NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1847-02T5

IN THE MATTER OF 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.

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.

Argued December 7, 2004 – Decided AUG 23 2005

Before Judges Skillman, Collester and Parrillo.

On appeal from the New Jersey Individual Health Coverage Program Board of Directors, AO 97-02 and 02-06.

John M. Pellecchia argued the cause for appellants CIGNA Health Care of New Jersey, Inc., CIGNA Health Care of Northern New Jersey, Inc. and Connecticut General Life Inc. Co. (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. Pellecchia, of counsel; Richard Edward Hamilton,

on the brief).

Eleanor Heck, Deputy Attorney General, argued the cause for respondent New Jersey Individual Health Coverage Program Board of Directors (Peter C. Harvey, Attorney General, attorney for respondent Michael J. Haas, Assistant Attorney General, of counsel; Ms. Heck, on the brief).

PER CURIAM

CIGNA Health Care of New Jersey, Inc., CIGNA Health Care of North New Jersey and Connecticut General Life Insurance. Co. (collectively, "CIGNA") appeal from the final administrative decision of the Board of Directors ("Board") of the New Jersey Individual Health Coverage Program ("IHCP") denying their request for a pro rata exemption and imposing an assessment of $9,536,777 for 1996 reimbursable losses of the IHCP for that year pursuant to N.J.S.A. 17B:27A-12.

By way of background, before 1992 health insurance carriers were not required to offer individual health policies in this State, and most did not because of the high risks of such coverage. The result was that individual coverage was prohibitively expensive for individuals and unprofitable for insurance companies. See In re N.J. IHCP, 353 N.J. Super. 494, 500 (App. Div. 2002), aff'd in part and rev'd in part, 179 N.J. 570 (2004). Therefore, the 1992 Individual Health Reform Act ("Reform Act"), N.J.S.A. 17B:27A-2 to 16.5, was enacted with the goal of increasing the availability of affordable individual

health insurance and sharing the losses in the individual health insurance market among all health insurers in proportion to their share in the overall health insurance market. N.J.S.A. 17B:27A-12. To this end, the Reform Act requires that as a condition of issuing health benefit plans in New Jersey, each health insurance carrier must offer individual health benefit plans on an open enrollment, community rated basis, N.J.S.A. 17B:27A-4a, or pay an annual assessment to reimburse those carriers who write a disproportionate share of individual health policies for their net losses, N.J.S.A. 17B:27A-12(a)(2), after subtracting any full or pro rata exemption received, N.J.S.A. 17B:27A-12(d).

The IHCP was created by the Reform Act to administer the apportionment of losses in the individual health care market among all health insurers in proportion to their total market share in the overall health insurance market.

Under the Act, a carrier electing to offer individual health benefits plans can request an exemption from the annual assessment by agreeing to enroll its proportional share of the overall individual health insurance market as determined by the IHCP Board. N.J.S.A. 17B:27A-12(a)(2) and 17B:27A-12(d). A carrier writing at least the minimum number of individual policies specified by the Board is entitled to a full exemption

from its assessment. N.J.S.A. 17B:27A-12(d)(6). If it falls short of its target number, the carrier is assessed "on a pro rata basis for any differential between the minimum number established by the board and the actual number covered by the carrier." N.J.S.A. 17B:27A-12(d)(5).

The Reform Act gave the IHCP Board regulatory power to establish procedures for effectuating the "equitable sharing of program losses among all members in accordance with their total market share." N.J.S.A. 17B:27A-12. To this end the Board adopted a regulation incorporating a good faith marketing component as a condition for a pro rata exception. N.J.A.C. 11:20-9.5(f)(2). If a carrier did not attain the minimum number of non-group policies assigned by the IHCP but achieved at least fifty percent of the target, it would receive a pro rata exemption based on the number of policies written upon a showing of a good faith effort to enroll the minimum number of individual policies. N.J.A.C. 1:20-9.5(f)(1) to -(2). However, if a carrier enrolled less than fifty percent of its target minimum, it was required to file a good faith marketing report for the Board's review and would receive the pro rata exemption only if the Board determined that the marketing for individual policies was adequate. N.J.A.C. 11:20-9.5(f)(2). Moreover, since the Reform Act provided that no carrier was liable for an

assessment that exceeded thirty-five percent of the aggregate net paid losses of all carriers filing under N.J.S.A. 17B:27A-12(a), the Board promulgated another regulation establishing an assessment known informally as the "second tier assessment" to make up any resulting shortfall and imposed it on those carriers which did not receive a full or partial exemption. N.J.A.C. 11:20-2.17(c)(2).

In summary, at the time of CIGNA's 1996 assessment, all carriers were responsible for paying the first or preliminary assessment unless the Board had granted them a full exemption. Carriers that received a pro rata exemption were only responsible for a pro rata assessment amount. A carrier was not liable for any part of their assessment that exceeded thirty-five percent of the total reimbursable net paid losses for that calendar year. Any shortfall that was created from these exemptions or from the thirty-five percent limitation was redistributed for a second tier assessment. Carriers that received a full or pro rata exemption in the first assessment were not liable to pay any part of the second tier assessment. The shortfall was redistributed among the other carriers until their members reached the thirty-five percent limit or the total reimbursable net paid losses for the calendar year were fully assessed.

On April 4, 1996, the Board notified CIGNA of their target goal or minimum enrollment share of non-group persons. CIGNA filed a request for exemption for reimbursable losses of the IHCP for 1996, thereby agreeing to meet their minimum enrollment share. N.J.A.C. 11:20-9.2. The Board granted CIGNA a conditional exemption contingent on meeting the goal. On March 24, 1997, CIGNA filed a certification of non-group persons pursuant to N.J.A.C. 11:20-9.5, which reported enrollment of 27.2 percent of their minimum enrollment share target. Since CIGNA enrolled less than fifty percent of the assigned target number of non-group policies in 1996, they filed a good-faith marketing report of its marketing efforts for sales of individual health benefit plans.

On July 15, 1997, the Board issued an administrative order denying CIGNA's request for a final pro rata exemption from the 1996 annual loss assessment on grounds that CIGNA failed to satisfy the applicable good-faith marketing requirement for enrollment of the minimum number of non-group persons. The Board then added the second tier assessment and sent CIGNA a total 1996 assessment bill of $9,593,777 which represented their "first tier" assessment with no exemption plus the "second tier" calculation. CIGNA contested the assessment, arguing that their total should have been $2,162,886 by applying their 27.2 percent

pro rata exemption or, if disallowed, $2,953,159 without any exemption. They objected to the Board's denial of a pro rata exemption, but even more to the second tier assessment allocated to them calculated by the Board to be approximately $7 million.

CIGNA argued that their 1996 assessment was more than 300 percent greater than any of their past assessments even though their market share had remained stable and they wrote more individual health insurance than in any prior years. Comparing their assessment to that allocated to the Prudential Insurance Company, CIGNA charged discrimination.

Because CIGNA's objections raised factual and legal issues, the Board referred the matter to the Office of Administrative Law for a contested case hearing on the nature and extent of CIGNA's marketing efforts and whether these efforts constituted good faith marketing in accordance with N.J.A.C. 11:20-9.6(c). Following several hearing dates, the Administrative Law Judge ("ALJ") issued his decision in which he concluded CIGNA did not comply with the good faith marketing requirement. CIGNA filed exceptions, but on October 28, 2002, the Board adopted the factual findings and conclusions of the ALJ in its final decision finding that CIGNA had not met the good faith requirement of N.J.A.C. 11:20-9.6(c). The Board also rejected CIGNA's claims of a denial of equal protection and

discrimination. Finally, the Board upheld its authority under the Reform Act both to require carriers who fell short of their goal to prove a good faith marketing effort before they received a pro rata exemption and to impose a second tier assessment on those carriers which did not receive either a full or pro rata exemption. This appeal followed.

While the appeal was pending, the Supreme Court decided In re New Jersey IHCP, 179 N.J. 570 (2004), and struck down the Board's good faith marketing and second tier assessment regulations applicable to the 1997-1998 IHCP assessments against CIGNA. The good-faith marketing requirement was invalidated because the Court found that the Reform Act did not grant the Board the authority to review any carrier's marketing efforts or place standards on those efforts to deny the loss-sharing methodology of the Reform Act entitling a carrier to an exemption of the percentage achieved toward the assigned minimum number of individual policies. Id. at 583-85. The second tier assessment regulation was invalidated because it placed a disproportionate amount of program losses on carriers without exemption and conflicted with the intent of the Reform Act for an "equitable sharing of program losses" among all carriers. Id. at 585.

After the Supreme Court decision in In re N.J. IHCP, the Board granted CIGNA a 27.2 percent pro rata exemption for their 1996 assessment, returning the remaining sum with accrued interest. The Board then filed a motion to dismiss this appeal as moot on grounds that CIGNA had received their requested relief of the 27.2 percent pro rata exemption for their 1996 assessment and the payment for the second tier assessment was reimbursed. CIGNA, however, opposes dismissal, claiming there remains a dispute both as to the relief sought and to the calculation of the 1996 assessment. They further argue that we should decide the issues raised in the appeal because the controversy is likely to recur and the constitutional issues warrant a decision on public policy grounds.

A case is moot if the disputed issue has been resolved with respect to the party who instituted the litigation, rendering the issue abstract and outside the proper realm of the courts. De Vesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring); Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303-04 (1975); Caput Mortuum, L.L.C. v. S & S Crown Servs., Ltd., 366 N.J. Super. 323, 330 (App. Div. 2004). By granting CIGNA the 27.2 percent pro rata exemption, the Board recognized that the holding of In re New Jersey IHCP applies with equal force to the regulations in effect for 1996 assessments and

gives CIGNA a pro rata exemption status. CIGNA's arguments in opposition to dismissal amount to speculation that the Board could impose an additional assessment unwarranted by the Reform Act. We will not issue an advisory opinion as to issues not properly before us. Crescent Park Tenants Ass'n v. Realty Equits. Corp. of N.Y., 58 N.J. 98, 107 (1971). As to CIGNA's constitutional arguments, while we may address matters otherwise moot whose issues of public importance are likely to recur, Clymer v. Summit Bancorp., 171 N.J. 57, 65-66 (2002); Mistrick v. Div. of Med. Assist. & Health Servs., 154 N.J. 158, 165 (1998), the issues raised by CIGNA are not of such an exceptional nature.

However, the issue as to the calculation of the 1996 assessment is still disputed. CIGNA argues they are owed an additional refund of $803,259. While the Board recognized CIGNA's entitlement to a 27.2 percent pro rata exemption, it calculated the 1996 assessment as $2,953,159. CIGNA asserts that this amount does not reflect the 27.2 pro rata exemption. We therefore remand the matter to the Board to recalculate CIGNA's 1996 assessment after applying the 27.2 percent pro rata exemption.

Remand for determination of amount of 1996 assessment and any additional refund. The remainder of this appeal is dismissed as moot.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ACTING CLERK OF THE APPELLATE DIVISION