Cinergy Exh.);* and to the briefs submitted as closing argument by the Staff, GTL, and Cinergy *(Staff, GTL, and Cinergy Br.).*

The insurance cards pictured in the Handbook feature Cinergy's name and logo, mention NCE in the fine print, and do not mention an insurance company anywhere on the card. *(Staff Exh. 25c)* On the fifth page of the Handbook, Cinergy explains that **"Cinergy Health** is not an insurance carrier. However, we work with insurance carriers to develop and implement innovative health programs for clients across the United States." *(Id.)* The limited medical benefit insurance featured in the plan is

provided, in most states, under a group policy issued to NCE by the American Medical and Life Insurance Company (AMLI), which is not a party to this proceeding. *(Staff Exh. 33e)* However, as discussed more fully below, Maine participants in the Cinergy Plan were covered by a different NCE group policy, which was issued by Respondent GTL. *(Staff Exh. 25a, 34a)*The plan ceased enrolling new business in Maine in December of 2008,[3] and all in-force GTL coverage was terminated effective November of 2009. *(Staff Exh. 21, 29, 32a, 35; I Tr. 168)*

[3] However, Staff Exhibit 28b lists one customer as buying coverage on January 20, 2009, effective February 1, 2009.

Cinergy marketed the Plan through television and radio commercials and occasional print advertising. *(Staff Exh. 33)* Typically, an interested consumer would call the toll-free number in the advertisement and talk with a Cinergy representative in Florida, where Cinergy is based. *(Staff Exh. 25, 25a, 25b; II Tr. 21-22, 87)* Applications for coverage were taken over the phone, with nothing in writing submitted by the consumer.[4] *(Staff Exh. 25)* If the consumer agreed to participate in the plan, a representative would call back to confirm, obtain authorization for monthly direct billing, and explain the monthly charge, plus an additional nonrefundable $50 application fee. *(Staff Exh. 25b)* Cinergy would then send the customer the Handbook, the certificate of coverage, and the insurance card.

[4] Although Cinergy represented to the Bureau that "All sales take place over the telephone" *(Staff Exh. 25),* information provided by Cinergy *(Staff Exh. 28b)* lists the producer for some accounts as "Website," indicating that there is also some direct online enrollment.

The price of the plan depended on the level of coverage chosen and whether the customer bought individual or family coverage. *(Staff Exh. 35)* For example, for a single individual, the price for the Preferred 1000 Plan was $241 per month at the time Cinergy responded to the Bureau's inquiries. *(Staff Exh. 25a)* That plan provides a lump-sum benefit of $1000 for each hospital admission, and covers up to 30 days of non-intensive-care hospital costs and 15 days of intensive-care hospital costs, with a maximum benefit of $1000 per day. The plan pays 80% of the Medicare rate (RBRVS) for covered surgery, plus an anesthesia benefit, and up to $100 per visit for up to five office visits and one emergency room visit per year.[5] *(Staff Exh. 25c)* For the lower level of coverage, the Preferred 500 Plan, $1000 and $100 are replaced by $500 and $50 respectively.*(GTL Exh. 9)*

[5] The Summary of Benefits also notes that the inpatient mental healthcare benefit is "100% of the cost for Anesthesia." This is a printing

error, and the actual benefit is up to 30 days at $100 per day. *(Staff Exh. 25d)*

In addition, according to Cinergy, "The Preferred 1000 plan includes not only coverage under the group limited medical benefits policy issued to NCE, but also a free dental discount medical plan, a free prescription drug discount medical plan, and access to many NCE benefits (medical records software, financial counseling services, a tax advice hotline, ID theft guardian program, auto maintenance discounts, car rental discounts, 24-hour roadside emergency dispatch assistance, floral savings, moving and storage savings, magazine subscription savings, hotel savings, amusement park savings, movie ticket savings and a tradesman referral service." *(Staff Exh. 28)* The Preferred 500 plan did not include the dental and prescription drug discount cards. *(Staff Exh. 25a)*

One customer who had bought the Plan, E.D., filed a complaint against Cinergy with the Bureau of Insurance. She alleged that she was told when she signed up that there would be no problem with immediate coverage for her pre-existing medical condition, but then she had a claim denied because of a pre-existing condition exclusion. She also alleged that Cinergy refused to refund the unused portion of her premium after she cancelled her husband's coverage, and she expressed concern that her coverage duplicated coverage that she had under her husband's policy. *(Staff Exh. 17)* In its response to the Bureau, Cinergy provided a phone transcript in which its sales representative asked E.D. if she currently had major medical coverage, she said yes, and the sales representative told her that she would be covered by "our [Cinergy's] plan" without a pre-existing condition exclusion if her previous insurer certified that she had been covered continuously for a year. Cinergy said the claim was denied because E.D. failed to provide the required proof of prior coverage. Cinergy agreed to provide a *pro rata* refund for the difference between single and family premium, "in the interest of business goodwill," although the contract said the change in coverage would not become effective until the following monthly bill. *(Staff Exh. 20)* Subsequently, Cinergy also resolved the claim dispute. *(II Tr. 64-65)*

Cinergy represents that 103 Maine customers bought the Cinergy Plan, paying a total of $221,296.26. *(Cinergy Exh. 3)* This dollar figure appears low, because Staff Exhibit 41 lists only 83 Maine customers and shows a total payment of $220,915.82, a difference of less than $400. Mr. Charley-Gad testified that an additional 39 Maine customers bought coverage under the same NCE group policy through a different Florida agency, First Choice, which according to the records of the Bureau of Insurance is not licensed in Maine.[6] *(I Tr. 69; Staff Exh. 32a)*

[6] The documentation provided by the Respondents is incomplete and inconsistent. Staff Exhibit 32a shows a total of 122 names, 83 of which

are designated as being placed by Cinergy. However, of the 27 "First Choice" accounts that list an individual producer, 23 of them name individuals who also worked for Cinergy, and two of the remaining four name "Cinergy Website" as the individual producer. *(Staff Exh. 32a; I Tr. 79-80)* In addition, Staff Exhibit 28b, which lists 92 names, includes several that are not among the 122 that appear on Staff Exhibit 32a. Cinergy's Supplemental Response shows 96 Maine customers who were sent "certificates of credible *[sic]* coverage" after their Cinergy Plan coverage terminated.

The data reported by GTL and Cinergy in their November 2009 letters to the Bureau indicated that at that time, 8 Cinergy customers had received benefits that exceeded their payments to Cinergy, as follows *(Staff Exh. 32a, 33g; GTL Exh. 35):*[7]

payment to Cinergy	benefits reported	ratio
$6,759.78	$26,575.86	393%
$1,702.00	$8,922.98	524%
$1,014.00	$8,792.62	867%
$4,428.63	$6,700.00	151%
$4.818.78	$6,411.91	133%
$1,136.00	$3,093.58	272%
$2,602.00 (Net)	$2,839.68	109%
$1,702.00	$2,217.33	130%

[7] The figure shown as "Net" is for E.D., whose reported GTL "Premium" of 2,719.90 exceeds the total Cinergy payment reported, and thus does not appear to reflect the refund she received. In addition, GTL reported that one of the 39 "First Choice" customers received benefits of $3,192.24. *(GTL Exh. 35)* She was not listed by Cinergy on Staff Exhibit 33g. GTL reported $974.00 in premium for her, which is $23 more than the amount reported for another customer with a total Cinergy plan fee of $1,702.00. *(GTL Exh. 35)*

By way of comparison, Staff Exhibit 41 shows no benefit payments at all for 26 of the 83 customers listed, despite the Plan's first-dollar coverage for preventive services. Their total payments to Cinergy ranged from $433.00 to $8,208.63. *(Staff Exh. 41)*

Customers who bought these plans paid the monthly charge to Cinergy as a lump sum. There was no itemization separating the charge for insurance from the charges for the NCE membership, the charges for the various discount programs, or additional fees collected by Cinergy. *(I Tr. 164-65)* In a letter to the Bureau of Insurance, Cinergy explained that "The membership fees are inclusive of premium. On a bi-monthly basis, Cinergy remits to NCE an amount comprised of GTL's premium, NCE membership dues and certain costs relating to the Multiplan preferred provider network." *(Staff Exh. 33)* In a subsequent letter, Cinergy explained further that "Neither Cinergy nor Cinergy's producers have received commissions or other compensation directly from GTL. Cinergy's compensation from NCE, called a recruiting fee, varies depending on the retail price of each plan. The plan pricing ranged from $181 to $640 per month and recruiting fees ranged from $85.70 to $162.12 with an average of approximately $109." *(Staff Exh. 35)*This recruiting fee appears to be the same fee that the Recruiting and Billing Agreement between Cinergy and NCE refers to as a "billing fee," to be collected by Cinergy from each NCE member. That agreement refers to the entire amount collected by Cinergy and remitted to NCE as "premium," and states that the NCE benefits include "Policies issued by NCE on behalf of its carriers such as AMLI." *(Staff Exh. 33e)*

To obtain benefits, customers were instructed that "Ordinarily your healthcare provider will file claims directly with the insurance carrier as indicated on the back of your membership ID card. Payment of claims will be made to your healthcare provider. This way you do not have to wait for reimbursement." *(Staff Exh. 25c)* As noted earlier, no insurance carrier was actually indicated on either side of the sample membership card Cinergy provided, which names only Cinergy Health. *(Id)* "If you prefer, you may file the claim yourself," and the Member Handbook provides instructions for downloading claim forms from Cinergy's Web site,[8] but the customer was warned that the cost may be higher if the claim is filed directly. *(Id.)*

[8] The Handbook says that "One claim form is included with this Membership Handbook" *(Staff Exh. 25c),* but Cinergy did not include it in the membership materials it provided to the Bureau.

Misrepresentations of Terms of Coverage

The most serious issues in this case are raised by Count IV of the Cinergy Petition, which alleges that Cinergy intentionally misrepresented the terms of the insurance contracts it was selling, in violation of 24-A M.R.S.A. § 1420-K(l)(E).

Cinergy's Member Handbook states: "A Limited Medical Benefit Plan is designed to pay the smaller, more common claims that the majority of people incur such as, physician office visits, labs and x-rays, minor accidents and short hospital admissions .... Members can choose to see any healthcare provider of their choice. **These plans are not designed to cover catastrophic claims and are not intended to be an equal replacement for Major Medical Insurance."** *(Staff Exh. 25c, emphasis in original)* These statements are not inaccurate. It is not illegal to offer limited benefit health plans in Maine and to market them on that basis.

However, the disclaimer quoted above is not part of Cinergy's advertising materials, and consumers do not see the disclaimer prior to purchase. When disclaimers appeared in Cinergy's advertisements, they appeared in ways that were difficult for consumers to see or understand. A print advertisement, for example, promises, in 11-point type, that "Cinergy Health provides the coverage you want, without a large deductible!" A footnote explains, in a 5-point type: **"Limited Medical Benefit Plan, underwritten by American Medical and Life Insurance Company (Form # GRP LM 2007) and Guarantee Trust Life Insurance Company (Form # GTL GRP LM 2007) offered through a paid association membership: may vary by member's state of residence. It is NOT major medical insurance and is not meant to replace catastrophic health insurance. Rates are illustrative: send no money: coverage requires application; exclusions and limitations may apply."** *(Staff Exh. 33c, approximate typefaces in original)* In a 60-second television commercial, the narration stops at 0:52 and the screen starts to fade into the Cinergy logo as the closing music begins. The logo, on a dark background, fills the screen from 0:54 through 0:58 as the music continues. The final chord stops shortly before 0:59, while the logo stays on the screen for at least half of the final second. Then a 10-line small-type disclaimer flashes on a black background, while the audio remains silent. *(Staff Exh. 33b)*

As Cinergy notes "Rather than focusing on certain words, [one must look] at the ad in context." *(Cinergy Br. 7)* While Cinergy claimed to provide disclosure, its message communicated the opposite. A Cinergy commercial filled the screen, in large letters, with the question "Health insurance?" followed by a sequence of screens that state: "Cinergy Has the Coverage You're Looking For!" "All Medical Conditions Accepted." "Real Health Insurance." Almost all the commercials feature the slogan

"Real Health Insurance." In most, the words "real health insurance" fill the screen for several seconds on a plain background with the Cinergy logo. Variations include "Real Health Insurance For A Little More Than $5/Day"[9] over a background of a patient getting a check-up. *(Staff Exh. 33a, 33b, approximate character size variation in original)* For consumers, "real" health insurance means the type of health insurance consumers ordinarily think of when they hear the words "health insurance" - major medical insurance or substantially similar coverage.

[9]Another screen shot consists of the slogan "$5 A Day Buys You Peace of Mind." *(Staff Exh. 33a, 33b)* The lowest rate available was $181 per month for single coverage *(Staff >Exh. 35),* which is between $5.84 and $6.46 a day, depending on the month. Furthermore, those rates are for the Preferred 500 Plan, which does not include the discount programs and therefore is not the plan actually described in the commercials. *(Staff Exh. 33a, 33b)* The phone scripts directed the sales representatives to mention the availability of that plan only if the caller indicated that he or she could not afford the Preferred 1000 Plan. *(Staff Exh. 25a)*

Another commercial is entitled "Mumbo Jumbo." It begins with a variety of insurance terms shifting around the screen, in and out of focus, while the narrator is asking "Are you shopping for health insurance, but all the mumbo-jumbo is driving you crazy? And the insurance options are too confusing? Then Cinergy Health has the solution you've been looking for!" Two prominent bits of "mumbo-jumbo," as the screen comes into focus, are "Major Medical" and "Limited Medical." *(Staff Exh. 33b)* Here, the message Cinergy is giving consumers is that its own disclaimers are merely confusing, technical insurance mumbo-jumbo, with the implication that they should be ignored.

Cinergy urges the Superintendent to evaluate whether statements such as this are deceptive by following the standards used by the Federal Trade Commission in enforcing similar federal legislation. *(Cinergy Br. 7)* I agree that the FTC's "reasonable consumer" guidance is an appropriate interpretive guide. It reads as follows:[10]

[10] Question and Answer # 4 in "Advertising FAQ's: A Guide for Small Business" posted on the FTC Web site at http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business

How does the FTC determine if an ad is deceptive?

A typical inquiry follows these steps:

- The FTC looks at the ad from the point of view of the "reasonable consumer" - the typical person looking at the ad. Rather than focusing on certain words, the FTC

looks at the ad in context - words, phrases, and pictures - to determine what it conveys to consumers.

- The FTC looks at both "express" and "implied" claims. An express claim is literally made in the ad. For example, "ABC Mouthwash prevents colds" is an express claim that the product will prevent colds. An implied claim is one made indirectly or by inference. "ABC Mouthwash kills the germs that cause colds" contains an implied claim that the product will prevent colds. Although the ad doesn't literally say that the product prevents colds, it would be reasonable for a consumer to conclude from the statement "kills the germs that cause colds" that the product will prevent colds. Under the law, advertisers must have proof to back up express and implied claims that consumers take from an ad.
- The FTC looks at what the ad does not say - that is, if the failure to include information leaves consumers with a misimpression about the product. For example, if a company advertised a collection of books, the ad would be deceptive if it did not disclose that consumers actually would receive abridged versions of the books.
- The FTC looks at whether the claim would be "material" - that is, important to a consumer's decision to buy or use the product. Examples of material claims are representations about a product's performance, features, safety, price, or effectiveness.
- The FTC looks at whether the advertiser has sufficient evidence to support the claims in the ad. The law requires that advertisers have proof before the ad runs.

Cinergy asserts that the reasonable consumer's understanding of its advertisements is reflected in the testimony of G.W., the only consumer witness at the hearing. He was asked whether he was "deceived by that ad," and in response he testified "No. Just made - it was an interesting ad that I wanted to check out." *(I Tr. 162*, cited in *Cinergy Br. 7)*

G.W., a Cinergy customer who "was pretty much satisfied at the time" *(I Tr. 173)*, is the only witness Cinergy called. The testimony of a single consumer is not conclusive regarding the point of view of the average reasonable consumer, but it is helpful, and it is consistent with the expectations of how a reasonable consumer would understand Cinergy's advertisements. He was "a little bit skeptical" about the commercial he saw *(I Tr. 157)*, and knew that he was not going to be buying anything "Cadillac style" *(I Tr. 162)*. However, he explained that he understood Cinergy to be competing with Anthem and MEGA, the two insurers offering individual basic medical expense or major medical expense coverage in the private market in Maine,[11] and he considers his current MEGA plan to be the same general type of coverage as his former Cinergy plan. *(I Tr. 157, 160-161)*

[11] *See* Bureau of Insurance Rule 755, §§ 6(F) & (G).

A reasonable consumer would understand "real health insurance" and similar claims to mean something substantially more comprehensive than the Plan's limited benefit coverage. Such claims are therefore deceptive when made for this Plan. This misrepresentation of the terms of coverage was intentional.

Cinergy argues further that a phone script that Cinergy provided to the Bureau proves that any misleading impressions that might have been created by its advertisements were corrected before consumers actually bought the coverage. *(Cinergy Br. 8, citing Staff Exh. 25a)* However, some of the issues misrepresented in Cinergy's advertising were not addressed in the phone scripts. Others, as noted below, continued to be misrepresented in the phone scripts. With regard to what it means to be a limited benefit plan, the type of disclosure provided by Cinergy's sales representatives depended on the callers' answers when they were asked about their health history. For the callers who are most likely to incur costly claims, the script emphasizes that **"IF THE CUSTOMER HAS SERIOUS MEDICAL CONDITIONS,"** he or she should be advised that the Cinergy Plan might not be suitable. *(Staff Exh. 25a, emphasis in original)* For healthy callers such as G.W. *(I Tr. 155, 160),* the disclosures were not as clear, and his testimony demonstrates, as discussed more fully below, that he did not understand some of the Plan's most significant limitations.

There is evidence that some meaningful disclosures were made at the point of sale about the limited scope of the Plan's coverage as compared to major medical policies.*(Staff Exh. 20, 25a, 25b; I Tr. 158-59)* These disclosures do not absolve Cinergy from liability for misleading advertising. The FTC's guidance is instructive on this point. Because consumers are not switched to a completely different product, this does not fall squarely within the definition of "bait advertising" as prohibited by 16 CFR Part 238: "an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell." However, the basic principle is the same. It is a classic deceptive practice to entice consumers into the store or onto the phone with glowing descriptions of a product, and then persuade them to buy something that does not match the original description. G.W. testified that "it was an interesting ad that I wanted to check out." *(I Tr. 162)*

Misrepresentations continued after enrollment. In the Handbook, Cinergy misrepresents the terms of coverage. Consumers are encouraged to "Think of limited medical plans as the flip-side of catastrophic coverage: Instead of paying out-of-pocket for big deductibles and your everyday medical expenses while guarding against the infrequent, but much larger medical expenses associated with a serious illness or accident, limited medical plans pick up the tab for most of your common health care services . . .." *(Staff Exh. 25c)* "Pick up the tab" greatly overstates what this benefit does. Because of the Plan's strict limits on benefits, the claim is not accurate. For example, benefits are limited to: $100 per visit for most services, including emergency room visits; $500 or $1000 per day for hospitalization; three diagnostic tests per year; one emergency room or urgent care visit per year. *(Staff Exh. 25c)* The promise in the

Handbook that the Plan will "pick up the tab" intentionally misrepresents the terms of coverage.

Cinergy has also misrepresented specific terms of coverage including the following six areas:

- Coverage for pre-existing conditions;
- The Cinergy Plan's status as creditable coverage;
- The enrollment of Cinergy customers in NCE;
- The nonrefundable application fee;
- The nature of the Cinergy Plan's surgical benefit; and
- The prescription drug discount program.

Pre-Existing Conditions: The record includes two print advertisements by Cinergy, both of which highlight three key features of the Plan in boldface. *(Staff Exh. 33c, 42)* The first two features are:

No Physical Exam Required

Pre-Existing Health Conditions Accepted

This makes what the Federal Trade Commission refers to as an "implied claim." As discussed above, the Commission has emphasized that advertisers are responsible for their implied claims as well as their express claims, and Cinergy has acknowledged that responsibility. *(Cinergy Br. 7 and FTC guidance cited)* The statement that Cinergy accepted applicants with health problems for coverage without requiring a physical examination is literally true, but the prominent manner in which it is presented would cause a reasonable consumer to believe that Cinergy considered it an important distinguishing feature of the Plan. It intended consumers to believe that there were other health insurers that did require physical examinations, and did not accept all applicants with pre-existing health conditions. Cinergy also stated expressly that if a consumer goes too long without insurance, an insurer would have the right to decline coverage. *(Staff Exh. 25c)*

Those claims are false. Health insurers are not allowed to require physical examinations. Individual health insurance carriers must issue coverage to all eligible Maine residents regardless of health status. 24-A M.R.S.A. § 2736-C(3)(A).

Furthermore, reasonable consumers would understand "preexisting health conditions accepted" to mean that their preexisting medical conditions are covered, especially when the only clarification the advertisements provide is to state inconspicuously that unspecified "exclusions and limitations may apply." *(Staff Exh. 33c, 42)* This misrepresentation is reinforced by Cinergy's warning that competing insurers may "impose lengthy waiting periods" for pre-existing conditions. *(Staff Exh. 25c)* Cinergy's implied

claim is that its Plan is different. That claim is false. *(Staff Exh. 25a)* Indeed, one of E.D.'s complaints was that one of her claims was denied as a result of the Plan's pre-existing condition exclusion. *(Staff Exh. 17)*

Similar statements appear in the television commercials. For example, one commercial displays the slogan "All Medical Conditions Accepted" in large type that fills the screen. There is a footnote at the bottom that describes the exclusion, but the type is about 20% the height (4% of the screen footprint) of the type in the slogan. *(Staff Exh. 33a, 33b)* The footnote is unlikely to be read by a reasonable consumer viewing the ad. The slogan in this commercial makes the same false claim as the print advertisements.

Cinergy asserts that the allegations of deceptive practices are "trumped-up" and "detached from the reality that these are relatively minor technical violations." *(Cinergy Br. 2)*Cinergy notes that under both Bureau of Insurance Rule 140 and the FTC guidance, the focus must be on whether the misrepresentations were material. *(Cinergy Br. 6-8)* In this case, Cinergy's own marketing acknowledged that coverage of pre-existing conditions is a material issue, by the manner in which its marketing emphasizes not only its own coverage but also its competitors' use of pre-existing condition exclusions. *(Staff Exh. 25a, 25c)*

It must be recognized that the use of pre-existing condition exclusions is the one area where the misrepresentations in Cinergy's advertising appear to have been corrected at the point of sale. The phone scripts direct the sales representatives to identify any callers at risk of any pre-existing condition exclusions and warn them clearly about the terms of the exclusion. *(Staff Exh. 25a)* The transcripts of the call when E.D. applied for coverage show that those procedures were followed in her case. *(Staff Exh. 20)* The basis of her complaint was not that Cinergy failed to disclose the requirements for coverage of pre-existing conditions, but rather that she had met those requirements. *(Staff Exh. 17)* However, for the reasons discussed earlier, corrective disclosure at the point of sale is only a mitigating factor, and does not absolve Cinergy from liability for misrepresentations made in the course of its advertising campaign.

In addition to concerns over the adequacy of the disclosures, some of the disclosures were misleading. For example, after airing commercials that promised "All Medical Conditions Accepted," Cinergy changed the language to "Most Pre-Existing Conditions Accepted." In some commercials, a footnote states that "Applicants with certain conditions may be ineligible." *(Staff Exh. 33a, 33b)* While the attempt at corrective action is noted, the new language is still incorrect and misleads consumers about their rights to guaranteed issuance of coverage, regardless of health status, under 24-A M.R.S.A. § 2736-C(3)(A).[12]

[12] Because the controlling laws in Maine differ from those in other states in which Cinergy was airing these commercials, this representation and the representation that consumers might be rejected for coverage due to health status are not false with respect to most of Cinergy's nationwide market. However, no corrective disclosures were made, and the misrepresentations continued when phone representatives made person-to-person contact. *(Staff Exh. 25a)*

Creditable Coverage: The Cinergy Handbook states that **"Cinergy Health Preferred** is intended to be used for your day-to-day health insurance needs." *(Staff Exh. 25c, emphasis in original)* Cinergy suggests that the Cinergy Plan gives their customers the ability to "transfer" to a major medical plan if they develop health problems and need services that the Cinergy Plan does not cover. When consumers called in, the sales representatives told them: "This program qualifies as **creditable insurance coverage** - so if you need to transfer to a major medical plan you will receive a certificate of prior coverage, which allows you to select another carrier without any interruption of coverage and without being singled out for any medical exclusions." *(Staff Exh. 25a, emphasis in original)* The Handbook provides a similar description and adds: "Having creditable coverage protects you if and when you ever replace your **Cinergy Health Preferred Plan** with a major medical plan. The absence of creditable coverage permits other insurance companies to impose lengthy waiting periods on your pre-existing medical conditions or worse, decline coverage altogether." *(Staff Exh. 25c, emphasis in original)*

"Creditable coverage" is a defined term under the federal Health Insurance Portability and Accountability Act (HIPAA).[13] Creditable coverage provides protection to individuals changing health plans, but the level of protection depends on the type of coverage the individual has and the reason for changing plans. The Cinergy Plan qualifies as creditable coverage, but Cinergy misrepresented the significance of that status by claiming that it protected customers in two ways if a Cinergy customer subsequently applied for coverage with another insurer: protected against being turned down for coverage, and protected against being subject to a pre-existing condition exclusion. The first risk does not exist, and the Cinergy Plan does not provide meaningful protection against the second risk.

[13] The insurance market provisions enacted by HIPAA, and amended by the Affordable Care Act (ACA), constitute Title XXVII of the federal Public Health Service Act (PHSA). Similar rights under state law are granted by the Maine Continuity of Coverage Act, 24-A M.R.S.A. §§ 2848 through 2850-D.

First, Cinergy claimed that without creditable coverage, other insurance companies could "decline coverage altogether." This is false because declining coverage is prohibited by Maine's guaranteed issue law. 24-A M.R.S.A. § 2736-C(3)(A).

Second, Cinergy claimed that buying the Cinergy Plan would give the customer the right to avoid "lengthy waiting periods on your pre-existing medical conditions" if he or she later needed to "transfer to a major medical plan." That claim is false because no such right exists, whether under state law, federal law, or private contract:

- There is no right under federal law (HIPAA) because Cinergy is not a "group health plan," a term that applies only to employee benefit plans. HIPAA provides protection against pre-existing condition exclusions in many situations when an individual enters or leaves a group health plan, but those federal protections do not apply when changing from one individual plan to another individual plan;[14]
- There is no right under Maine law because Maine law gives individual insurers the right to exclude pre-existing conditions for new customers except to the extent that they were covered by their prior plan. 24-A M.R.S.A. § 2849-B(4). That means that for the first 12 months of coverage, the level of benefits under a new major medical plan would be functionally identical to the Cinergy Plan for all pre-existing conditions, contrary to Cinergy's promise that its customers could obtain major medical benefits without "lengthy waiting periods"; and
- There is no private contractual right because neither Cinergy nor GTL had the authority to impose contractual obligations upon other insurers.

[14] PHSA § 2791(a)(l) (42 U.S.C. § 300-gg91(a)(l), Under HIPAA, an individual with creditable coverage only has the right to buy new coverage in the individual market, and protection against preexisting condition exclusions in a new individual policy, if the individual's "most recent prior creditable coverage was under a group health plan, governmental [employee] plan, or church [employee] plan (or health insurance coverage offered in connection with any such plan)." PHSA § 2741(b)(l)(B) (42 U.S.C. § 300-gg41(b)(l)(B); *see also* 24-A M.R.S.A. §§ 2848(1-C)(B) & 2850(2)(C).

Cinergy's promise that its customers are free to "select" a new carrier and "transfer" at any time to a major medical plan with full coverage misrepresents the benefit provided by the Plan.

That misrepresentation is reinforced by the certifications of creditable coverage that are issued when customers leave the Cinergy Plan. Those certifications misrepresent to the customer and to any new insurer that the Plan is a "group health plan." *(Cinergy Supplemental Post-Hearing Response)* The false impression that the Plan is job-based coverage is reinforced by the master policyholder's use of the name "National Congress of Employers" and its representation that it is a "plan administrator or issuer."[15]

[15] Cinergy is responsible for the misrepresentation because the preparation and issuance of these certificates was an enrollment and compliance function that NCE delegated to Cinergy. *(Staff Exh. 33f)*

"Group health plan" and "creditable coverage" are two fundamental concepts of federal health insurance law, and it is assumed that Cinergy is aware of their meaning. Furthermore, even if Cinergy used these terms without an understanding of their meaning, that would not have been a harmless mistake. If a consumer was misled into buying the Cinergy plan in reliance on a belief that he or she could get coverage for major medical expenses immediately if the need arose, the consequences could be devastating for that consumer. The misuse of these terms was either dishonest or incompetent within the meaning of 24-A M.R.S.A. § 1420-K(l)(H).

The Role of NCE: Cinergy's disclosure to consumers of NCE's role was neither clear nor accurate. Membership in NCE is automatic when the Plan is purchased from Cinergy*(Staff Exh. 25c)*, but G.W. testified that he was never a member of an organization called the National Congress of Employers. *(I Tr. 167)*

E.D., on the other hand, remembered being "told that this was insurance coverage of a 'national congress of employers' that enabled me to get coverage at a reasonable price." *(Staff Exh. 17)* E.D.'s statement was admitted into the record without objection. It is credible and corroborated by Cinergy's marketing materials. *(Staff Exh. 25a, 25c, 33a, 33b, 33c, 42)*

Cinergy's representation that NCE membership enabled customers to get insurance coverage at a reasonable price was deceptive. The evidence is to the contrary. The amounts Cinergy charged to NCE members included substantial fees, which Cinergy did not disclose to its customers, above and beyond the premium that GTL was authorized to charge for the coverage. *(Staff Exh. 33, 35; 36a; I Tr. 164-65)* This misrepresentation was intentional.

The failure to disclose the actual cost of the insurance coverage and the representation that NCE membership was necessary in order to obtain the coverage were further misrepresentations. *(Staff Exh. 25c, 33a, 33b, 33c)* Under Maine law, GTL was required to file its premium rates for approval by the Superintendent and make its coverage available at those same rates to any Maine resident not eligible for Medicare, whether or not that resident was a member of NCE. 24-A M.R.S.A. §§ 2736, 2736-C(2) & (3)(A). Association plans meeting certain qualifications may be exempted from those requirements with the prior approval of the Superintendent pursuant to 24-A M.R.S.A. § 2736-C(9), but that exemption is not automatic or routine, and was not requested by GTL.

The Nonrefundable Application Fee: Cinergy offered a ten-day "free look" period. If the customer cancelled coverage within 10 days after receiving the certificate of coverage, or at any time before the effective date, he or she was entitled to a refund.[16] *(Staff Exh. 25a, 25c)* However, Cinergy told consumers both at the time of application and in the Handbook that there was a $50 nonrefundable application fee. That misrepresents the consumer's free look rights. Pursuant to 24-A M.R.S.A. § 2717, the entire premium must be refundable, and pursuant to 24-A M.R.S.A. §§ 2174 and 2403, it is impermissible to charge application fees separate from the premium. In addition to deterring dissatisfied customers from requesting the full refund to which they are entitled, calling the application fee nonrefundable might have a chilling effect on whether they exercise their free look rights.

[16] This provision was not in the insurance contract as required by 24-A M.R.S.A. § 2717.

Unlimited Surgical Benefit: On the page of the Handbook entitled "THE PREFERRED DIFFERENCE," Cinergy explained that **"Cinergy Health Preferred** is a leader in the industry by including unlimited surgical benefits to ensure greater coverage." *(Staff Exh. 25c, emphasis in original)* This is a significant claim. The other benefits in the Cinergy Plan are all subject to strict limits on both the dollar value of the benefit and the number of days or services that may be covered, and those limits are often low enough to amount to scheduled payments. Surgery is the only area where the plan assumes any sort of open-ended risk, and an unlimited surgical benefit would provide a valuable protection to the consumer.

More specifically, Cinergy's advertisements promised "Coverage For Inpatient & Outpatient Surgery" *(Staff Exh. 33c, 42),* and Cinergy's sales representatives promised callers that "You can use this benefit for an unlimited number of in-patient or out-patient covered surgical procedures involving an anesthesiologist." *(Staff Exh. 25a)* A reasonable consumer would understand this to mean that there is no limit on the number of surgical procedures that are covered.

To the contrary, the contract imposed significant limits on the number of procedures that are covered. It provided that only one covered surgical procedure is covered within any 90-day period for the same accident or illness. It provided further that if multiple procedures are performed in the same operation, even for different conditions, only one of the procedures is covered. *(Staff Exh. 25a)* The summary of benefits in the Handbook states that "This benefit does not include coverage for outpatient facility charges."*(Staff Exh. 25c)*

Additionally, there were also dollar limits on the coverage. Those dollar limits were not adequately disclosed. G.W.'s description of the benefit in his testimony shows a misunderstanding of the benefit. He stated "if I had an operation or something. I don't know if it covers 80 percent, if there was a 20 percent deductible or what the - I can't remember what the deductible was." *(I Tr. 172)* Although Cinergy tells customers that the benefit is "80% of covered surgery" *(Staff Exh. 25c),* that is not what the plan provides. The surgical benefit is actually capped at 80% of the Medicare fee schedule. *(Staff Exh. 25a, 25c)* This means that even if the patient stays within the Plan's network, the Plan will not actually pay 80% of the bill unless the negotiated network rate is less than or equal to the Medicare rate. There is nothing in the insurance contract that guarantees that the network rates will be that low, and no evidence that the actual network rates were that low.

Unless there is adequate clarification, stating a benefit in percentage terms is an implied representation that the patient's responsibility is limited to a coinsurance payment that is the remaining percentage of the bill. In other words, a representation that a plan will pay 80% is inherently deceptive if the consumer is at risk of being required to pay more than 20%. In Maine, consumers covered by health plans must be clearly and explicitly informed if they might be subject to balance billing. 24-A M.R.S.A. § 4303(8).[17] The disclosure that "Reimbursements are based on RBRVS, which is the methodology used by the federal government to determine the benefits payable under Medicare" *(Staff Exh. 25c)* is not adequate to cure the deception. To the contrary, it aggravates it. Even if a consumer understands fully how coinsurance works and to understand the differences between market rates, network rates, and RBRVS, the consumer still might believe that the use of RBRVS is beneficial to the consumer. If the consumer did not realize whose "reimbursement" was being limited, he or she might understand this disclosure not as a warning of the likelihood of balance billing, but as an assurance that his or her own out-of- pocket cost would not exceed 80% of RBRVS.

The Prescription Drug Discount Program: Finally, Cinergy's sales representatives encouraged callers to decide quickly by promising: "And as a special offer, if you enroll in the Preferred 1000 plan today you will also get our **discount prescription drug plan and discount dental plan** at no additional cost." *(Staff Exh. 25a, emphasis in original)*

That is false and deceptive. The offer was not special. It was part of the standard phone script, offered to every caller every day. It was also a standard feature of the Preferred 1000 Plan. *(Staff Exh. 25c)*

Cinergy also made confusing and misleading representations about the nature of the prescription drug discount program. What a discount

program provides is access to a network of pharmacies that have agreed to charge members the prices negotiated by the program for drugs that are in the program's formulary. How much value, if any, the program actually provides depends on how those negotiated prices compare to prices the consumer would otherwise be able to pay in the market. Whatever price the participating pharmacy ultimately charges is paid entirely by the consumer. The discount program does not pay providers. The nature of the discount program was accurately described in disclaimers that flashed on the screen at the end of the commercials, which included the following sentence: "The discount dental and prescription programs are NOT insurance, do not make payments to providers, are not available in all states and may be cancelled within 30 days." *(Staff Exh. 33a, 33b)*

[17] Although the Cinergy Plan's benefits do not fully satisfy the minimum requirements for "Basic Hospital/Medical-Surgical Expense Coverage" under Bureau of Insurance Rule 755, § 6(D), they are substantially similar. Therefore, pursuant to Rule 755, § 9(G)(3), the Plan must satisfy the balance billing disclosure requirement and the other provisions of the Maine Health Plan Improvement Act.

Cinergy's disclaimers did not provide effective disclosure because, as discussed in more detail below, they could not be read or understood as presented. Especially when offered in connection with insurance sales, references to "prescription or dental benefits" *(Staff Exh. 25a)* or a "prescription program" *(Staff Exh. 33a, 33b)* are easily misunderstood to mean a benefit or program that actually subsidizes the cost of prescription drugs. That is what G.W. thought he had bought. After he saw the Cinergy commercial, he called the number and "talked with them, and I found out that I get copayments on my prescription drugs and stuff like that." *(I Tr. 157)* He testified in detail as to how he thought the process worked when he had a drug claim. Asked whether there was a deductible, he responded: "No, no, it was just so much copayment per prescription." "That they paid, and you paid the rest?" "Right. So if something was like $40, they paid 15 of it probably or something like that, just as an example." *(I Tr. 173-74)* G.W. explained further: "It was paid to the provider, right to the - see, I have all my prescription drugs and stuff through Hannaford, of course, Hannaford pharmacies, and they pay Hannaford their share. Hannaford would submit, you know, the bill to them, and they would pay their share of it. Actually, they knew what the - Hannaford knew what the deductibles was, and they knew how much Cinergy covered and how much they didn't .... [T]hey paid a copayment on everything that I got for prescription drugs. So if I went to Hannaford and bought blood pressure pills, I'd give them my Cinergy card, and they'd say, well, Cinergy will cover this much, and this is your portion. *(I Tr. 175-76)* G.W. testified that he knew the difference between insurance

and a discount card, and that he believed that what he bought was insurance, not a discount card. *(I Tr. 178-79)* Cinergy's failure to provide understandable disclosure of the nature of the prescription drug discount program was a material omission, resulting in a misrepresentation of the actual terms of coverage and was intentional.

For all the reasons discussed in the preceding pages, I conclude that Cinergy engaged in a pattern and practice of repeatedly, in numerous ways, intentionally misrepresenting the terms of the insurance contracts it was selling, in violation of 24-A M.R.S.A. § 1420-K(l)(E).

Illegal Rebating

Count VI of the Cinergy Petition alleges that offering the prescription discount program also constitutes a violation of 24-A M.R.S.A. § 2160, which, with limited exceptions not applicable here, prohibits offering, as an inducement to buy health insurance, "Any valuable consideration or inducements not specified in the contract." Cinergy's brief does not respond directly to the allegation that Cinergy offered illegal rebates and does not suggest that any exception applies. The brief states only that none of Cinergy's advertising was deceptive or misleading. *(Cinergy Br. 2, 6-8)*

It is undisputed that Cinergy offered a prescription drug discount program. The program is not mentioned anywhere in the insurance policy or certificate of coverage. *(Staff Exh. 25a)* Cinergy has not asserted any affirmative defenses or any exceptions to the applicability of Section 2160. In both the commercials and the telephone script (discussed in the previous section), Cinergy offered the program as an inducement to buy health insurance.

I therefore conclude that Cinergy used the prescription drug discount program as an illegal inducement to purchase the insurance plan, in violation of 24-A M.R.S.A. § 2160,

Representations that Cinergy was an Insurer

Count V of the Cinergy Petition alleges that Cinergy violated 24-A M.R.S.A. § 2177, which provides that "No person who is not an insurer shall assume or use any name which deceptively infers *[sic]* or suggests that it is an insurer." As with Count VI, Cinergy's brief says only that none of Cinergy's advertising was deceptive or misleading *(Cinergy Br. 2, 6-8),* and does not respond directly to the allegation that Cinergy deceptively suggested that it was an insurer.

Cinergy represented itself to consumers as the provider of the "Cinergy Health Preferred Insurance Plan," and its logo includes the slogan "Cinergy Health. Your Life. Your Health. Your Plan." *(See, e.g., Staff Exh.*

25c, 33a, 33b, 33c, 42) Customers who sign up are welcomed "to The Cinergy Health Family." *(Staff Exh. 25b)* The Cinergy Handbook is filled with statements such as **"Cinergy Health Preferred** is intended to be used for your day-to-day insurance needs" and **"Cinergy Health Preferred** provides coverage starting on your first medical visit." *(Staff Exh. 25c)* The membership materials Cinergy provided in response to the Bureau's request refer to "the insurance carrier ... indicated on the back of your membership ID card," along with a copy of a card that names only Cinergy. *(Staff Exh. 25c)* All of Cinergy's advertising and marketing materials that appear in the record promote Cinergy, not the insurers that actually issued the coverage. Some commercials displayed, in large letters, the slogan "Cinergy Health is Insurance."*(Staff Exh. 33a, 33b)* A reasonable consumer could believe that Cinergy is the insurer.

Some disclaimers were provided in the handbooks and advertisements clarifying, for example, that "**Cinergy Health** is not an insurance carrier" (on the fifth page of the Cinergy Handbook), and that "This plan ... may vary by availability, vendor or member's state of residence" (on the first page). *(Staff Exh. 25c).* The version of the Cinergy card shown in some TV commercials mentions AMLI in the fine print beneath the large Cinergy logo. *(Staff Exh. 33a, 33b)* As with the misrepresentations discussed earlier, however, these disclaimers are insufficient to dispel the impression made by Cinergy's branding program.

Again, the experience of actual consumers, both satisfied and dissatisfied, confirms this. The insurance company that was the subject of E.D.'s complaint was Cinergy Health, Inc. She made no mention of GTL or AMLI. *(Staff Exh. 17)* In his testimony, G.W. responded to a question, saying that Cinergy was "a pretty good insurance company." *(I Tr. 164)* He also testified that his four most recent insurers were Blue Cross, Anthem, Cinergy, and MEGA. *(I Tr. 171)* G.W. testified that he responded to a Cinergy advertisement, made his payments to Cinergy, received a Cinergy card, and had claims paid by Cinergy. *(I Tr. 163-66, 168, 170, 172-78)* He could not a mention of another company involved in the Cinergy Plan until after he began filing claims and receiving benefits. *(I Tr. 163, 166, 176-77)* At that point, all he knew was that some firm called Guarantee Trust "had something to do with it. It was on the paper, you know, so it says from Guarantee Trust and Cinergy Health." *(I Tr. 177)*

GTL did not realize that it was one of the insurers for the nationally advertised Cinergy Health Plan until August of 2008 at the earliest, because its personnel thought CrossAmerica was still the marketing subcontractor for GTL's own program manager. *(I Tr. 52)*

I therefore conclude that Cinergy deceptively suggested that it was the insurer that issued the Cinergy Health Plans, in violation of 24-A M.R.S.A. § 2177.

Deceptive Advertising Generally

Count III of the Cinergy Petition alleges that Cinergy violated 24-A M.R.S.A. § 2153, which prohibits false advertising of insurance policies.

Cinergy argues that its techniques are consistent with accepted industry practices, and would not materially deceive a reasonable consumer. In particular, Cinergy asserts that "Countless healthcare advertisements are aired continuously nationwide all with varying disclaimer times and formats which fail to convey information adequately. At the hearing, the Superintendent viewed an example of an Allstate advertisement which illustrates this very point." *(Cinergy Br. 8;* see *11 Tr. 96-101)*[18]

[18] Cinergy has notified the Superintendent that the Allstate advertisement may be viewed on the Web at http://www.youtube.com/watch?v=jSvutOU0mRO&NR= 1

The Cinergy and Allstate advertisements are not comparable. The Allstate advertisement made very clear that the insurer was Allstate, and that the product it was advertising was personal automobile insurance. The only time the Cinergy advertisements named the insurer or disclosed the type of product being sold was in a lengthy disclaimer that, as discussed previously, appeared on the screen for at most half a second, after a consumer could reasonably have believed that the commercial was over. There is nothing similar in the Allstate advertisement, which contains only two print disclaimers, both of which are shown as subtitles while the advertisement is in progress. The first appears for four seconds, while a slapstick fender-bender is shown on the screen, and warns: "Demonstration only. Do not attempt." The second is a three-line subtitle that is on the screen for the final six seconds, while the phrase "ACCIDENT FORGIVENESS" appears in larger type. It reads: "Feature is optional. Subject to terms, conditions & availability. Safe Driving Bonus® won't apply after an accident. In CA you could still lose the 20% Good Driver Discount. Allstate Property and Casualty Insurance Co. & Allstate Fire and Casualty Insurance Co. & their affiliates: Northbrook, IL. © 2010 Allstate Insurance Co." I agree with Cinergy that the second disclaimer is not informative to the average consumer. However, it does not contradict the underlying commercial, and the disclosures it provides are appropriate to make at the point of sale. Furthermore, even if Allstate's practices were substantially similar to Cinergy's, that would not make them lawful.

The preceding three sections document a wide range of misrepresentations and deceptive practices by Cinergy, and demonstrate that consumers were in fact materially deceived. I therefore conclude that Cinergy engaged in a pattern and practice of false advertising, in violation of 24-A M.R.S.A. § 2153.

Cinergy's Unauthorized Producer Activities

Counts I and II of the Cinergy Petition allege that Cinergy sold GTL coverage in Maine without being appointed as a GTL producer, in violation of 24-A M.R.S.A. § 1420-M(l), and knowingly accepted insurance business from unlicensed individuals, in violation of 24-A M.R.S.A. § 1420-K(l)(L).

Cinergy does not contest that it violated the producer licensing laws. *(Cinergy Br. 2, 3, 4)* This issue came to the Bureau's attention when E.D.'s complaint named the agent who sold her the coverage, and the Bureau determined that he was not licensed.[19] *(Staff Exh. 17, 18)* Cinergy explained to the Bureau: "When we began insurance agency operations in December 2007, not all agents were licensed in all states and we started the process of obtaining nonresident licenses for our agents in batches of 15-20 agents at a time. With the approval of AMLI, NCE and CrossSummit Enterprises (the former managing general agent), verifiers licensed in the customer's state were used to complete sales initiated by agents who had not yet completed the nonresident licensing process.[20] This prior process was not a perfect one and some sales were not completed by an agent licensed in Maine." *(Staff Exh. 28)*

[19] His name is Joseph Fricano, but was spelled "Frincano" in E.D.'s complaint. Cinergy has used both spellings, but neither spelling appears in the Bureau's license records.*(Staff Exh. 20, 32a, 366; Cinergy Exh. I)*

[20] In an earlier letter, Cinergy's Chief Compliance Officer provided the Bureau with a different explanation. He said that AMLI had assured Cinergy that it is in compliance with nonresident licensure laws as long as the sale is made by a Florida-licensed agent and that agent is "under the supervision of an agent licensed in the state where the member resides." He represented that Cinergy was still relying on that guidance at the time of E.D.'s enrollment in late August, 2008 *(Staff Exh. 17),* but that shortly afterwards, "we altered our enrollment methodology so that agents speak with potential enrollees from a state in which they are duly licensed." *(Staff Exh. 20)*

Cinergy's letter essentially states that it chose to ignore and therefore violate the law in order to avoid slowing down its operations while waiting to get the necessary licenses for its sales force. Additionally, Cinergy's unlicensed activity was not limited to a brief transition period. Out of the 51 individual producers listed on Staff Exhibit 32a as making sales in Maine, Cinergy admits that 40 of them were not licensed in Maine at the time of their first sale.[21] *(Cinergy Exh. I)* 26 of them never obtained Maine licenses, and 8 of the remaining 14 made their first Maine sales at least six months before they were licensed, in one case more than two years. *(Cinergy Exh. I; Staff Exh. 32a)* In the last two weeks Cinergy did business in Maine, selling coverage effective December 15, 2008, Cinergy

admits that four unlicensed agents made a total of five sales in Maine. Two of the agents involved did not obtain Maine licenses and the other two did not become licensed until April and May of 2009. *(Cinergy Exh. I)* Cinergy takes responsibility for its unlawful actions by admitting to 59 unlicensed sales in Maine. *(Cinergy Br. 3, 4, citing 11 Tr. 86-8 7)*

[21] Cinergy Exhibit 1 lists one additional producer as having been licensed on June 11, 2008, four days before the effective date of coverage of his first Maine sale. Other information provided to the Bureau by Cinergy shows that he made this sale on May 29, 2008, almost two weeks before he was licensed. *(Staff Exh. 28b)*

In addition to the licensing requirement, 24-A M.R.S.A. § 1420-M requires all producers who act as an insurer's agents to be appointed by the insurer, and requires the insurer to give the Superintendent notice of the appointment no later than 15 days after the producer first enters into an agency contract with the insurer or submits an application to the insurer. Cinergy admits that it was selling the Cinergy Plan in December of 2007, under contract with AMLI. *(Staff Exh. 28, 33e)* Shortly thereafter, in Maine and several other states, GTL assumed responsibility for insuring this plan, and at that point, AMLI began operating as GTL's program manager.

The written Program Manager Agreement between GTL and AMLI was executed on February 8, 2008, and states that it was "effective January 1, 2008." *(Staff Exh. 34c).*Negotiations began in 2006 *(GTL Exh. 32),* and GTL began taking preparatory steps to implement the agreement early in 2007, when it filed policy and certificate forms for regulatory approval. *(Staff Exh. 21a, 21b)* The record does not indicate whether the parties intended the agreement to have retroactive effect, or whether they were memorializing an agreement that was already in place on January 1, 2008. In either case, however, Cinergy became GTL's agent through its subcontractor relationship no later than February 8, 2008.

Therefore, GTL was required to file a notice of appointment with the Superintendent no later than February 25, 2008. (February 23 was a Saturday). The notice was filed on October 20, 2008. *(Staff Exh. 11)* All GTL sales made by Cinergy to Maine customers before October 5, 2008, are additional violations of 24-A M.R.S.A. § 1420-M. Cinergy indicates that there were 62 such sales.[22] *(Staff Exh 28b)* Measuring the number of sales is not a true measure of unlicensed activity because it does not reflect all unlicensed solicitations. It is likely, for example, that a number of Maine consumers called in to the toll-free number, spoke with Cinergy personnel, but decided not to buy the Cinergy Plan.

[22] Cinergy also admits that on and after October 5, 2008, at least 22 additional sales were made by individual Cinergy producers who were not

licensed, and therefore could not have been appointed by GTL, within 15 days after the date of sale. *(Cinergy Exh. I; Staff Exh. 28b)* At least four other sales were made directly over the Cinergy Web site with no record of any interaction between the customer and any licensed producer. *(Staff Exh. 32a)* None of these violations were charged in the Petition, which only addresses Cinergy's own unappointed status

Cinergy responds that "any penalty for licensing issues should be minimal. Not only were many of these agents licensed in Florida, which has licensing requirements that exceed Maine's requirements, but many of the agents were later issued Maine licenses." *(Cinergy Br. 2)*

The information provided by Cinergy, however, shows that out of the 42 agents listed who were not licensed in Maine when they made their first Maine sales, 17 were not licensed in Florida either. *(Cinergy Exh. I; Staff Exh. 28b, 32a, 39)* As late as November of 2008, Maine sales were being made by two Cinergy producers who were not licensed in Maine or Florida. *(Cinergy Exh. 1)*

Cinergy's argument that Florida has stronger licensing requirements than Maine,[23] even if it was true, is not an exception to Maine's license requirement. Although Cinergy argues that "the purpose of 24-A M.R.S. § 1420-K(l)(L) is to ensure that producers selling to Maine consumers meet the requirements of a licensed producer" *(Cinergy Br. 3),*that is not the only purpose..

[23] Subsequently, Cinergy makes a more accurate claim "that Florida's licensing requirements are materially similar to Maine's requirements." *(Cinergy Br. 5)*

Licensing requirements also ensure that licensees are accountable, that they pay their fair share of the costs of administering the licensing system, and that consumers can be confident that producers' qualifications have been verified before they begin selling insurance in Maine. In addition, a producer who becomes licensed in Maine makes a commitment to understand and comply with Maine law, which has many crucial differences from Florida law in the areas of underwriting, rating, and marketing of health insurance, and the regulatory status of coverage offered through association groups.

I therefore conclude that Cinergy systematically failed to obtain licenses and appointments for its producers, in violation of 24-A M.R.S.A. §§ 1420-K(l)(L) and 1420-M(1). These violations were not mere "technical violations" as Cinergy asserts *(Cinergy Br. 2).* Cinergy engaged in a pattern of serious and willful disregard for the licensing laws that continued throughout its operations in Maine. It began in 2007, before GTL was licensed in Maine, when these producers were selling coverage

on behalf of the unlicensed insurer AMLI *(Staff Exh. 28, 32a; I Tr. 24, 79-80, 98, 110-11I),* and continued for months after GTL ordered marketing in Maine to cease, and was advised that marketing had ceased. *(GTL Exh. 18, 22; I Tr. 93-94, 99)*

Findings and Conclusions Relating to GTL

Background - the Fronting Agreement

GTL became involved because AMLI, the plan's primary insurer, is not licensed in every state. AMLI had applied in 2006 to become licensed in Maine, but was turned down due to its inability to meet Maine's financial requirements. *(GTL Exh. 15-16; Staff Exh. 9)*

In order to be able to offer its limited benefit coverage legally in states where it was not licensed, AMLI entered into a fronting arrangement with Respondent GTL, which has been licensed in Maine since 1990. "Fronting" means a reinsurance arrangement under which a licensed insurer, the "fronting carrier," agrees to issue insurance coverage on behalf of the unlicensed "assuming carrier," but to transfer back most or all of the insurance risk and administrative responsibilities to the assuming carrier. There are separate contractual relationships between the insured and the fronting carrier, and between the fronting carrier and the assuming carrier - the fronting carrier is directly accountable to the insured, to the regulator, and to the public, while the assuming carrier is in turn accountable to the fronting carrier. Fronting agreements are legal, as long as the fronting carrier fulfills the legal and contractual obligations it takes on when the insurance policy is issued in its name. Such agreements are accepted practice in the insurance industry.

As Matthew Charley-Gad, GTL's assistant counsel, explained in his testimony, he "began working in the spring of '07 when I was first addressed of potential - or a fronting arrangement with American Medical and Life Insurance Company .... The fronting arrangement is where Guarantee Trust Life is fully licensed and has a certificate of authority in a state, and another carrier would like to partner with Guarantee Trust Life in order to offer a specific insurance product, and typically those products which are not a core competency of Guarantee Trust Life. So Guarantee Trust Life will issue a policy, and the other carrier and its entities will perform the administration of that policy, and through a reinsurance agreement, a majority of the risk will be shifted to that carrier." *(I Tr. 31-32)*

In court papers, GTL stated that AMLI first approached GTL about the fronting arrangement in 2006. *(GTL Exh. 32)* As noted earlier, the written agreement between GTL and AMLI was executed on February 8, 2008, with an effective date of January 1, 2008. Under the agreement, AMLI

agreed to act as "Program Manager" for insurance policies issued by GTL "that mirror the design and coverage of the AMLI limited medical policies currently being marketed as of the date of this agreement." An addendum to the contract specified that it applied, at the time of execution, to coverage issued under GTL policy GTL GRP LM 2007 (Group Limited Benefits Accident and Sickness Health Insurance) in California, Colorado, Idaho, Iowa, Louisiana, Maine, New Mexico, Michigan, and Massachusetts, and that other policies and states could be added with written notice by GTL after receiving regulatory approval in those states. *(Staff Exh. 34c, 35b)* The Maine version of this GTL policy form and the certificate of coverage issued to individuals covered under the policy were approved by the Maine Bureau of Insurance on or about March 12, 2007. *(Staff Exh. 21a, 21b)* The policy GTL actually used to provide coverage to Cinergy Health Plan participants appears to have been issued to NCE in the District of Columbia, although that was not one of the jurisdictions specified in the agreement.[24] Mr Charley-Gad testified that he believed that NCE was based there *(I Tr. 59),* but NCE is domiciled in New York, uses a New York address, and executed its agreements with AMLI and Cinergy in New York. *(Staff Exh. 33e, 33f, 38)* Although the NCE policy had an inception date of January 1, 2008, NCE's application for the policy was signed on July 1, 2008.[25] *(Staff Exh. 34b; I Tr. 85)*

Under the agreement between AMLI and GTL, AMLI agreed to serve as the Program Manager, with responsibility for administration, marketing, underwriting, and premium billing. The agreement contemplated that AMLI would subcontract "certain duties," and GTL expressly recognized and accepted AMLI's appointment of CP Risk Solutions, LLC as "Manager" and CrossAmerica Enterprises, Inc. as "Administrator." *(Staff Exh. 35b)* By December of 2007, however, Cinergy represented that it had already replaced "CrossSummit Enterprises"[26] as the program's "managing general agent."[27] *(Staff Exh. 28)*

[24]The certificate of coverage states that "This policy is delivered in and governed by the laws of the governing jurisdiction" *(Staff Exh. 25a),* but neither the certificate nor the policy expressly names that jurisdiction. However, the forms filed in Maine include the letters "ME" in the policy number *(Staff Exh. 21a, 21b),* while the forms used by Cinergy include the letters "DC" in the corresponding place *(Staff Exh. 25a, 34a, 34b).*

[25] The copy of the application form in the records is faint, and it is not clear whether the last figure in the year is a "6" or an "8." However, the printed application form is designated as a 2007 form, and Mr. Charley-Gad testified that the application was signed in 2008. *(I Tr. 85)*

[26] GTL received an e-mail on August 1, 2008, confirming that "We gave a cease & desist out for ME," in which the sender identified himself as the President of "CrossAmerica Health Plans." *(GTL Exh. 22)* The Respondents

refer at various times to "CrossAmerica" *(Staff Exh. 35),* "CrossSummit" *(Staff Exh. 28),* "Crosssummitt" *(Staff Exh. 35b),*"Crosswalk" *(Staff Exh. 35b),* and "Crossroads" *(I Tr. 25).* Based on the interchangeable terminology and Mr. Charley-Gad's testimony *(I Tr. 111),* these apparently are either different names for the same entity or were affiliated entities operating as a single enterprise.

[27] The Recruiting and Billing Agreement between Cinergy and NCE, which was executed in June of 2008 but states that it was "made on this 14th day of November, 2007," states that Cinergy assumes certain responsibilities of Cross Summit Enterprises as NCE's Preferred Marketing Agent. *(Staff Exh. 33e)*

The companies entered into a quota share reinsurance agreement under which GTL retained 10% of the risk and ceded 90%. AMLI was one of the subscribing reinsurers, and assumed 40% of the risk up to a cap, and 90% above the cap. *(Id.)* The reinsurer that assumed the remaining 50% (up to the cap) was not named in the documents provided to the Bureau,[28] but Mr. Charley-Gad testified that it was Transatlantic Re *(I Tr. 35, 37-38),* which he believes is based in London and which was "brought to us by this program." *(I Tr. 11 8)*

As noted earlier, customers' monthly payments were collected by Cinergy, which deducted a "recruiting fee" that ranged, according to the description in Cinergy's letter, from approximately 25% to approximately 47% of the monthly payment. For the customers listed on Staff Exhibit 36a, the total fees retained by Cinergy during the time they were covered ranged from 30.4% to 48.8% of the total amount the customer paid Cinergy for coverage. Cinergy represents that it paid unspecified "operating expenses" out of that fee and then remitted the remainder primarily to Group Plan Administrators, Inc. (GPA),[29] but also to "Other Product Suppliers (e.g., discount Rx)," and Patriot Health Florida, Inc., "which provided billing." *(Cinergy Exh. 3 and Supplemental Post-Hearing Response)* GPA's role is not clear from the record, but if Cinergy's earlier representation is accurate, GPA was acting on behalf of NCE.[30] *(Staff Exh. 33)* A substantial portion of the amount collected by GPA constituted GTL's premium, which was collected at some stage by or on behalf of AMLI in its capacity as GTL's Program Manager. How much was ultimately designated as premium is unclear from the record. Mr. Charley-Gad testified: "I don't know how NCE collected the premium or where it's distributed from because that's the association, so if it's $100 dues that comes, it's my understanding that, say, 30 percent, 40 percent goes to association benefits, that being prescription drug - whatever benefits they have, I can't remember the list of NCE benefits; but the other portion, say the 70 percent, would then be premium payment to in this case AMLI." *(I. Tr. 127-1 28)*

Out of the premium amount, 5% went to GTL as a "Company Fee" in compensation for its responsibilities as fronting carrier, and GTL was also reimbursed for premium taxes up to a maximum of 2 1/2%. AMLI paid a 1% fee to D.W. Van Dyke & Co., Inc., the reinsurance intermediary, and collected a fee of up to 25% for its services as Program Manager, a portion of which was used to compensate AMLI's subcontractors.[31] *(Staff Exh 35b; I Tr. 115-118)* Finally, Preferred Care Incorporated (PCI), a licensed third-party administrator, received a fee of 5% of gross premium for administering claims under an agreement between GTL and PCI executed in December of 2007. *(GTL Exh. 13)* What was left, after Cinergy, GPA, NCE, GTL, AMLI, and PCI had deducted their respective fees and expenses, went into the claims fund maintained by PCI, which had authority to write checks from an account maintained in GTL's name. *(GTL Exh. 13; I Tr. 125)* The agreements among the three companies had the effect of dividing any surplus or deficiency in the claims fund in proportion to their respective quota shares: 10% for GTL, 40% for AMLI, and 50% for Transatlantic Re.[32] *(Staff Exh. 35b; I Tr. 125-126)*

[28] The Bureau had requested copies of agreements among Cinergy, GTL, NCE, and AMLI. *(Staff Exh. 35)*

[29] According to the records of the Bureau of Insurance, GPA is located in Glen Head, New York, and is licensed in Maine as an insurance producer agency but not as a third-party administrator.

[30] GTL did inform the Bureau that it paid commissions of $18,213 to GPA for coverage to Maine residents. *(Staff Exh. 34)*

[31] Out of that amount, 20% was designated as "The Producer's Fee," 3% as "Administrative Fee," and 2% as "Manager Fee." *(Staff Exh. 35b)* However, all three of those fees were payable to AMLI, and as Mr. Charley-Gad testified, "the breakdown was 20 percent to your producer, but since it's their fee, they can choose to keep all of it." *(I Tr. 117)*

An Unapproved Plan

Count III of the GTL Petition alleges that it was unlawful to offer the Cinergy Plan in Maine because it was never filed for review by the Superintendent. Specifically, Count III alleges that GTL provided coverage to Maine residents under an association group policy without having filed the information required by 24-A M.R.S.A. § 2412(1-A)(B) at least 60 days before any solicitation in Maine.

Because association group coverage is sold to individuals, it is considered an "individual health plan" under Maine law, 24-A M.R.S.A. §§ 2701(2)(C)(l) & 2736C(1)(C),[33] and it is considered "individual health

insurance coverage" under HIPAA[34] The regulatory filings required by 24-A M.R.S.A. § 2412(1-A)(B) ensure that the Superintendent has advance notice that an insurer intends to offer such coverage in Maine; that the Superintendent can verify that the coverage offered and the premium rates meet the requirements of Maine law; and that the Superintendent can verify that the association meets the requirements of 24-A M.R.S.A. § 2805-A, including the requirement that the association "have been organized and maintained in good faith for purposes other than that of obtaining insurance."

If GTL had made the required filing, the Plan would not have been approved for sale in Maine, because NCE was not a *bona fide* association meeting the requirements of Section 2805-A.[35] Cinergy's contract with NCE provided that Cinergy "would retain total control of NCE membership enrolled via the efforts of [Cinergy] after the initial one year term, such total control including but not limited to changing associations and/or insurance carriers for those members." *(Staff Exh. 33e)* Membership in NCE was automatic when the customer bought the Cinergy Health Plan, a process that took place without a written application. *(Staff Exh. 25, 25c)* The membership did not include a right to participate in the governance or activities of the association. Only NCE's secretary had the authority to act as proxy to participate and vote in all NCE meetings on the members' behalf. In addition, in a provision not usually found in proxy designations, the secretary was granted the authority to receive all notices on the members' behalf.[36]*(Staff Exh. 25c)* There was no procedure for revoking that proxy designation.

[32] Although GTL was contractually responsible for PCI's entire fee, the ceding commission schedule in the reinsurance agreement provides for GTL to be reimbursed for the reinsurers' 90% share of that fee. *(Staff Exh. 35b)* When he testified, Mr. Charley-Gad inadvertently reversed AMLI's 3% administrative fee and PCI's 5% fee in the ceding commission schedule. *(I Tr. 118)*

[33] Although the benefits also include an indemnity benefit of $500 or $1000 per hospital admission, it is undisputed that the policy provides expense-incurred coverage within the meaning of 24-A M.R.S.A. § 2736-C(l)(C). Indeed, one of Cinergy's principal marketing points was the plan's qualification as "creditable coverage" under federal law, which is inseparable from its status as individual health insurance coverage.

[34] The relevant definitions, are found at PHSA §§ 2791(a)(1), (b)(5), & (e)(l) (42 U.S.C. §§ 300gg-91(a)(l), (b)(5), & (e)(1)).

[35] New York, NCE's domiciliary state, found that NCE was not a qualified association under a law substantially similar to Maine's. *(GTL Exh. 27; Staff Exh. 38)*

People enrolling were not enrolling to join an association, but enrolling for health insurance. The one consumer who testified in this proceeding believed that he was not a member of an organization called the National Congress of Employers, and was unaware of the NCE membership benefits that Cinergy promoted, such as travel and hotel discounts. *(I Tr. 167, 177)* If consumers were unaware of their NCE membership when they were enrolled, it was unlikely that they would become aware from reading the details on the back page of the Cinergy Plan Handbook.

When GTL filed its forms for "policies that mirror the design and coverage of the AMLI limited medical policies" in March of 2007 *(Staff Exh. 34c),* it filed a specimen form whose cover page labels the policyholder "XYZ Company" and states that it is governed "to the extent applicable by the Employee Retirement Income Security Act of 1974 (ERISA) and any amendments." The specimen certificate of coverage gives the individual "Named Insured" the name "John Employee." *(Staff Exh. 21a)* Although the form briefly states later that it can also be used for association coverage, GTL did not file the association certificates as required by law before NCE coverage was offered in Maine. The certificates used in Maine were not in the form that had been approved by the Superintendent, and did not include certain provisions required by Maine law, such as a provision allowing the certificate holder to designate a family member or other third party to receive backup notices if coverage is cancelled. *(Staff Exh. 21a, 25a)*

GTL's issues with unapproved association coverage first came to the Bureau's attention in an unrelated matter, involving different associations. On June 9, 2008, the Bureau wrote to GTL expressing concern that its approved forms might be in use in Maine with unapproved association groups. The Bureau's letter indicated to GTL that Maine's approval requirement applies even if the master policy is issued in another state. It named four entities that had not been approved as association policyholders in Maine, and asked, *inter alia,* for a "List of all association or trustee groups that have been issued policies" and the "Number of Maine residents that have been issued certificates under those policies." *(GTL Exh. 17, emphasis added)* Allan Heindl, GTL's Vice-President of Product Approval and Compliance, replied to the Bureau on July 1, 2008. His response appears to be a form letter, as it assures the Bureau that "GTL is committed to complying with all Louisiana insurance statutes and regulations reasonably determined to apply to the administration of our accident business." GTL's letter stated that the Bureau's "letter references Consumer Health Benefits Association (CHBA), Century Senior Services, VantageAmerica Solutions and National Benefits Consultants. Regarding the various entities listed, CHBA is the only entity operating as an Association." *(GTL Exh. 19)*

Although Mr. Heindl represented to the Bureau that he was responding to its request to list all the association and trustee groups through which GTL was providing coverage, he either concealed the existence of additional groups or failed to conduct a diligent inquiry before finalizing his response. Mr. Heindl sent an internal e-mail on July 28, 2008, advising six other GTL employees that Maine is investigating unauthorized association groups. He explained that Maine's law was similar to an Oregon law they had previously addressed, and he requested them to "Please communicate to each association that we cannot accept any new ME members after July 31, 2008. If any association listed believes it truly exists for purposes other than insurance, we'll need to submit bylaws and all related marketing materials for review and approval by ME." At the end of his message, he provided a table of the GTL association counts he knew about, and eleven of those associations were not mentioned in his letter to the Bureau. *(GTL Exh. 21)* GTL did not supplement its response to inform the Bureau of those additional associations until January 27, 2009, after the Bureau had begun asking GTL for information about the Cinergy Plan and NCE. *(Staff Exh. 23)*

[36] Despite the lack of opportunity for membership input, NCE stated that it engaged in activities such as "advocacy ... toward legislative reform" on behalf of its members, who were told that membership would be "adding your voice to thousands of other members for these causes." *(Staff Exh. 25c)*

NCE was not one of the associations listed in Mr. Heindl's table. However, one of the recipients of his message was Monty Edson, GTL's Senior Vice-President of special markets, who was responsible for the NCE program and all of GTL's other fronting arrangements. *(GTL Exh. 21; I Tr. 81-82)* On July 30, Mr. Edson wrote to AMLI to advise them that "we have to cease marketing" association group products in Maine until the associations are approved by the Bureau of Insurance. He continued: "NCE has some lives in Maine, correct? You may have some other associations that are affected." He asked whether AMLI would like GTL "to file these associations for approval in Maine."*(GTL Exh. 18)* On August 1, 2008, Kevin Dunn, who identified himself as the President of CrossAmerica Health Plans, responded that they had given "a cease & desist out for ME" on July 30 in response to AMLI's message that a filing would be necessary. Mr. Edson forwarded that message to Mr. Heindl with the note: "FYI. AMLI has ceased writing new business in ME." *(GTL Exh. 22)*

The Bureau became aware of the existence of "a national congress of employers" as a result of E.D.'s consumer complaint, and sent inquiries to both GTL and Cinergy on December 15, 2008. *(Staff Exh. 18)* On January 7, 2009, Mr. Heindl wrote to the Bureau on behalf of GTL, explaining: "The group association policy, GTL GRP LM 2007 POL-ME, et al. was

approved by your Department on March 12, 2007 .... The group policy was designed and intended to be issued to valid associations....[37] American Medical Life *[sic]*Insurance Company (AMLI), as program manager, has the responsibility of confirming that an association is valid prior to issuing a GTL policy. We have yet to receive a response to our demands from AMLI as to why such a policy was issued. However, since it's been determined that the National Congress of Employers has not registered in Maine, we have instructed AMLI to immediately cease all marketing in the State of Maine." *(Staff Exh. 21)*

GTL admits that NCE was never an approved association in Maine *(GTL Br. 10),* that it "assumed responsibility for handling the claims and underwriting the insurance" for the NCE policy in Maine, and that it collected premiums through AMLI "as if a GTL NCE policy had been sold." *(GTL Br. 11)* GTL requests the Superintendent to find, however, that collecting premium and paying claims makes it at most the "de facto insurer but ... not the insurer of record in Maine." *(GTL Br. 11)* In its defense to Count III, GTL argues: "The statute relied upon by the Bureau Staff, 24-A M.R.S. § 2412(1-A), requires preapproval not only of the policy which was approved but of the group.[38] Unfortunately, AMLI did not get NCE approved as a group pursuant to the statute even though it had agreed to do so as part of its Program Management Agreement with GTL." *(GTL Br. 18)*

[37] As noted earlier, it was filed and submitted in the form of an employer group policy. *(Staff Exh. 21a)*

The sole purpose of the fronting arrangement was so that GTL, a licensed insurer, would be the insurer of record in Maine. The conversation between Mr. Edson and AMLI's representatives provides evidence that GTL had knowledge that it was the insurer of record and that it had the responsibility for getting NCE approved in Maine. GTL admitted issuing a group policy to NCE, and admitted that Maine residents were covered under this policy. *(Staff Exh. 21, 23, 29, 32, 34)* There is no evidence that until the hearing in this matter, GTL denied providing coverage in Maine under this policy. In these circumstances, any failure to make clear which company had made the actual contractual commitment to pay Maine consumers' claims under which NCE group policy would be an aggravating factor, not a defense.

GTL also notes that the Staff alleged in the Petition that "GTL violated 24-A M.R.S. § 2412(1-A) each time it issued or delivered for delivery in Maine a certificate of coverage under the NCE policy," and responds that no GTL certificates were issued in Maine. As discussed more fully below in the section on GTL's responsibility for Cinergy's violations, the preponderance of the evidence demonstrates that GTL certificates were in fact issued. Furthermore, what Section 2412 prohibits is the issuance of

"coverage to a resident of this State" before the insurer makes the required form filing. If an insurer issues coverage without providing the certificates required by 24-A M.R.S.A. § 2821, that would constitute an additional violation of law but would not excuse the insurer from compliance with the filing requirement.

I conclude that GTL committed multiple violations of 24-A M.R.S.A. § 2412(1-A)(B) by providing coverage to Maine residents under an association group policy without filing the required information about the association.

GTL's Responsibility for Cinergy's Misconduct

Counts II, IV, V, VI, and VII of the GTL Petition allege that GTL is liable for Cinergy's use of unlicensed and unappointed producers, false advertising, misrepresentations of the terms of insurance contracts, deceptively suggesting that it was an insurer, and illegal rebating, pursuant to 24-A M.R.S.A. § 1445(1)(D), which provides that an insurance carrier "Is accountable and may be penalized by the superintendent, as provided for in this Title, for the actions of its producers."

[38] The NCE certificates of coverage were not submitted for review in Maine as required by 24-A M.R.S.A. § 2412(1-A)(B). Generic forms that were substantially similar were approved in Maine, but the NCE certificates themselves were not filed in Maine, and they were issued on the DC version of the form rather than the approved Maine version. However, that violation was not charged in the Petition.

Cinergy committed the violations alleged as discussed in the preceding sections. GTL does not dispute that Cinergy committed any of those violations, and affirmatively agrees that Cinergy engaged in unlicensed activities and misrepresented itself as the Plan's insurer.[39] *(GTL Br. 13)*

GTL's defense is that "The Bureau Staff has presented no evidence that Cinergy acted as an agent for the GTL NCE policy during the alleged time frame." *(GTL Br. 16)* The Staff's evidence includes: GTL agreed to issue insurance coverage in Maine and authorized AMLI to act as its program manager for that coverage, effective January 1, 2008*(Staff Exh. 34c);* in connection with that program, GTL issued a group policy to NCE with an effective date of January 1, 2008 *(Staff Exh. 34a);* AMLI hired Cinergy to make the actual sales *(Staff Exh. 28);* and certificates of coverage under that GTL policy were issued to Maine consumers *(Staff Exh. 25a, 34a).* Thus, the Staff has presented persuasive evidence that Cinergy was acting as GTL's subcontractor at all relevant times.

GTL agrees with most of the above facts. *(GTL Br. 8-9, 11-13; Staff Exh. 34)* The one exception is GTL's claim that the sales Cinergy made on behalf of AMLI were not sales of GTL coverage. *(GTL Br. 2-6, 11-21)* GTL argues that Cinergy "instead issued certificates of insurance for the AMLI or Pan American policy."[40] *(GTL Br. 15)* The evidence cited by GTL does not support that claim.

All copies of certificates of coverage in the record are sample copies rather than copies of certificates actually issued to consumers.[41] GTL argues that the Staff's failure to provide a copy issued to a Maine consumer is significant. However, there was no indication that any party intentionally failed to provide such evidence. G.W. testified that he looked for his coverage documents but could not find them.[42] *(I Tr. 165-66)* While there is no direct evidence, there is significant circumstantial evidence, including Cinergy's internal record documenting E.D.'s cancellation of coverage, which explicitly identifies the insurer as GTL. *(Staff Exh. 28a)*

Mr. Charley-Gad testified that "It is my understanding that no GTL certificate was ever issued to any Maine resident .... If a Maine certificate was issued, it was the AMLI certificate that was sent." *(I Tr. 97-98; GTL Br. 14)* He did not offer documentation or other evidence to support that statement, and the remainder of his testimony demonstrates that Mr. Charley-Gad had no affirmative knowledge of what Cinergy was doing in GTL's name.

[39] GTL's records differ from Cinergy's in some cases regarding which producers made which sales at which times. *(See, e.g., GTL Exh. 35)*

[40] According to the records of the Bureau of Insurance, Pan American Life Insurance Company, domiciled in Louisiana, is an accredited reinsurer in Maine, but not a licensed insurer. It withdrew an application for licensure in June of 2007. The only references to Pan American in the record are the commercials cited below and the testimony discussing them. There is no evidence that Pan American coverage was ever issued or offered in Maine.

[41] Although GTL refers to the certificate of creditable coverage discussed below as a "Certificate of Insurance" *(GTL Br. 8),* that document is completely different from the certificate of coverage, which is the contract document issued to each insured at the time of coverage.

[42] He testified that to the best of his recollection, Cinergy Health was the insurer named in the policy he received. *(I Tr. 163, 177-78,* cited in *GTL Br. 13)* However, no party has claimed that Cinergy issued certificates of coverage in its own name, and Cinergy had no motive to expose itself to contractual, civil, and criminal liability in that manner.

In its post-hearing response, Cinergy produced a sample copy to illustrate the certificates of creditable coverage provided to Maine consumers after coverage terminated, and the certificate that Cinergy provided was issued by AMLI. That sample copy was issued to an Indiana consumer, and Indiana was not one of the states where GTL provided the Plan's coverage. *(Cinergy Supplemental Post-Hearing Response; Staff Exh. 34c)* The post-hearing response also refers to AMLI as "the insurer," and stated that Maine customers received their certificates of creditable coverage on behalf of AMLI. *(Cinergy Supplemental Post-Hearing Response)*

Cinergy's statement that AMLI was acting as an insurer in Maine was an error, resulting from confusion over AMLI's differing roles in different states. AMLI was always the Plan's lead insurer and Cinergy's only point of contact, and by January 7, 2011, when this response was provided, there were no longer states such as Maine where AMLI was acting in the capacity of GTL's Program Manager. Cinergy accurately explained the relationship in 2009, when it explained that "AMLI informed us that pursuant to an agreement between AMLI and GTL, GTL was the carrier of record for Maine residents." *(Staff Exh. 28)*

According to GTL, "GTL's certificates of insurance for the GTL NCE policy (GTL Ex. 2) were never issued to any of the insured's *[sic]* in Maine." *(GTL Br. 4)* This is accurate in part - it is likely correct that the certificates of coverage shown in GTL Exhibit 2, which is the form that was approved by the Maine Bureau of Insurance, were never issued to any Maine consumer. But those were not the certificates for the NCE policy. The NCE certificates were issued on a different version of the form *(Staff Exh. 34a),* although that form was never filed with the Bureau of Insurance for review as required by 24-A M.R.S.A. § 2412(1 -A)(C). GTL itself provided copies of those certificates to the Bureau, and acknowledged that they were issued for the NCE policy. *(Staff Exh. 34)*

GTL also argues that it did not advertise directly to Maine consumers and did not interact directly with Maine consumers. *(II Tr. 17, 29; GTL Br. 13)* GTL is not mentioned in the commercials until September of 2008, and "When GTL's name finally appears in CD # 7, it crosses the screen so quickly that no reasonable consumer could possibly read the name." *(GTL Br. 12,* citing *II Tr. 15* see also *Staff Exh. 33a, 33b; I Tr. 211-12)*

As a fronting carrier, however, GTL had no particular interest in publicity. It had an obligation to disclose that it was the company that had assumed responsibility, and GTL's failure to meet that disclosure obligation is an aggravating factor, not a defense.

GTL argues that it was unaware that Cinergy was acting on its behalf, but acknowledged that it was aware at the time that AMLI was acting on

GTL's behalf, at least as of January 1, 2008, and GTL does not dispute that Cinergy acted on AMLI's behalf at all relevant times. *(GTL Br. 11-13, 16)*

GTL also argues that AMLI was selling coverage in Maine in 2007, and, according to GTL, "continuing into 2008 and 2009." *(GTL Br. 7,* see also *11)* Because of the varying effective dates and execution dates in the documents provided by the parties, it is not entirely clear precisely how the GTL/AMLI/NCE relationship developed over time. GTL filed forms in Maine "that mirror" the AMLI forms in March of 2007, although the agreement with AMLI had not yet been formalized. *(Staff Exh. 21a, 21b)* Cinergy's agreement to act as NCE's Preferred Marketing Agent states that it was entered into in November of 2007. *(Staff Exh. 33e)* Cinergy began marketing NCE group coverage on behalf of AMLI no later than December of 2007 *(Staff Exh. 28),* and began making sales to Maine consumers no later than January of 2008 *(Staff Exh. 28b).* At least ten Maine consumers had NCE coverage with effective dates ranging from May to November of 2007, and five of the individuals who placed NCE coverage in 2007 also placed coverage on behalf of Cinergy in 2008. *(Staff Exh. 32a)* In an agreement executed in December of 2007, GTL engaged PCI to administer claims for the "GTL/AMLI Limited Medical Insurance Program," effective January 4, 2008. *(GTL Exh. 13)* GTL's agreement for AMLI to act as its program manager and GTL's group insurance policy issued to NCE both state effective dates of January 1, 2008, although the AMLI agreement and NCE's policy application were not executed until February 8 and July 1, 2008, respectively. *(Staff Exh. 34a, 34b, 34c)* This chronology supports Mr. Charley-Gad's testimony that some sales of unlicensed AMLI coverage took place before the fronting agreement was in effect, and that premiums received by AMLI in its capacity as insurer were subsequently "attributed" to GTL after the fact. *(I Tr. 112-13)*

Although initially, AMLI appears to have been acting without authorization from GTL, the evidence shows that the fronting agreement was in effect in Maine no later than its execution on February 8, 2008, and that when AMLI collected Maine premiums on business written after that date, it did so in its capacity as GTL's program manager.[43]

None of the evidence cited by GTL would change the interpretation of the evidence the Staff has presented. Cinergy and GTL provided identical GTL certificate forms to the Bureau, and represented that those were the certificates of coverage issued to Maine consumers. *(Staff Exh. 25, 25a, 34, 34a)* The record confirms that those representations were accurate, and thereby proves that Cinergy acted as GTL's producer in Maine, beginning no later than February 8, 2008.

The finding is further reinforced by GTL's assertion in court papers that AMLI "sold insurance policies on GUARANTEE forms." *(GTL Exh. 32)* GTL represented to the Bureau that it was providing coverage to Cinergy's customers *(Staff Exh.29),* GTL paid commissions on these sales *(Staff Exh. 34),* and GTL accepted premium for all of these sales. *(Staff Exh. 32, 32a)* GTL instructed AMLI to cease and desist marketing a policy that GTL now claims AMLI never marketed in Maine. *(GTL Br. 10; GTL Exh. 18, 22)* Although there is evidence that GTL's program manager hired Cinergy without actual notice to GTL, and that Cinergy did not properly fulfill its duties to GTL, that does not mean that Cinergy was not working for GTL. GTL cannot insulate itself from its obligations by delegating its responsibilities to subcontractors and failing to monitor those subcontractors. Asked whether he understood that "when you enter into a fronting arrangement, you're legally accountable for 100 percent of the risk," GTL staff counsel Charley-Gad responded "Correct." *(I Tr. 123)* The Program Manager Agreement expressly makes AMLI jointly and severally liable for all damages, liabilities, and other losses incurred by GTL as a result of the actions of AMLI's subcontractors. *(Staff Exh. 34c)* This reflects GTL's recognition that GTL is responsible for the actions of AMLI's subcontractors. Although ambiguous language in the Agreement could be interpreted as obligating AMLI to appoint CrossAmerica as its only marketing subcontractor, the Agreement also expressly states that the agreement between GTL and AMLI is not dependent on any of the agreements between AMLI and its subcontractors. Under the Agreement, GTL delegated full authority over marketing to AMLI. *(Staff Exh. 34c)* If GTL believes that AMLI abused that authority, that is a matter between GTL and AMLI. *(GTL Exh. 32, 33)*

[43] This is also the interpretation of the evidence most favorable to GTL. If GTL did not in fact provide group coverage through NCE before the formal application was executed in July of 2008, then the policy's stated effective date of January 1 would imply backdating with the intent to conceal AMLI's illegal issuance of coverage.

GTL argues further, however, that it bears no responsibility for Cinergy's actions because the agency relationship terminated before it began. *(GTL Br. 19)* GTL first appointed Cinergy as its producer in Maine on October 20, 2008 *(Staff Exh. II),* but, as GTL explains in its brief, "When GTL first learned in June 2008 that NCE was not a Maine approved association, it instructed AMLI to cease and desist to market and sell the GTL NCE policy in Maine." *(GTL Br. 10)* GTL sent AMLI its cease and desist instruction on July 30, 2008, and received confirmation the next day that AMLI had ceased writing new business. *(GTL Exh. 18, 22)* Mr. Charley-Gad testified that "once the cease and desist was issued in July of 2008, there was really no need to give any further attention to that." *(I Tr. 99)*

It is not disputed that Cinergy did continue to market new business in Maine for the remainder of the year, and that both AMLI and GTL continued to accept the new business Cinergy produced. *(e.g., Staff Exh. 32a)* The failure to take action in response demonstrates that they did not reasonably rely on the cease and desist notice, and that Cinergy remained GTL's producer throughout 2008. Furthermore, on October 20, 2008, Cinergy filed with the Superintendent of Insurance a document confirming that Cinergy now had GTL's explicit and direct authorization to sell GTL coverage in Maine. *(Staff Exh. 11)* According to GTL, "When in late 2008 GTL appointed Cinergy as its agent, that appointment was part of a national ministerial program and did not authorize or ratify any actions of Cinergy." *(GTL Br. 22,* see also *18)* To the contrary, authorization is precisely what appointment as an agent means, and this notice of appointment was specific to the State of Maine. It referred to an appointment for future business, not for past business, and the termination notice stated that the appointment was terminated effective November 5, 2009, not July 30, 2008. *(Staff Exh. 11)*

GTL also asserts defenses specific to Counts II, V, and VII. Regarding counts II and V, GTL argues that a violation of 24-A M.R.S.A. § 1420-K cannot result in liability for an insurer because the only remedies provided in Section 1420-K are remedies against the producer. *(GTL Br. 17)*

The actions prohibited by 24-A M.R.S.A. § 1420-K are unlawful sales practices. When a producer engages in those practices on behalf of an insurance carrier, both are liable, and the remedies available include all remedies set forth in 24-AM.R.S.A. § 12-A. The Superintendent's authority to impose those remedies against the producer is set forth in 24-A M.R.S.A. § 1420-K(1), and the Superintendent's authority to impose those remedies against the carrier is set forth in 24-A M.R.S.A. § 1445(1)(D).

Regarding Count II, GTL argues further that even if it accepted business from unlicensed producers, it did not do so knowingly. *(GTL Br. 17)* Count II, however, charges that Cinergy knowingly accepted business from unlicensed producers on behalf of GTL, and that GTL should be held accountable for those actions on its behalf. I have found that Cinergy knowingly accepted business from unlicensed producers, and that it did so on behalf of GTL. GTL allowed this and therefore is accountable as the law provides.

Finally, regarding Count VII, GTL argues that "The drug rebate program was not part of or related to any insurance offering by GTL or any sale of the GTL NCE certificates."*(GTL Br. 5,* see also *21)* The evidence, however, indicates that the program was a sales inducement for the insurance being marketed by Cinergy. *(Staff Exh. 25a)* The phone scripts used in Maine specifically describe that insurance as being "underwritten by

the **Guarantee Trust Life Insurance Company,** an AM Best rated insurance company." *(Id., emphasis in original)* For all the reasons discussed earlier, I find that the insurance in question was in fact an insurance offering by GTL.

I therefore conclude that GTL is accountable, pursuant to 24-A M.R.S.A. § 1445(1)(D), for Cinergy's violations of 24-A M.R.S.A. §§ 1420-K(l)(E), 1420-K(l)(L), 2153, 2160, and 2177.

GTL's Failure to Appoint Cinergy

Count I of the GTL Petition alleges that between February and October of 2008, GTL accepted business sold by Cinergy before appointing Cinergy as its agent, in violation of 24-A M.R.S.A. § 1420-M(1).[44]

GTL raises both the factual defense that Cinergy was not selling GTL coverage and the legal defense that insurers have no obligation under the Maine Insurance Code to appoint their agents. *(GTL Br. 2-3)*

I have found that Cinergy was selling GTL coverage at all relevant times, and GTL has admitted that agents were selling coverage without being appointed. After E.D. filed her complaint with the Bureau, which advised GTL that the agent who sold her the plan was unlicensed, GTL's Vice-President for compliance responded on January 7, 2009, that "we agree that the agent should not have conducted solicitation activities in Maine without being duly licensed and appointed by GTL. Again, we are still awaiting a reasonable explanation as to how a non-appointed agent was apparently soliciting on behalf of GTL." *(Staff Exh. 21)*

GTL argues, however, that the appointment of agents was AMLI's responsibility *(GTL Br. 9),* and Mr. Charley-Gad testified to the same effect *(I Tr. 99).* Even if this were accurate, delegating this responsibility to AMLI does not extinguish GTL's own responsibility. Furthermore, the Program Manager Agreement between GTL and AMLI provides that AMLI makes recommendations and pays commissions on behalf of GTL, but "GTL maintains sole discretion in matters of appointing any agent or broker." *(Staff Exh. 34c)*

Maine's law requiring the appointment of producers begins with the general requirement that "An insurance producer may not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer." 24-A M.R.S.A. § 1420-M(1). GTL argues that because the subject of the sentence is "an insurance producer," and "becomes an appointed agent" is phrased in the passive voice, the sole responsibility for finding a way to become appointed rests with the producer, and it is therefore legal for an insurer to use unappointed agents. *(GTL Br. 15-1 7)*

[44] Count I also alleges that GTL "permitted Cinergy to solicit and sell coverage under the NCE policy to residents of Maine without GTL having appointed them as agents," but does not cite this as a separate violation and does not assert that GTL is accountable under 24-A M.R.S.A. § 1445 for Cinergy's violations of the appointment laws.

Even if the statute ended with the provision cited by the parties, the only way a producer can become an appointed agent is if the insurer makes the required appointment. Thus, Section 1420-M necessarily places a legal duty on the insurer as well as on the producer. Furthermore, Subsections 2 through 4 make that duty explicit: the insurer must file a notice of appointment with the Superintendent and must pay the required appointment fee and renewal fee.

I therefore conclude that GTL violated 24-A M.R.S.A. § 1420-M(l) by repeatedly permitting Cinergy to act as its agent, as authorized by AMLI, without having been appointed by GTL.

AMLI as Unlicensed TPA

Count VIII of the GTL Petition alleges that GTL committed fraudulent insurance acts, in violation of 24-A M.R.S.A. § 2186(2), by hiring AMLI to act as a third-party administrator (TPA) for its Maine business when AMLI did not have a Maine license.

With limited exceptions that do not apply in this case,[45] any entity that collects health insurance premiums or pays health insurance claims on behalf of an insurer is acting as an administrator, and must be licensed by the Superintendent. 24-A M.R.S.A. §§ 1901(1) & 1902. GTL hired two TPAs to handle its funds. Premiums were collected and administered by AMLI pursuant to the Program Manager Agreement. *(Staff Exh. 34c; I Tr. 127-128)* The claim fund was administered by PCI. *(GTL Exh. 13; I Tr. 125)*

PCI has been a Maine-licensed TPA at all relevant times, but AMLI has not been. GTL does not deny that "AMLI was not licensed in Maine to collect premiums," but argues that AMLI should bear the sole blame for that unlicensed activity. According to GTL, "AMLI was ... responsible for registering itself as a third-party administrator" *(GTL Br. 9),* and "AMLI had not complied with a single requirement of Maine law" *(GTL Br. 21).* Therefore, GTL argues, "If AMLI were part of this Petition this count would be against them and not GTL." *(GTL Br. 21)* To the contrary, AML17s wrongdoing on behalf of GTL does not excuse GTL from its responsibility for hiring an entity that violated the law.

The violation GTL committed, however, was not a fraudulent insurance act. Although GTL hired AMLI to act as its third-party administrator, and

AMLI was not licensed as required by law, unlicensed activity is only a fraudulent insurance act within the meaning of 24-A M.R.S.A. § 2186(1)(A)(6) "when committed knowingly and with intent to defraud." 24-A M.R.S.A. § 2186(1)(A). GTL contends that "the Bureau Staff can not meet its burden that GTL intended to defraud anyone." *(GTL Br. 22)* In support of its allegation that GTL acted knowingly and with intent to defraud, the Staff cites only the undisputed fact that GTL did know that AMLI was not licensed as an insurer, which was the reason the fronting agreement was necessary. *(Staff Br. 25)*

[45] The most nearly relevant exception is for one licensed insurer administering the business of another insurer, 24-A M.R.S.A. § 1901(1)(D)(l), but AMLI was not licensed.

That is insufficient to support an inference that GTL knew that AMLI would not obtain a TPA license, let alone that GTL hired an unlicensed TPA with intent to defraud anyone. I find Mr. Charley-Gad to have been credible when he testified repeatedly that GTL had little idea what AMLI was actually doing in GTL's name. Therefore, I cannot conclude from this record that GTL committed a fraudulent insurance act by hiring AMLI as its TPA.

However, GTL should have verified that both of its TPAs obtained the licenses they needed in order to carry out the responsibilities GTL knew it had delegated to them. Only one of the TPAs did so. Therefore, I conclude that while GTL did not commit the specific violation charged in Count VIII, the Staff did prove all the factual allegations alleged in Count VIII, and thereby proved that GTL hired an unlicensed TPA in violation of 24-A M.R.S.A. § 1902. That is a lesser included violation, because GTL was on notice both that TPAs are required to be licensed and that Count VIII alleged that GTL unlawfully hired an unlicensed TPA.

Remedies

In summary, Cinergy has engaged in a pattern and practice of deceptive conduct, in violation of 24-A M.R.S.A. §§ 1420-K(l)(E), 2153, 2160, 2177, and has engaged in a pattern and practice of unauthorized producer activity, in violation of 24-A M.R.S.A. §§ 1420-K(l)(L) and 1420-M(1).

During almost all of the relevant time period, beginning no later than February 8, 2008, Cinergy was acting on behalf of GTL. GTL is therefore accountable, pursuant to 24-A M.R.S.A. § 1445(1)(D), for all of the above violations by Cinergy to the extent that they occurred on or after February 8, 2008. In addition, GTL violated 24-A M.R.S.A. § 2412(1-A)(B) by providing coverage to Maine residents under an association group policy without filing the required information about the association, violated 24-A M.R.S.A. § 1420-M(l) by permitting Cinergy to act as its

agent without appointing Cinergy, and violated 24-A M.R.S.A. § 1902 by hiring AMLI as an unlicensed third-party administrator.

Revocation

Pursuant to 24-A M.R.S.A. § 1420-K(l), the Superintendent may revoke an insurer's license for serious misconduct. The statutory grounds for license revocation include, but are not limited to, violation of insurance laws; intentionally misrepresenting the terms of actual or proposed insurance contracts or applications; committing insurance unfair trade practices or fraud; using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility; and knowingly accepting insurance business from unlicensed individuals. 24-A M.R.S.A. § 1420-K(l)(B), (E), (G), (H), & (L).

Multiple instances of each of these grounds for revocation has been proven. Cinergy's insurance producer license is therefore revoked.

Civil Penalties

Pursuant to 24-A M.R.S.A. § 12-A(1), for every violation of the insurance laws by a business entity, the Superintendent may impose a civil penalty of up to $10,000. In this case, the number of proven violations by each Respondent numbers in the hundreds, which would support a maximum penalty in the millions of dollars. Specifically, Cinergy made more than 80 sales to Maine consumers, and each of those sales was found to involve at least 8 completely distinct violations: material misrepresentations regarding Cinergy's status, material misrepresentations regarding 6 aspects of the Plan's terms, and an illegal rebate offer. In addition, Cinergy Exhibit 1 lists 59 sales by unlicensed producers, and more than 60 Cinergy sales were made in violation of the appointment laws. That amounts to more than 760 separate violations, without addressing the misrepresentations directed for a year to the general public, and the telephone solicitations to consumers who did not buy the Plan.

Penalties must reflect the serious nature of the wrongful acts. In order to have a meaningful deterrent effect, a penalty must measurably exceed the gains that could be expected from unlawful conduct. Otherwise the penalty is simply a cost of doing business. A civil penalty of $650,000 against Cinergy is ordered. The impact of restitution has been considered and is reflected in the amount of the civil penalty.

GTL's violations are not on the same order of magnitude. The record does not demonstrate that GTL engaged in knowing or intentional misconduct in the same manner as Cinergy. However, GTL facilitated Cinergy's misconduct by recklessly delegating its authority to AMLI, and ultimately to Cinergy, with no meaningful effort to monitor the performance of its

subcontractors. I am therefore imposing a civil penalty of $150,000 against GTL.

Restitution and Accounting

Finally, pursuant to 24-A M.R.S.A. § 12-A(6), the superintendent may order restitution for any insured or applicant for insurance injured by a violation for which a civil penalty may be assessed.

Although this was not charged in the Petition, there is compelling evidence that the primary source of Cinergy's profits in Maine was the collection of unlawful fees from Maine consumers, as excess charges for insurance in violation of 24-A M.R.S.A. § 2174. Cinergy is not entitled to retain such fees. Cinergy told its customers they were paying for an insurance plan, and if they bought it from Cinergy they would be getting a few incidental benefits. They were explicitly told the prescription drug discount card was free, and they were not told that there was any charge for the other NCE benefits. *(Staff Exh. 25a, 25c)* G.W. testified that the only thing he bought from Cinergy was health insurance.*(I Tr. 164-65, 177)* Consumers paid Cinergy a single monthly amount for the "Cinergy Health Preferred" plan, with no itemization between the charge for the GTL insurance and any charge Cinergy might have levied for other plan benefits. *(I Tr. 164-65; Staff Exh. 33)* By Cinergy's own calculations, however, Cinergy collected $221,296.26 from its Maine customers, while the premium actually charged by GTL was at most $132,856.14. *(Cinergy Exh. 3; I Tr. 119)* Furthermore, although Cinergy represented to the Bureau that "Neither Cinergy nor Cinergy's producers have received commissions or other compensation directly from GTL" *(Staff Exh. 35, emphasis added),* that does not mean that the "recruiting fees" were Cinergy's only compensation even if Cinergy's representation is accurate. "Marketing Assistance" was one of the functions for which GTL paid substantial program manager fees to AMLI *(Staff Exh. 34c),* and the record is silent as to whether AMLI paid any share of those fees to Cinergy.

Therefore, Cinergy is ordered to provide a full accounting of all compensation it has received, directly and indirectly, for its Maine business, so that I can determine how much restitution is owed to Maine consumers pursuant to 24-A M.R.S.A. § 12-A(6). Because the collection of unlawful fees is not a violation that was charged in the Petition, I am not imposing any penalty for that violation. Restitution is remedial rather than punitive, and the accounting I am ordering in this Decision and Order is an obligation Cinergy has as a former licensee, independent of any disciplinary proceeding, pursuant to 24-A M.R.S.A. §§ 220, 221, and 1447, and 1449.

Order and Notice of Appeal Rights

It is therefore *ORDERED:*

1. The license of Cinergy Health, Inc. to act as a nonresident insurance producer agency is *REVOKED,* effective immediately.
2. No later than June 1, 2011, Cinergy Health, Inc. shall pay a civil penalty of $650,000, by check payable to the Treasurer of State.
3. No later than June 1, 2011, Guarantee Trust Life Insurance Company shall pay a civil penalty of $150,000, by check payable to the Treasurer of State.
4. Cinergy Health, Inc. shall provide a full accounting of all compensation it has received, directly and indirectly, for its Maine business. Cinergy Health, Inc. shall make its books and records available for review by Bureau of Insurance personnel, shall respond promptly and fully to all inquiries by the Bureau relating to this issue, within such time and in such manner as the Bureau reasonably directs, and shall provide the Bureau at its own expense with copies of all relevant documents requested by the Bureau. After reviewing the information provided, the Superintendent shall determine the amount of restitution Cinergy Health, Inc. is required to pay and the persons entitled to payment.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before June 6, 2011. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF

APRIL 26, 2011

MILA KOFMAN, Superintendent of Insurance