

**The State of New Hampshire
Insurance Department**

Health Management Advisors, LLC and HM Life Insurance Company

Docket No.: Ins. No. 09-026-EP

**PROPOSED REQUESTS FOR FINDINGS OF FACT
AND RULINGS OF LAW OF HEALTH MANAGEMENT
ADVISORS, LLC**

Health Management Advisors, LLC (“Health Management Advisors” or “Respondent”), by its attorneys, Orr & Reno, P.A., submits the following Requests for Findings of Fact and Rulings of Law in accordance with the Order of Hearing Officer Russell Hilliard, issued August 27, 2009.

1. Health Management Advisors is a limited liability company duly organized under the laws of the Commonwealth of Massachusetts. Health Management Advisors is a benefits consulting company and holding company which itself is not licensed or regulated by the Commissioner of Insurance.
2. Respondent HM Life Insurance Company is no longer a party to this action as the Department has settled its claims against HM Life Insurance Company.
3. New England Custom Health Plan Administrators, LLC (“NECHPA”), is a limited liability company organized under the laws of the Commonwealth of Massachusetts. It is licensed as a producer by the Department under RSA 402-J.
4. HMA MGU, LLC (“MGU”), is a managing underwriter organized as a limited liability company under the laws of the Commonwealth of Massachusetts. It is not licensed or regulated by the Department.

5. HMA Administrators, LLC (“HMA Administrators”), is a benefits administrator organized as a limited liability company under the laws of the Commonwealth of Massachusetts which is licensed as a third-party administrator under RSA 402-H.

6. HMA Captive Insurance Company is an insurance company licensed by the State of Vermont, in which Respondent has an interest. HMA Captive Insurance Company is *not* a subsidiary of Health Management Advisors.

7. The Department has alleged that Respondent has:

a. committed an unfair trade practice under RSA 420-G:5, VI by “facilitating” the transfer of an employee who was a member of his employer’s self-funded plan to the High Risk Pool after the employee was diagnosed with bone cancer;

b. violated RSA 404-G:5-E, V by “knowingly transferring” an employee who was eligible for group-sponsored coverage to the High Risk Pool;

c. violated RSA 420-G:9 by creating a fictitious small employer group and representing that the group met the minimum participation requirements of RSA 420-G:9;

d. committed an unfair trade practice under RSA 420-G:5, VI by “advising” an employer that it intended to refer individuals who were members of an employee group to the High Risk Pool, and

e. violated RSA 417:4, I (f), (g) and (h) by entering into a business arrangement with HM Life to provide self-insured coverage to small employers in New Hampshire that allegedly violated RSA 415-H (minimum aggregate attachment point for “stop loss” insurance), by misrepresenting information and by discriminating against certain employees.

See Amended Order to Show Cause ¶¶ 41, 42, 43, 44 and 45.

8. On the basis of these alleged statutory violations, the Department seeks to revoke the producer license of NECHPA and the TPA license of HMA Administrators, neither of whom has been made a party to this proceeding, and to impose an administrative fine of \$90,000.

The Alleged Violation of RSA 420-G:5, VI

9. In paragraph 41, the Department alleges that Respondent unlawfully facilitated the transfer of an employee to the High Risk Pool in violation of RSA 420-G:5, VI.

10. RSA 420-G, by its terms, applies *only* to any entity licensed, controlled or regulated by RSA 415 (accident and health insurers); RSA 415-E (multiple employer welfare plans); RSA 420-A (health service corporations); RSA 420-B (health maintenance organizations) or RSA 420-C (preferred provider agreements); or any other entity which offers or provides health coverage. *See* RSA 420-G:3, I. Respondent is not licensed, regulated or controlled under any of these statutes, or otherwise regulated by the Department.

11. RSA 420-G:5, VI makes it an unfair trade practice under RSA 417 for
 . . .an insurer, insurance producer, or third-party
 administrator to refer an individual employee to the [High
 Risk] pool, or arrange for an individual employee to apply
 to the pool, for the purpose of separating that employee
 from group health insurance coverage provided in
 connection with the employee's employment.

Respondent is neither an insurer, insurance producer, or third-party administrator and therefore cannot, as a matter of law, be held liable under RSA 420-G:5, IV.

12. The Amended Show Cause Order has failed to identify the employee whose transfer to the High Risk Pool was allegedly facilitated by Respondent, or the self-funded employer group from which the single employee was transferred. Nor does the Amended Show Cause Order specify which, if any, entity over which it has jurisdiction “facilitated” the transfer or the specified means by which the transfer was allegedly facilitated.

13. The Department’s claim under RSA 420-G:5, VI against Respondent fails to state a claim upon which relief can be granted against Health Management Advisors.

The Alleged Violation of RSA 404-G:5-e, V

14. In paragraph 42 of the Amended Show Cause Order the Department alleges that Respondent knowingly transferred an employee eligible for group-sponsored coverage to the High Risk Pool in violation of RSA 404-G:5-e, V.

15. RSA 404-G:5-E, V provides, in pertinent part, that an individual shall not be eligible for coverage under the [High Risk] pool if:

(a) The individual is eligible for employer sponsored health coverage, including continuation of group coverage, as either an employee or an eligible dependent.

16. Section 5-e, V(a) merely excludes certain employees from coverage by the High Risk Pool, and does not impose liability on Respondent (or any other individual or entity). The stated purpose of RSA 404-G is to create a non-profit voluntary association to establish and operate the High Risk Pool. There is no provision of RSA 404-G or any other provision of the insurance laws that imposes any obligation on Respondent with respect to the determination of eligibility of individuals for the High Risk Pool. *Cf.* RSA

420-G:5, V (imposing obligation to ascertain eligibility of any applicant or insured for high risk pool coverage on “[i]ndividual health insurance carriers”).

17. The Department’s claim under RSA 404-G:5-e, V against the Respondent fails to state a claim upon which relief can be granted against Health Management Advisors.

The Alleged Violation of RSA 420-G:9

18. In paragraph 43 of the Amended show Cause Order, the Department alleges that Respondent violated RSA 420-G:9 by misrepresenting that a fictitious small employer group met minimum participation requirements of RSA 420-G:9. Amended Show Cause Order, ¶ 43; *see also* ¶ 26.

19. RSA 420-G does not, by its terms, apply to Respondent, as Respondent is not an insurer, insurance producer or third-party administrator. *See* RSA 420-G:3, I.

20. RSA 420-G:9 provides, in pertinent part, that

A health carrier may not require more than the minimum participation percentage of the employees eligible for health coverage in a small employer group to participate in the coverage plan. The minimum participation percentage shall be 75 percent when the health carriers plan is the sole health coverage plan being sponsored by the employer group, and 37.5 percent when the health carriers plan is not the sole health coverage plan being sponsored by the employer group.

21. RSA 420-G:9, which, by its terms, applies only to a *health carrier*.

22. The Department’s claim under RSA 420-G:9 against Respondent fails to state a claim against Health Management Advisors.

The Alleged Violation of RSA 420-G:5, VI

23. In paragraph 44 of the Amended Show Cause Order the Department alleges a second violation of RSA 420-G:5, VI by asserting that Respondent committed an unfair trade practice in “advising” an unidentified employer that it intended to refer individuals who were “members of an employee (sic) group” to the High Risk Pool. This violation is presumably based on the vague allegations set forth in paragraphs 22 and 27 of the Amended Show Cause Order which refer to an unidentified “representative of HMA Direct (sic),” and three unidentified members of an unidentified New Hampshire small employer group.

24. The Department did not allege, and there is no evidence that Health Management Advisors made any misrepresentations to any employees of a small employer group.

25. It is axiomatic under New Hampshire law that fraud must be pled with particularity, and the Department’s Amended Show Cause Order fails to satisfy elemental pleading requirements for a claim of misrepresentation by Respondent. *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 449 (2002).

26. RSA 520-G:5, VI is, by its terms, inapplicable to Respondent.

27. The Department’s second claim under RSA 420-G:5, VI against Respondent fails to state a claim upon which relief can be granted against Health Management Advisors.

The Alleged Violation of RSA 417:4, I (f), (g) and (h)

28. In paragraph 44 of the Amended Show Cause Order, the Department alleges certain violations of RSA 417 (“Unfair Insurance Trade Practice”).

29. RSA 417:4, I (f), (g) and (h) sets forth certain misrepresentations in the offer or sale of any insurance “which constitutes unfair and deceptive acts and practices in the business of insurance,” to include:

(f) Employing any device, scheme, or artifice to defraud;

(g) Obtaining money or property by means of any untrue statement of a material fact or any omission to state a material facts necessary in order to make the statement made. . .
not misleading. . .; and

(h) Engaging in any other transaction, practice or course of business which operates as a fraud or deceit upon the purchaser, insured or person with policy ownership rights.

30. The gravamen of the alleged violations of RSA 417:4, I (f), (g) and (h) appears to be that:

a. HM Life Insurance Company issued stop loss policies to small employer groups that violated RSA 415-H:3, I (b);¹

b. Respondent and/or HM Life Insurance Company used the “RAS process” to save New Hampshire small employers money by transferring high risk members of the employer group to the High Risk Pool.

c. Respondent and/or HM Life Insurance Company obtained medical information from members of the employer group by representing that the information was being collected for life insurance coverage to be provided as a “bonus” to enrollees; and

¹ RSA 415-H:3 applies only to insurers. As the Hearing Officer is aware, there is a dispute pending as to the interpretation of RSA 415-H:3. A copy of Respondent’s Petition for Declaratory Ruling and the Department’s Answer are attached as Exhibit A.

d. Respondent and/or HM Life Insurance Company proposed and/or underwrote self-insured plans that illegally excluded certain employees from participating in those plans.

31. The only “misrepresentation” arguably alleged by the Department in paragraph 45 of the Show Cause Order is the alleged misrepresentation made to obtain medical information set forth in (c). The remaining claims asserted in (a), (b) and (d) are either not applicable to Respondent or are reiterations of the alleged statutory violations set forth in paragraphs 41, 42, 43, and 44 of the Amended Show Cause Order.

32. The Amended Show Cause Order does not identify who at “HMA Direct” (sic) made the representation, to whom it was made other than “to the small group employer and the employees.” Amended Order to Show Cause ¶ 20. In fact, the Department alleges that the representation regarding the use of medical information was contained in a letter issued from the group’s employer. *Id.* There is no allegation that Respondent made any misrepresentations. There is no allegation that any “purchaser, insured or person with policy ownership rights” relied on any misrepresentation by Respondent. Paragraph 45(c) fails to state any alleged fraud with the requisite particularity. *See Brzica, supra* at 449.

33. The Amended Show Cause Order fails to allege any misrepresentations by Health Management Advisors, actionable under RSA 417:4.

34. Respondent is not a “person” as defined in RSA 417:2 and cannot, as a matter of law, be held liable for violation of RSA 417.

35. The Department’s interpretation of RSA 415-H:3 is erroneous as a matter of law.

36. A holding company cannot, as a matter of law, be held liable for the acts or omissions of its subsidiary. *1 Fletcher, the Law of Corporations*, §43.

37. Due process requires notice and a meaningful opportunity to be heard prior to the revocation of a license issued by the Insurance Department. *Ginoris v. Contreras*, 409 F. Supp. 2d 101, 111-112 (D.P.R. 2006).

38. The Department has no authority to revoke the license of a regulated entity which has not been made a party to the proceeding, and which therefore has not been provided with notice and an opportunity to be heard. *See*, RSA 400-A:15, III; *see also*, *State v. Holmes*, 113 Mont 303, 124 P.2d 994 (1942) (where order to show cause was not directed to subsidiary licensees, but only to parent company, insurance commission acquired no jurisdiction to issue any valid order against licensees).

39. Health Management Advisors is not a proper party to this proceeding as it is neither licensed nor regulated by the Department.

40. The Department has not alleged sufficient facts to impute liability to Health Management Advisors.

41. The Amended Show Cause Order should be dismissed.

WHEREFORE, Respondent prays:

- A. That the Amended Show Cause Order be dismissed with prejudice;
- B. That Health Management Advisors be granted its costs, including reasonable attorneys' fees; and
- C. For such other and further relief as deemed just and proper.