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IN THE MATTER OF REQUEST BY CIGNA OF NEW JERSEY, INC., ALONG WITH AFFILIATED CARRIERS CIGNA HEALTHCARE OF NORTHERN NEW JERSEY, INC., INSURANCE COMPANY OF NORTH AMERICA, AND LIFE INSURANCE COMPANY OF NORTH AMERICA, FOR EXEMPTION FROM ASSESSMENT FOR 1996 REIMBURSABLE LOSSES

IN THE MATTER OF APPEAL BY CIGNA HEALTHCARE OF NEW JERSEY, INC., ALONG WITH AFFILIATED CARRIERS CIGNA HEALTHCARE OF NORTHERN NEW JERSEY, INC., INSURANCE COMPANY OF NORTH AMERICA, AND LIFE INSURANCE COMPANY OF NORTH AMERICA FROM 1996 ASSESSMENT

IHC ADMINISTRATIVE ORDER NO. 02-06

Background

On February 23, 1998, the Individual Health Coverage Program Board of Directors (the "IHC Board") issued IHC Administrative Orders Nos. 98-01 ("In re Request by CIGNA Healthcare of New Jersey, Inc., along with Affiliated Carriers CIGNA Healthcare of Northern New Jersey, Inc., Insurance Company of North America, and Life Insurance Company of North America, for Exemption from Assessment for 1996 Reimbursable Losses") and 98-02 ("In re Appeal by CIGNA Healthcare of New Jersey, Inc., along with Affiliated Carriers CIGNA Healthcare of Northern New Jersey, Inc., Insurance Company of North America, and Life Insurance Company of North America from 1996 Assessment"). Those orders, which are

described more fully below, arose from a challenge by CIGNA HealthCare of New Jersey, Inc., along with affiliated carriers CIGNA HealthCare of Northern New Jersey, Inc., Insurance Company of North America, and Life Insurance Company of North America (collectively, "CIGNA"), of the IHC Board's denial of CIGNA's request for an exemption from its loss assessment for the 1996 calculation period and from CIGNA's appeal from its assessment for 1996, which the IHC Board calculated on the basis that CIGNA did not qualify for an exemption.

After being denied an exemption, CIGNA made a request for a hearing regarding the denial on August 22, 1997, pursuant to N.J.A.C. 11:20.9-5(g).[1] CIGNA supplemented its request on September 4, 1997, September 9, 1997, November 5, 1997, and January 14, 1998. Pursuant to N.J.A.C. 11:20-2.15, in response to the IHC Board's issuance on December 15**,** 1997 of the 1996 assessment, CIGNA also requested a hearing on January 12, 1998.

CIGNA's submissions to the IHC Board raised various factual and legal issues relating to the 1996 assessment and the IHC Board's denial of CIGNA's request for an exemption therefrom. On February 23, 1998, the IHC Board voted to transmit the factual issues to the Office of Administrative Law ("OAL") for a contested-case hearing, and it reserved decision on the legal issues, which are set forth below, pending the completion of the OAL's consideration of the factual issues before it. The following factual issues were transmitted to the OAL:

> 1. the nature and extent of CIGNA's marketing efforts, as reflected in the Good-Faith Marketing Report that it submitted on June 30, [1997], as

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1. After the activities that form the basis for this litigation, both the IHC Act and the IHC's regulations were amended. See L. 1997, c. 146, §§ 1-6; 30 N.J.R. 3289(a) (Sept. 8, 1998). Unless otherwise noted, citations in this Order to the IHC Act and the IHC's regulations refer to the pre-amendment versions of the statute and regulations, which were in effect at all times relevant to this case.

> supplemented on July 9, 1997, September 4, 1997, September 9, 1997, November 5, 1997, and January 14, 1998;
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> 2. whether those efforts could reasonably have been expected to result in the enrollment by CIGNA of the minimum enrollment share that the IHC Board established for CIGNA to meet in order to be eligible for an exemption from the 1996 loss assessment; and
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> 3. whether those efforts constitute good-faith marketing, as set forth in [N.JA.C.] 11:20-9.6.

[IHC Administrative Order No. 98-01.] The IHC Board further ordered that with regard to CIGNA's challenge of the IHC Board's denial of its request for an exemption, "because any remaining issues raised by CIGNA are purely legal issues, the IHC Board will reserve decision on them until after the Office of Administrative Law has rendered its decision in the hearing on the issues before it." Ibid.

With regard to CIGNA's challenge of the loss assessment itself, the IHC Board ordered "that the IHC Board shall reserve decision on CIGNA's challenge of its 1996 assessment until after the Office of Administrative Law has rendered its decision in the hearing on the issues before it."

A hearing was held before the OAL on the transmitted factual issues, and an Initial Decision was sent to the parties on June 20, 2002. In the Initial Decision, the Administrative Law Judge found that "[b]ecause CIGNA's 1996 marketing efforts cannot reasonably be deemed a significant marketing campaign in direct support of sales of standard health benefits plans, CIGNA did not comply with the good-faith marketing requirement as set forth in N.J.A.C. 11:20-9.6(c)." Initial Decision 28-29 (Jun. 20, 2002). After considering

exceptions filed by CIGNA and the IHC Board's responses thereto, the IHC Board issued a Final Decision on October 28, 2002, in which it adopted the Initial Decision, pursuant to N.J.S.A. 52:14B-10c and N.J.A.C. 1:1-18.6(a).

Discussion

Pursuant to Orders 98-01 and 98-02, the IHC Board now renders its decision on the reserved legal issues. In its filings to the IHC Board in late 1997 and in January 1998, CIGNA raised the following legal issues, set forth *verbatim*:

1. THE GOOD FAITH MARKETING RULE IS ARBITRARY, CAPRICIOUS UNREASONABLE AND VAGUE [Letter from David Mannis, CIGNA, to Wardell Sanders, Executive Director, New Jersey Individual Health Coverage Program Board 9 (Sept. 4, 1997) ("9/4/97 Letter").]

2. DENIAL OF A PRO RATA EXEMPTION IS CONTRARY TO PUBLIC POLICY [9/4/97 Letter, at 11.]

3. THE BOARD'S DENIAL OF CIGNA'S EXEMPTION EXCEEDED ITS AUTHORITY UNDER THE INDIVIDUAL HEALTH INSURANCE REFORM ACT, N.J.S.A. 17B:27A-2 to -16.5 [9/4/97 Letter, at 15.]

4. THE IHC BOARD'S 1996 ASSESSMENTS UNLAWFULLY EXCEED ITS STATUTORY AUTHORITY AND FAIL TO FOLLOW THE REQUIREMENTS OF THE IHC ACT [Letter from John M. Pellecchia, Esq., to Wardell Sanders, Executive Director, Individual Health Coverage Program Board, 6 (Jan. 12, 1998) ("1/12/98 Letter").]

   a. CIGNA Has A Statutory Right to a Pro Rata Exemption For The Coverage It Has Written In The Individual Market [1/12/98 Letter, at 10.]

b. CIGNA Has A Statutory Right To An Assessment That Is Proportionate To Its Share Of The Market Of All IHC Program Members [1/12/98 Letter, at 11.]

5. THE IHC BOARD'S DENIAL OF A PRO-RATA EXEMPTION AND THE ADJUSTMENT OF CIGNA'S MARKET SHARE ARE INVALID BECAUSE THESE ACTS ARE ARBITRARY, CAPRICIOUS AND LEAD TO AN UNREASONABLE RESULT [1/12/98 Letter, at 17.]

6. EVEN ASSUMING THAT THE IHC BOARD'S GOOD FAITH MARKETING CONDITION IS AUTHORIZED BY STATUTE, IT NONETHELESS FAILS TO CONTAIN APPROPRIATE STANDARDS FOR CARRIERS SEEKING TO COMPLY WITH ITS PROVISIONS [1/12/98 Letter, at 20.]

7. THE IHC BOARD ENGAGED IN UNLAWFUL RULEMAKING [1/12/98 Letter, at 23.][2]

In August 1998 the IHC Board filed a readoption with amendments of its governing regulations, which were due to expire pursuant to Executive Order No. 66 (1978). In September 1998, CIGNA challenged the readoption with amendments in the Appellate Division, raising several of the same issues that it had raised to the IHC Board in 1997 and 1998 – specifically issues numbered 1 through 6 above. When it issued its decision, therefore, the Appellate Division resolved many of the issues that CIGNA had put to the Board in 1997 and 1998, including the extent to which N.J.A.C. 11:20-9.6 sets forth standards for compliance and the IHC Board's authority to include a "second-tier" calculation in the loss assessment and to

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2. In addition, CIGNA alleged additional legal issues in both the September 4 and the January 12 letters, relating to its claimed entitlement to a hearing. Because the IHC Board did transmit the factual issues to OAL for that hearing, those legal allegations are moot and therefore will not be addressed in this Order.

require that certain carriers demonstrate good faith marketing. See In re New Jersey Individual Health Coverage Program's Readoption of N.J.A.C. 11:20-1, 353 N.J. Super. 494 (App. Div. 2002) (hereinafter "In re IHC Regulations"). For that reason, we will not revisit at length the issues that the court has already resolved.

The Appellate Division rejected CIGNA's contention that the good faith marketing regulation (that is, N.J.A.C. 11:20-9.6) is vague and does not contain adequate standards, 353 N.J. Super. at 497-98, and upheld the provision without opinion, Id. at 527. (That issue is set forth in the contentions numbered 1 and 6 above.) Although the appeal applied to regulations that were adopted in 1998, the 1998 amendments made few changes to the earlier version, which governed the 1996 assessment, and the two versions are essentially the same. As was the case with the 1998 version of the regulation, the language of N.J.A.C. 11:20-9.6 applicable to the 1996 assessment was quite specific. It included a broad-ranging list of the types of marketing activities that can be included in the report, providing carriers with adequate guidelines regarding the types of activities that can constitute good-faith marketing. It provided a standard for the focus of those activities: "advertising, marketing, and promotion efforts in direct support of sales of standard health benefits plans during the calendar year to which the conditional exemption applies ...." N.J.A.C. 11:20-9.6(a) (emphasis added). Finally, the regulation also set forth the standard that the IHC Board is to apply when evaluating a Good-Faith Marketing Report, specifying that the marketing efforts demonstrated in the report submitted to the IHC Board must be: (1) significant; (2) proportional to the carrier's target enrollment; and (3) in direct support of New Jersey individual-coverage plans. N.J.A.C. 11:20-

9.6(c)

The good-faith marketing regulation provides abundant information to a carrier seeking to assemble a Good-Faith Marketing Report. The fact that over the years other IHC members have obtained exemptions by virtue of their Good-Faith Marketing Reports indicates that other carriers understood the regulation and presented reports that met the Board's requirements. (Even CIGNA itself has earned exemptions in the past by filing satisfactory Good-Faith Marketing Reports.) Far from imposing the "subjective" standard that CIGNA alleges, N.J.A.C. 11:20-9.6 provides precise guidelines that can be followed with little difficulty by a carrier that did indeed market in good faith. Consequently, the IHC Board concludes that the regulation does provide adequate standards and that the regulation is not arbitrary, capricious, unreasonable, nor vague.

The Appellate Division also rejected CIGNA's contention that "The Board's denial of CIGNA'S exemption exceeded its authority under the individual health insurance reform act, N.J.S.A. 17B:27A-2 to -16.5," 9/4/97 Letter, at 15, and that "CIGNA has a statutory right to a pro-rata exemption for the coverage it has written in the individual market" 1/12/98 Letter, at 10-11. (Those contentions are set forth in the items numbered 2, 3, 4a and 5 above.) CIGNA attempts to support those contentions by arguing that the IHC Board lacks the statutory authority to consider the marketing efforts of a carrier that meets less than 50 percent of its enrollment target, 9/4/97 Letter, at 15-18; 1/12/98 Letter, at 10-11. The Appellate Division, however, ruled that the good faith marketing requirement is consistent with the Legislature's intent. 353 N.J. Super. at 521-23. Again, although the Appellate Division's ruling applied to

regulations adopted in 1998, those regulations did not materially change the good faith marketing requirement, and therefore the ruling is equally applicable to the 1996 assessment year. In fact, the court also recognized that the Legislature's amendment of the IHC Act in 1997 had not addressed the good faith marketing requirement, providing another indication that the requirement is consistent with legislative intent. Id. at 522-23. Based on that precedent, the IHC Board concludes that it was within its statutory authority to require that any carrier not meeting at least half of its enrollment target demonstrate that it at least made a good faith effort to do so. See 353 N.J. Super. 522.[3]

The Appellate Division also recognized the need for and approved the IHC Board's inclusion of what has come to be termed a "second tier" calculation in its loss assessments. (That contention is set forth at item numbered 4b above.) Thus, the court rejected CIGNA's argument that the IHC Board lacks the authority to adjust carriers' assessment amounts to compensate for monies uncollected as the result of full or *pro rata* exemptions duly earned by other carriers, 1/12/98 Letter, at 11-16, which it set forth to support its contention that "CIGNA has a statutory right to an assessment that is proportionate to its share of the market of all IHC program members," Id. at 11. The Appellate Division reached a contrary conclusion regarding the second-tier calculation -- that is, the re-apportionment of assessments to collect monies left uncollected as the result of exemptions. The court found that the IHC Board is authorized to collect monies necessary to fully reimburse carriers for their reimbursable losses (that is, the loss

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3. Although CIGNA has cross-petitioned the Supreme Court of New Jersey with regard to the Appellate Division's decision regarding both good faith marketing and the IHC Board's authority to include a second-tier calculation in its loss assessment, the Appellate

amount as set forth in N.J.S.A. 17B:27A-12a(1)(b) less losses forfeited by carriers seeking exemptions and by assessments on carriers entitled to reimbursement). 353 N.J. Super. at 524-25. The court found that

> because a full reimbursement is mandatory, the Board must reallocate the equivalent of the shortfall through the use of a second-tier assessment or something similar. Indeed, the inclusion of a second-tier calculation is an effective way of furthering legislative intent, especially in light of every member's ability to avoid or diminish its assessment by meeting its enrollment target. [Id. at 525.]

Based on that precedent and on the fact that the IHC Act has at all times, both before and after the enactment of L. 1997, c. 146 ("Chapter 146"), required full reimbursement of reimbursable losses, the IHC Board concludes that it was within its authority to include a second-tier calculation in the 1996 loss assessment because it is necessary to collect the amounts needed to reimburse carriers fully for their reimbursable losses.

The one issue not raised by CIGNA before the Appellate Division is its contention that the IHC Board had engaged in "unlawful rulemaking" because it did not propose its reimbursement formula in accordance with the Administrative Procedure Act ["APA"] set forth in Metromedia v. Director, Div. Of Taxation, 97 N.J. 313 (1984)." 1/12/98 Letter, at 23-24. (That contention is set forth as the item numbered 7 above.) CIGNA's contention is without merit. Metromedia lists several factors to be considered when determining whether a rule must be proposed and adopted pursuant to the APA. One of those factors is whether the action "reflects an administrative policy that (i) was not previously expressed in any official and

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Division's ruling is valid law unless and until it is altered by the higher Court.

explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter ...." Metromedia, supra, 97 N.J. at 331. In this case, that factor is not present. The IHC Board has followed exactly the same assessment methodology without change for every calendar year (including 1996) since 1993. CIGNA has participated in the assessments every year; in years when it has been granted a *pro rata* exemption, it has even benefited from the Board's methodology of apportioning the second-tier assessment among non-exempt IHC members. For it to object to that methodology for 1996, simply because it worked against CIGNA, is startling.

Even if rulemaking were required, however, CIGNA's claim has been rendered moot by the IHC Board's subsequent promulgation of regulations that set forth the methodology in question. See Blyther v. N.J. Dep't of Corrections, 322 N.J. Super. 56, 64 (App. Div.), certif. denied, 162 N.J. 196, (1999) (defect caused by adoption of departmental policy statement without APA-mandated rulemaking procedure was "cured by the subsequent adoption of the regulations encompassing the policy statement") (citing In re Madin/Lord Land Dev. Int'l, 103 N.J. 689, 695 (1986) "(subsequent adoption of regulation rendered issue moot)"; In re Producer Assignment Program, 261 N.J. Super. 292, 302-03 (App. Div.), certif. denied, 133 N.J. 438 (1993) "(adoption of regulation cured procedural defect)"). The IHC Board concludes that even if rulemaking had been required, any defect would therefore be rendered moot by subsequent rulemaking.

Finally, CIGNA's challenge to the apportionment of the "second tier" calculation among non-exempt carriers is also without merit. (That contention is set forth as the item

numbered 4b above.) As a threshold matter, the IHC Board notes that the Appellate Division's decision in In re IHC Regulations to invalidate the IHC Board's 1998 regulation apportioning the second tier calculation among non-exempt carriers is inapposite because the court's decision was based on the version of the IHC Act that includes the amendments enacted in 1997. See Chapter 146, § 6. Unlike the regulatory and statutory provisions governing the other issues in this case, involving no substantial changes between 1996 and 1998, the regulation at issue in this matter is based on a significant change to the assessment provision in the IHC Act. The 1996 assessment, which is at issue here, is governed by the IHC Act in its pre-Chapter 146 form. Chapter 146, however, repealed the following provision:

> e. Notwithstanding the provisions of this section to the contrary, no carrier shall be liable for an assessment to reimburse any carrier pursuant to this section in an amount which exceeds 35% of the aggregate net paid losses of all carriers filing pursuant to paragraph (1) of subsection a. of this section. To the extent that this limitation results in any unreimbursed paid losses to any carrier, the unreimbursed net paid losses shall be distributed among carriers: (1) which owe assessments pursuant to paragraph (2) of subsection a. of this section; (2) whose assessments do not exceed 35% of the aggregate net paid losses of all carriers; and (3) who have not received an exemption pursuant to subsection d. of this section. For the purposes of paragraph (3) of this subsection, a carrier shall be deemed to have received an exemption notwithstanding the fact that the carrier failed to enroll or insure the minimum number of non-group persons required for that calendar year. [L. 1992, c. 161, § 11e (N.J.S.A. 17B:27A-12e).]

Because N.J.S.A. 17B:27A-12e was applicable to the 1996 assessment, the Appellate Division's decision invalidating the IHC Board's method of apportioning the second-tier calculation among non-exempt carriers does not extend to the 1996 assessment. The

amendments made in Chapter 146 do not apply to 1996 because the legislation took effect on July 1, 1997.

Although the Appellate Division held that its decision did not apply to assessments made prior to the 1997/1998 two-year period, it highlighted the deleted language in N.J.S.A. 17B:27A-12e that applied to assessment years 1993 through 1996. That deleted language included both a cap on a carrier's assessment liability and provided that partially exempt carriers would not participate in an assessment to make up for funds not collected as a result of the application of that cap to a carrier or carriers. The court stated,

> Nevertheless, we agree with appellants and intervenor that the Board's second-tier assessment, as presently written, is arbitrary, capricious and unreasonable, or inconsistent with legislative intent because those who receive a pro rata exemption are completely excluded from the second-tier assessment irrespective of the amount of its exemption and the consequences it has with respect to the other carriers who must make up the shortfall (in the absence of the 35% cap that no longer exists)." [353 N.J. Super. at 525 (emphasis added).]

The Appellate Division recognized that the repeal of N.J.S.A. 17B:27A-12e created a distinction between assessments for calculation periods before and after that time: "although N.J.S.A. 17B:27A-12e, repealed by L. 1996, c. 146, § 6, originally excluded all members that received any exemption, including *pro rata* exemptions, from paying any shortfall due to the 35% cap, the Legislature deleted that section in 1997. The Act is now clear that carriers that do not cover their minimum requirements must pay a pro-rata assessment." 353 N.J. Super. 526 (emphasis added). Thus, the court recognized a distinction between the pre- and post-Chapter 146 versions of the IHC Act and a sufficient ambiguity in the pre-Chapter 146 version (that is, N.J.S.A. 17B:27A-

12e) to warrant the IHC Board's determination, made pursuant to its technical expertise, that allocating the second tier among non-exempt carriers was an appropriate means of effectuating legislative intent. The IHC Board's second tier calculation methodology for collecting the shortfall resulting from exemption was consistent with the only methodology in the law – N.J.S.A. 17B:27A-12e – that described explicitly and clearly how the Legislature intended that the IHC Board make up for a shortfall in assessment collections. Further, the Board designed the second tier methodology at the inception of the IHC Program to further legislative intent, by building a viable and competitive market by providing carriers with a significant incentive to enter the individual market and offer coverage. Therefore, the IHC Board concludes that it was within its authority to allocate the second tier calculation among non-exempt carriers.

The IHC Board notes that by letter dated July 3, 2002, CIGNA requested that the IHC Board return to CIGNA approximately $8.8 million being held in an interest-bearing account, representing the disputed portion of CIGNA's 1996 assessment liability plus accrued interest, paid pursuant to N.J.A.C. 11:20-2.17(e)3. Because the dispute surrounding CIGNA's 1996 assessment liability has not been resolved in CIGNA's favor, the Board concludes that CIGNA is not entitled to the disputed amount being held in the interest-bearing account.

Conclusion

NOW THEREFORE, pursuant to the authority granted to the IHC Board by N.J.S.A. 17B:27A-2 et seq., N.J.A.C. 11:20-1 et seq., and all powers expressed or implied therein, and the decision of the IHC Board as expressed by this Administrative Order,

IT IS on this 26th day of November, 2002,

ORDERED that CIGNA's appeal of the IHC Board's denial of CIGNA's request for an exemption for the 1996 calendar year is hereby denied; and

IT IS FURTHER ORDERED that CIGNA's appeal of the 1996 loss assessment is hereby denied; and

IT IS FURTHER ORDERED that CIGNA's request for the return of the disputed portion of the 1996 assessment, currently being held in an interest-bearing account, is denied.

This Order constitutes a final agency decision and is effective immediately. Any appeals from this Order must be filed with the Appellate Division within 45 days from the date of service of the Order.

/s/ Mary McClure, Chair
Individual Health Coverage Program Board of Directors

Dated: December 6, 2002