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SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-09-29

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HUGH E. LUMBERT
CLERK OF COURTS

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

PLAINTIFF/PETITIONER ANTHEM
HEALTH PLANS OF MAINE, INC'S
BRIEF IN SUPPORT OF PETITION
FOR REVIEW OF
FINAL AGENCY ACTION
(M.R.Civ.P. 80C)

v.)

SUPERINTENDENT OF INSURANCE,)
Respondent, and)

ATTORNEY GENERAL OF THE STATE OF)
MAINE,)
Party in interest)

Pursuant to Maine Rule of Civil Procedure 80C, Plaintiff / Petitioner Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield (“Anthem BCBS”), by and through its attorneys, hereby submits its brief.

I. Introduction

Maine law requires that insurance carriers doing business in the State of Maine submit proposed premium rates for individual insurance products¹ to the Superintendent of Insurance (“Superintendent”) for review and approval. Among other statutory requirements, the Superintendent must ensure that the rates set for individual insurance products are adequate – that is, cover all expenses incurred by the carrier to provide the product plus allow for a reasonable rate of return. As the individual rating laws apply to individual insurance products only, the adequacy of the rates is determined based on a review of all of the expenses and

¹ Individual insurance products are policies issued directly from the insurance carrier to the individual policyholder, as distinct from group insurance products, which are offered to employees through their employers.

corresponding premium revenues that apply to the individual insurance products that are the subject of the review. The expenses, revenues and profitability of other lines of business are not considered; indeed, as recently as April, 2009, the Superintendent reiterated this very principle when testifying concerning then pending legislation.

Historically, the Superintendent has approved a 3% pre-tax margin for profit and risk for the individual insurance products offered by Anthem BCBS in the Maine market. Demonstrating that even a 3% profit and risk charge frequently is insufficient to cover the risks in the Maine individual insurance market, over the past five years, only once has Anthem BCBS achieved an operating gain of 3% or more for its individual products, and in the aggregate, Anthem BCBS has experienced losses of more than \$3.7 million from its individual line during that time.

Notwithstanding all of the above, on May 18, 2009, the Superintendent issued a Decision and Order (the "Decision") following review of Anthem BCBS's 2009 rate filing for individual HealthChoice, HealthChoice Standard, HealthChoice Basic, and Lumenos Consumer Directed Health Plan products (collectively "Individual Insurance Products"), which ordered that Anthem BCBS be "allow[ed] no profit and risk margin this year." Decision, Record, p. 311. The Superintendent's stated basis for the 0% margin was 1) the financial hardship of those subscribing to individual products in Maine; and 2) the overall financial health of Anthem BCBS. *Id.*

Regulatory imposition of a 0% risk and profit margin is both unprecedented and highly unlikely to cover all of Anthem BCBS's costs of providing its Individual Insurance Products, much less allow for a reasonable rate of return. As explained more fully below, the Superintendent's Decision is (1) contrary to the Legislative requirement that rates must be adequate, (2) sets rates that are confiscatory and contrary to the Superintendent's own

interpretation of the existing law, (3) inadequately supported by the record, and (4) discriminatory and unconstitutional. Unless modified, the Decision will result in Anthem BCBS having to absorb potentially multi-million dollar losses in its Individual Insurance Products through its sales of group products and/or a substantial reduction to its bottom line. This is fundamentally unfair and would place Anthem BCBS at a competitive disadvantage *via a vis* every other insurance carrier in Maine.

The Superintendent's Decision should be vacated and remanded with instructions to allow for rates that include at least a 3% profit and risk margin based solely on the financial results of Anthem BCBS's Individual Insurance Products.

II. Background and Facts

A. The Composition of Individual Insurance Rates

Before discussing the statutory framework for setting rates for individual insurance products and how the Superintendent's Decision does not comply with those statutes, it is important to understand, in basic terms, what Anthem BCBS asked for in its 2009 rate filing and what the Superintendent ordered. Anthem BCBS's rate filing included proposed premium rates for its HealthChoice and Lumenos products. The components for the proposed premium rates included in the rate filing were as follows:

- Medical claims paid by Anthem BCBS for members: 87.7 cents of each \$1.00 of premium, Record, p. 372;
- Premium Tax: 2 cents of each \$1.00 of premium, Record, p. 203;
- Costs to deliver and administer the insurance product (including commissions): 7.3 cents of each \$1.00 of premium, Record, p. 192;
- Risk and Profit: 3 cents of each \$1.00 of pre-tax premium (approximately 2 cents of post-tax premium), Record, p. 203.

Therefore, out of each \$1.00 (one dollar) of premium, Anthem BCBS proposed that it receive 3 cents (pre-tax) to cover both its risk in the individual insurance business in Maine and to contribute to the surplus of the company. Instead of accepting this reasonable and fully precedented 3% risk and profit amount, which over the past five years has resulted in a cumulative loss for Anthem BCBS's individual line of business, the Superintendent took the extreme step of imposing a 0% risk and profit charge. In other words, the Superintendent ordered that Anthem BCBS's individual insurance premium rates must contain 0 cents out of every \$1.00 of premium to account for risk in the product line and to contribute to the company's surplus. By making this decision, the Superintendent turned what was a struggling line of business – overall loss during the past 5 years – into a line of business that will lose money in the next year.

B. Individual Insurance Rates Must Be Set By Reviewing The Expenses And Revenues Of The Individual Insurance Products And Must Cover All Costs Plus Allow For A Reasonable Rate Of Return That Results In A Contribution To The Surplus Of The Company.

Anthem BCBS offers both group health insurance and individual health insurance in the State of Maine. Pursuant to 24-A M.R.S.A. § 2736, individual health insurance premium rates must be submitted to the Superintendent for review and approval. Among other requirements, the Superintendent is required to ensure that premiums for individual insurance in the State of Maine are not inadequate as to the insurance carriers. *Id.*, § 2736(2). Rates are adequate if they cover all expenses of providing the insurance product (e.g., the cost of health claims, administering the product, premium tax, etc.) as well as allow for a reasonable return to add to the surplus of the company. Record, p. 1584 (acknowledgment by the Attorney General's expert that individual insurance rates must be sufficient to cover all claim and administrative costs plus provide for a reasonable after tax profit to contribute to the surplus of the company).

Section 2736 requires that the Superintendent consider rates in the context of the financial performance of only the carrier's individual insurance products, not the financial performance/health of the carrier as a whole and/or other lines of insurance offered by the carrier. The Superintendent recently acknowledged this requirement in public testimony concerning L.D. 1205:

Part D [of L.D. 1205] would make various changes to the health insurance rate filing laws, including . . . requiring the Superintendent to “consider revenues and expenses from all line segments of the filing insurer,” rather than limiting the inquiry to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product. If the intent of this provision is to allow rates to be deemed excessive based on the overall profitability of the carrier, whether or not the rates are sufficient to make the product self-supporting, it could have the unintended consequence of encouraging carriers to withdraw from the individual market entirely, and concentrate on more profitable group markets.

(Testimony of Superintendent Mila Kofman submitted to the Joint Standing Committee on Insurance and Financial Services concerning L.D. 1205, dated April 13, 2009.)²

The concept that individual insurance rates should be set without regard to the overall financial health of the particular carrier and without the need for subsidization from the carrier's group business is not a new one. In 2002, former Superintendent of Insurance Alessandro A. Iuppa explained that setting Anthem BCBS's individual insurance rates at an inadequate level would lead to inappropriate subsidization of the individual insurance business, placing Anthem BCBS at a competitive disadvantage in the group insurance market. In his 2002 Anthem rate decision, Docket No. INS-02-785, Superintendent Iuppa stated that “it would not be proper or prudent for the Superintendent to require Anthem to write its non-group business at a loss,” and noted in a footnote that “[w]hile there are good public policy arguments for requiring individual products to be subsidized, requiring the subsidy to come only from Anthem would put the

² The individual insurance products rating laws do not apply to group insurance products.

Company at a competitive disadvantage in the group market.” Docket No. INS-02-785, available at http://www.maine.gov/pfr/insurance/hearing_decisions/02-785.htm.

C. Financial Risks Associated with Providing Individual Insurance in Maine

There are significant financial risks associated with providing individual health insurance in Maine. In addition to having an older population, Maine has high incidences of chronic illnesses (such as asthma, heart disease, diabetes, etc.), high numbers of smokers, and a regulatory environment that imposes a number of mandated benefits and prohibits underwriting of any sort that would otherwise allow individuals to be rated in a way that is more reflective of their relative risks. 24-A M.R.S.A. §2736-C(2). Maine law also requires that policies must be issued and renewed to any consumer, irrespective of their medical condition or claims history. 24-A M.R.S.A. §2736-C(3), §2850-B. As Anthem BCBS remains the only significant insurer in the individual insurance market, Anthem BCBS individual products including HealthChoice and Lumenos have become a de facto individual high-risk pool for the State of Maine. This means that Anthem BCBS provides insurance for those Maine individuals who are far more likely to use health services than the general population, which creates far more risk to Anthem BCBS than would a healthier, stable membership population.

These risks have been reflected in Anthem BCBS’s financial results for its Individual Insurance Products. More specifically, in the past, when the Superintendent approved rates that contemplated a 3% profit margin as being adequate, the company achieved a 3% profit on its Individual Insurance Products once since 2004, and in the aggregate has actually experienced a net loss of more than \$3.7 million since that time (Record, p. 144):

Year	Operating Gain Before Federal Income Tax (\$000)	Operating Gain as a Percentage
2004	\$1,044	1.6%

Is this all indiv policies, or just the indivs in question?

2005	(\$3,056)	-4.2%
2006	(\$7,094)	-9.9%
2007	\$3,575	5.3%
2008	\$1,769	2.8%
Total	(\$3,762)	

In prior orders, the Superintendent determined that a 3% pre-tax margin for profit and risk for the HealthChoice products was adequate.³ As recently as December 1, 2008, the Superintendent approved of a 3% risk and profit charge (pre-tax profit margin) for Mega Life and Health Insurance Company for its individual health insurance product rates that were effective for 2009. *See* Docket No. INS-08-1000.⁴

If the approved profits for 2004 – 2008 had been actually achieved, Anthem BCBS would have had gains of \$10.3 million. *See* Record, p. 144 (calculating 3% of revenue total from 2004 through 2008). As illustrated by the significant losses for this product in 2005 and 2006 followed by moderate profits in 2007 and 2008, the 3% pre-tax margin has been inadequate to cover even the risks associated with providing individual insurance in this market, much less provide a reasonable contribution to surplus. That is, even when the rates included a 3% pre-tax profit and risk charge, Anthem BCBS has in some years lost multiple millions of dollars on the Individual Insurance Products.

D. The Superintendent's 2009 Rate Decision: 0% Risk and Profit

³ Since 2003, the Superintendent in each year's rate proceeding approved a 3% risk and profit charge (pre-tax profit margin) for Anthem BCBS's Individual Insurance Products as meeting the standards of adequacy. *See, e.g.*, Bureau of Insurance Docket Nos. INS-02-785 (2003 individual rate decision); INS-04-610 (2005 individual rate decision); INS-05-820 (2006 individual rate decision); INS-06-1000 (2007 individual rate decision); INS-07-1000 (2008 individual rate decision). (All of the above decisions are available at http://www.maine.gov/pfr/insurance/hearing_decisions/index.htm.)

⁴ In this recent decision setting 2009 individual insurance rates for Mega Life and Health Insurance Company, *see* Docket No. INS-08-1000, the Superintendent ordered a 3% risk and profit charge and rejected a request for a higher risk and profit charge, in part, by relying on "the need for equity in the marketplace." Docket No. INS-08-1000.

Notwithstanding the requirement that rates must be adequate, the Superintendent in the Decision broke both with well-established historical precedent and her most recent decision for 2009 rates for another carrier and summarily ordered Anthem BCBS to use a 0% profit and risk charge in its 2009 rates, citing only that there were many public comments about the state of the economy and Anthem BCBS's overall general financial health:

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

Decision, Record, p. 311. (emphasis added).

Importantly, the Superintendent did not base the decision to order a 0% risk and profit charge exclusively on the financial performance of the Individual Insurance Products (which have resulted in the losses outlined above). Instead – contrary to her own almost contemporaneous testimony before the Legislature on existing Maine law– the Superintendent based the 0% profit and risk charge on the overall financial health of the company.

III. Argument

A. The Superintendent’s 0% Risk and Profit Charge Should be Rejected Because it Creates Confiscatory Rates that are Inadequate and Contrary to the Superintendent’s Own Interpretation.

As stated above, the Superintendent’s charge is to review Anthem BCBS’s proposed rates for its Individual Insurance Products to determine if they are “excessive, inadequate, or unfairly discriminatory.” 24-A M.R.S.A. § 2736(2). On the one hand, the review of whether the rates are “excessive” protects the consumers by making sure that the individual rates are not unreasonably high. On the other hand, the review of “adequacy” is included in the statute to ensure that carriers offering individual insurance products receive sufficient premiums to cover costs and a

reasonable margin to cover unanticipated risks and contribute to the surplus of the carrier. Therefore, the “excessive” check protects the consumer and the “inadequate” check protects the carrier. Importantly here, the Superintendent made no finding that a 3% pre-tax profit is “excessive” – indeed, given the well-established precedent set by the Superintendent to the contrary, there would be no basis for such a finding. The Superintendent likewise made no explicit finding that 0% to cover risk and profit is adequate, deciding instead to impose the societal problems attendant to the poor economy – at least among insurance carriers – solely on Anthem BCBS because the overall company is financially sound. This is not a valid basis upon which to determine the adequacy or excessiveness of insurance premium rates.

As the Superintendent has testified, the concept of adequacy in existing Maine law must be determined in the context of the particular product line’s performance and contribution to surplus, not on the overall financial health of the Company. *See* Testimony of Superintendent Mila Kofman before the Joint Standing Committee on Insurance and Financial Services concerning L.D. 1205, dated April 13, 2009 (explaining that allowing rates to be evaluated based on the overall profitability of the carrier, whether or not the rates are sufficient to make products self-supporting, is improper because this could lead to carriers withdrawing from the individual market entirely).⁵ The Superintendent’s contrary interpretation in the Anthem BCBS Rate Decision is simply not supportable.

A 0% risk and profit charge, by definition, builds in no cushion for any of the risk that Anthem BCBS takes on by selling Individual Insurance Products in Maine. In addition, with a 0% risk and profit charge under the Superintendent’s approved rates, Anthem BCBS will not be

⁵ Indeed, L.D. 1205, recognizes that existing Maine law requires the Superintendent to consider the financial performance of each health insurance product when setting rates, not the “revenues and expenses from all line segments of the filing insurer.” Importantly, the Legislature did not enact this provision of L.D. 1205. As such,

able to provide any contribution to the surplus of the Company. Because the Superintendent's rates, including a 0% risk and profit charge, are confiscatory, the Superintendent's Decision should be vacated and remanded with instructions to include at least a 3% pre-tax risk and profit charge in Anthem BCBS's individual insurance rates that allows for a reasonable contribution to the surplus of the Company.

B. The Superintendent Fails to Provide a Reasoned Basis for The Decision to Order a 0% Risk and Profit Charge

Even if the Superintendent's change in interpretation of Section 2736 were otherwise permissible (which it is not in light of the Legislature's rejection of that portion of L.D. 1205 addressed by the Superintendent), neither of the Superintendent's articulated reasons for ordering a 0% risk and profit charge – the overall financial health of Anthem and the comments from policyholders at the public hearings – provides the rationale that is necessary for such a change in course. *See, e.g., Motor Vehicle Man. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 403 U.S. 29, 42 (U.S. 1983) (agency changing its course by rescinding rule or policy “is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”; vacating decision upholding agency action due to agency's failure to provide rationale for change in policy). Anthem BCBS – a for-profit Company – cannot be required to operate its highly risky Individual Insurance Products essentially as a non-profit company that must offset losses generated by the Individual Insurance Products through its group insurance business in Maine.

1. The Superintendent's Reliance on the Overall Financial Health of Anthem BCBS is Contrary to the Statutory Scheme of the Maine Insurance Code.

upholding the Superintendent's Decision would have the effect of doing that which the Legislature affirmatively rejected.

The Superintendent's reliance on the overall financial health of Anthem BCBS, which includes Anthem BCBS's group insurance products, is contrary to: (1) Section 2736, which on its face regulates only Individual Insurance Products, (2) the Superintendent's own most recent interpretation of Maine law which "limit[s] the inquiry to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product," see Superintendent's April 13, 2009 testimony interpreting existing legal requirements, and (3) former Superintendent Iuppa's statement that "it would not be proper or prudent for the Superintendent to require Anthem to write its non-group business at a loss."

In effect, the Superintendent's Decision to order a 0% risk and profit charge singles out Anthem BCBS and requires it to operate its individual insurance business in Maine at a loss and subsidize its Individual Insurance Products with profits from its group business. As both the current and a predecessor Superintendent warned, the imposition of a 0% risk and profit charge requires an indirect subsidy of the individual products by the group products that Anthem BCBS offers; a subsidy not authorized by the Maine Insurance Code and not required of any other insurer in the Maine insurance market. Requiring Anthem BCBS to subsidize its individual business with its group business singles out Anthem BCBS and puts the company at a competitive disadvantage with all of the carriers in Maine that offer group, but not individual, insurance products. Ironically then, in exchange for Anthem BCBS's continued willingness to serve the individual market, the company's "reward" will be losses that would act as a competitive drag on the other business it writes in Maine. If there is going to be an individual high risk pool in Maine, then it should be recognized as such, and, if it needs to be subsidized, all carriers in the State should share in that effort. To require Anthem BCBS to shoulder this burden alone is discriminatory, inequitable and, in any event, contrary to Maine's statutory requirement

that rates must be adequate. There is thus no basis for the Superintendent's reliance on the overall financial health of Anthem BCBS when setting Anthem BCBS's rates for Individual Insurance Products.

2. The Superintendent's Reliance on the Comments of Policyholders is Improper.

Besides the impermissible reliance on the overall financial health of Anthem BCBS, the Superintendent's only other articulated basis for the decision to require a 0% risk and profit charge is the "ample evidence" of "extreme financial hardship of subscribers" presented through comments of individuals at public hearings or in written comments.⁶ The Superintendent's reliance on these comments as one of only two bases for the decision to order a 0% risk and profit charge is improper. None of the witnesses who made sworn or unsworn statements professed to have an actuarial background and/or familiarity with the financial and actuarial analysis reflected in Anthem BCBS's rate filing to determine whether the rates were designed to cover the costs of the products plus allow for a reasonable rate of return.⁷ Rather, the majority of the statements, while certainly reflecting personal dissatisfaction with any rate increase, were directed at the state of the economy in general, their own personal financial situation,⁸ and, in some cases, the overall profitability of WellPoint, Inc. and salaries paid to corporate officers.

⁶ Not all of the individuals offering sworn statements at the public hearings were holders of Anthem BCBS individual insurance policies.

⁷ Only sworn statements were to be included as part of the record upon which the Superintendent based her Decision. 5 M.R.S.A. § 9057.

⁸ Nothing in Section 2736 suggests that the general state of the economy or a particular insured's personal financial circumstances are factors to consider when establishing insurance rates. Instead, the Superintendent must evaluate the proposed rates for "excessiveness" and "adequacy" in light of the performance of Anthem BCBS's individual line of business. Put differently, the statutory parameters of "excessiveness" and "adequacy" of individual rates do not vacillate depending on the state of the overall economy and insureds' personal financial circumstances. See Testimony of Superintendent Mila Kofman before the Joint Standing Committee on Insurance and Financial Services concerning L.D. 1205, dated April 13, 2009 (addressing the proposed amendments to the health insurance rate filing laws and explaining that the existing law "limit[s] the inquiry to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product") (emphasis added). Indeed, if consideration of the general state of the economy or a particular insured's personal financial

Counsel for Anthem BCBS noted to the Superintendent – several times – that these comments were not relevant to the determination of whether the proposed rates for the Individual Insurance Products were excessive, inadequate or unfairly discriminatory. *See e.g.*, March 12, 2009 Public Hearing Transcript, Record, p. 1384. The Superintendent acknowledged this point at the hearing, *see e.g.*, March 12, 2009 Public Hearing Transcript, Record, p. 1384, yet thereafter apparently relied upon those public comments when imposing a 0% profit and risk charge. This was improper.

Anthem BCBS has demonstrated in its rate filing and throughout the rate-setting proceeding before the Superintendent that a 3% risk and profit charge has led to a loss for Anthem BCBS's individual products over the last five years. Record, p. 144. The comments from the public do not directly address the financial and actuarial analysis included in Anthem BCBS's rate filing, including Anthem BCBS's analysis of risk and profit for its Individual Insurance Products. Therefore, the public comments do not provide a valid, legally supported basis for the Superintendent's decision. Moreover, while the recent economic downturn has created challenges for many businesses and individuals, it is unfair to impose the burden of subsidizing those financial challenges on Anthem BCBS, particularly when that is not required of any other insurance carrier in the State of Maine.

In sum, the two articulated bases for the Superintendent's decision to order a 0% risk and profit charge are unreasonable, constitute an error of law, an abuse of discretion, and are arbitrary and capricious.

C. The Superintendent's Decision Imposing a 0% Risk and Profit Charge Should be Vacated because it Ignores the Statutory Adequacy Requirement.

circumstances was appropriate, it would also have to be true that permissible profit levels in rate design would increase above historical levels when the economy and anecdotal personal financial circumstances exceed historical averages.

The Superintendent does not have the authority to change or ignore a legislative directive. *See, e.g., Bd. of Tr. of Univ. of Maine Sys. v. Assoc. Colt Staff of Univ. of Maine Sys.*, 659 A.2d 842, 846 (Me. 1995) (deference not warranted to Board's newfound construction that was contrary to statute's plain language and legislative history). The Superintendent's 0% profit and risk charge ignores the adequacy requirement of 24-A M.R.S.A. §2736 in that it does not provide for rates that cover all costs plus allow for a reasonable margin to cover unanticipated risks and contribute to the surplus of the Company. The Decision also violates the fundamental rule of statutory construction requiring all words in a statute to be given meaning, and no words to be treated as surplusage if they can be reasonably construed. *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566, 569. Finally, by ignoring the adequacy requirement, the Superintendent has failed to give effect to the intent of the legislature. *See State v. Lane*, 495 A.2d 773, 775 (Me. 1985) ("A statute must be construed as a whole to give effect to the intent of the legislature."). For all of these reasons, the Superintendent's order of a 0% risk and profit charge should be vacated.

D. The Superintendent's Decision to Require a 0% Risk and Profit Charge is Discriminatory and Violates Anthem BCBS's Constitutional Rights.

Anthem BCBS's rights to due process and equal protection are guaranteed by the 14th Amendment to the United States Constitution as well as by the Maine Constitution. The Superintendent's decision to order Anthem BCBS to use a 0% profit and risk charge violates Anthem BCBS's equal protection rights in at least two ways.

First, the Superintendent's decision to order Anthem BCBS to use a 0% profit and risk charge in its 2009 rates unfairly discriminates against Anthem BCBS when Anthem BCBS's profit and risk charge, as ordered by the Superintendent, is compared to other carriers in the Maine individual insurance market.

Second, the Superintendent's decision to order Anthem BCBS to use a 0% profit and risk charge in its 2009 individual insurance rates requires Anthem BCBS to subsidize its Individual Insurance Products with dollars earned by its group insurance product line, and therefore unfairly discriminates against Anthem BCBS as a provider of group insurance in Maine as compared to other providers of group insurance in Maine who are not subject to forced subsidization.

The federal and state Constitutions mandate that no state shall deny any person the equal protection of the laws. U.S. Const. amend. XIV; Me. Const. art. 1, § 6-A.⁹ In a 2003 Supreme Court decision addressing an equal protection challenge to a tax law, the Court described rational basis scrutiny as follows: “[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103 (2003) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992)).

The guarantee of equal protection under the Maine Constitution is coextensive with the federal guarantee, and Maine courts employ a similar rational basis analysis. Where there is no suspect class or fundamental right at issue, “different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest.” *Sch. Admin. Dist. No. 1 v. Comm’r, Dep’t of Educ.*, 659 A.2d 854, 857 (Me. 1995).

⁹ Although equal protection typically applies to distinctions between classes, the Supreme Court has also “recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000). Thus, to make out a claim for violation of equal protection, the plaintiff need not allege membership in a class or group, but instead may allege that that she has been singled out for differential treatment without rational justification. *Id.*

Here, there is no dispute that Anthem BCBS is the only individual insurance carrier in Maine for whom the Superintendent has required a 0% risk and profit charge for individual rates effective in 2009. The Mega Life and Health Insurance Company was allowed 3% pre-tax profit for its 2009 individual rates (in December 2008 – only 5.5 months earlier). See Bureau of Insurance Docket Number INS-08-1000. When rejecting Mega’s request for a profit and risk charge greater than 3%, the Superintendent acknowledged the importance of “equity in the marketplace” among competitors. Bureau of Insurance Docket Number INS-08-1000. That principle was abandoned in the Superintendent’s Decision on Anthem BCBS’s 2009 rates. Therefore, Anthem BCBS is being treated differently than similarly situated insurance carriers in Maine.

Even if having lower health insurance rates may be a legitimate state interest, there is no rational basis for singling out Anthem BCBS and treating it differently than other carriers in the individual insurance market. Furthermore, there is no rational basis for treating Anthem BCBS differently than the other group carriers in Maine, none of which are required to subsidize an individual line of business. In fact, requiring Anthem BCBS to include a 0% risk and profit charge as part of its rates for its Individual Insurance Products is both arbitrary and irrational when no other individual insurance carrier in Maine has a 0% risk and profit charge included in its rates and when no other group insurance carrier in Maine is being required to subsidize its individual insurance business.

In *Verizon New England v. City of Rochester*, 940 A.2d 237 (N.H. 2007), the New Hampshire Supreme Court held that the City of Rochester violated the equal protection clause of the New Hampshire Constitution by imposing a real property tax on Verizon’s use and occupation of public ways, where it did not impose the tax on other utilities’ indistinguishable

use and occupation of the public ways. *Id.* at 625. The court noted that “[t]he equal protection clause protects [an entity] from state action which selects [it] out for discriminatory treatment by subjecting [it] to taxes not imposed on others of the same class.” *Id.* at 630 (quoting *Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster Cty.*, 488 U.S. 336, 345 (1989)). The court explained, “the city offers, the record reveals, and we can conceive of, no rational reason for selectively imposing this tax upon Verizon, and not upon other utilities that use and occupy public property in the same manner as Verizon. Moreover, the record fails to indicate that any legitimate governmental interest is furthered by this disparate treatment.” *Id.* at 631.

Similarly, in *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597 (Ohio 1994) (per curiam), the Ohio Supreme Court held that a decision by the Tax Commissioner to tax MCI’s transmission equipment at 100% of true value while assessing MCI’s competitors’ transmission equipment at 31% of true value violated the federal and state equal protection clauses. *Id.* at 601. The Commissioner relied on a distinction between MCI and its competitors: MCI, a facility-based carrier, owned or leased the transmission equipment being taxed, while its competitors, “resellers,” leased Wide Area Telephone Service lines from other carriers. *Id.* The Court found that this was a distinction without a difference, finding that the Public Utilities Commission treated facility-based carriers and resellers the same for purposes of regulation and classification. Thus, “two taxpayers within the same class owning or leasing the same type of equipment are treated differently, and this treatment denies MCI equal protection of the laws.” *Id.*

As in *Verizon* and *MCI*, Anthem BCBS is being singled out for discriminatory treatment with the Superintendent’s order of a 0% risk and profit charge. Anthem BCBS and its competitors in the individual market in Maine offer similar products, including state-mandated

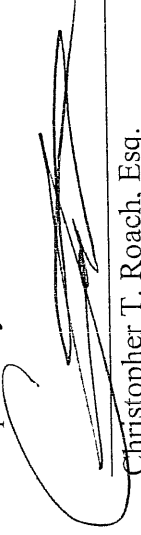
products. But only Anthem BCBS is singled out by being subject to a 0% risk and profit charge thereby eliminating any risk cushion in its rates and any possibility for earning a profit. In addition, only Anthem BCBS, of all the carriers offering group health insurance in Maine, is being required to subsidize its individual business with money earned through its group business. Under both of these circumstances – Anthem BCBS as compared to other individual insurance carriers in Maine and Anthem BCBS as compared to other group insurance carriers in Maine – the Superintendent’s order of a 0% risk and profit charge violates Anthem BCBS’s equal protection rights because Anthem BCBS is being singled out for unfair, discriminatory treatment. Accordingly, the Superintendent’s application of 24-A M.R.S.A. § 2736(2) is unconstitutional under the equal protection rights afforded by both the United States Constitution and the Maine Constitution.

IV. Conclusion

For the reasons set forth herein, Anthem BCBS respectfully requests that the Court enter a judgment vacating the Superintendent’s Decision and Order dated May 18, 2009 and remanding to the Superintendent with instructions to approve rates that include at least a 3% pre-tax profit and risk margin, which is based on the financial results of Anthem BCBS’s Individual Insurance Products and allows for a reasonable contribution to the surplus of the Anthem BCBS.

Dated: August 21, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher T. Roach", is written over a horizontal line.

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