THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

Objection to NH Insurance Department's Motion in Limine

Margaret McCarthy objects to the Department's Motion in Limine,[1] which seeks to limit her ability to introduce evidence solely to the question whether she was individually injured as a result of the Department's approval of Anthem Blue Cross Blue Shield's narrow network. In support of her objection, she states:

1. The Department's argument confuses and impermissibly mingles the requirements of standing with the scope or relevant evidence. There is no supporting authority cited in the Department's Motion, and there is none, that limits the scope of Ms. McCarthy's challenge to the adequacy of Anthem's narrow network to the facts and circumstances that gave her standing to be heard in this matter.

2. In essence, the Department argues that Ms. McCarthy may only submit evidence concerning, and seek relief for, the deficiencies in Anthem's narrow network that affect her personally.

3. This argument fails because standing is a threshold determination concerning whether the party bringing the action is a proper party to do so. The evidence subsequently submitted, and the relief sought or granted, are in no way limited to proving or redressing the particularized wrongs suffered by the

[1] Ms. McCarthy also notes that the Motion in Limine was received just a day and a half before the pre-hearing conference set for May 8, 2014. Counsel has moved as quickly as possible to prepare an objection.

individual with standing. See *Appalachian Voices v. McCarthy*, Civil Action No. 12–0523, slip op. (October 29, 2013, D.D.C. 2013).

4. For just one example, in *Appalachian Voices*, the Federal District Court for the District of Columbia concluded that several environmental groups had standing broadly to challenge the U.S. EPA's "failure to review and revise…its solid waste disposal regulations at least every three years[.]" *Id*. at *3. In discussing the environmental groups' standing, the court detailed the injury in fact suffered by a single member:

> [T]he Environmental Plaintiffs have demonstrated standing to pursue these claims. Kathy Little, a member of both the Sierra Club and Kentuckians For The Commonwealth, submitted an affidavit stating that she lives about 100 yards from a coal-fired power plant that contains a coal ash landfill. Ms. Little stated that "[c]oal ash from the landfill blows all over the neighborhood constantly coating nearby homes with dust that [she] understand[s] to be laden with toxi[n]s" so that she "can't open [her] windows, and still the dust penetrates [her] home and covers [her] furniture." She further alleges that her "use and enjoyment of [her] property has been greatly diminished" because she "would like to be able to open [her] windows, and spend time outside on [her] front porch, but [she] cannot currently do that because of the coal ash contamination." *Id.* In addition, Ms. Little stated that she "no longer swim[s] or fish[es] in the river due to toxic coal ash from the plant. The Environmental Plaintiffs have thus shown that Ms. Little is suffering an actual injury to the enjoyment of both her property and nearby recreational areas due to the EPA's alleged failure to undertake its required review and revision of its regulation exempting coal ash from regulation as a hazardous waste [.]… Because the Sierra Club and Kentuckians For The Commonwealth have associational standing to bring suit *by virtue of Ms. Little's standing*, the Court finds that the Environmental Plaintiffs have met their burden to establish standing to pursue their first and second claims.

Id. at *9 (internal citations omitted, emphasis added).

5. Under the Department's argument, the environmental groups of *Appalachian Voices* would be limited to submitting evidence about, and arguments

concerning, the particular impact of the EPA's approach to reviewing its regulations in the single neighborhood where Kathy Little lived. *See id*. at *9-10. That is absurd. Just as the environmental groups in *Appalachian Voices* can challenge the impact of a broad national regulation after demonstrating standing based upon that regulation's individual impact on a single member in one city in Kentucky, so can Ms. McCarthy challenge the statewide effects of an action of the Department due to the impact of that action on her personally.

6. The *Appeal of Boston & Maine Corp.*, 126 N.H. 360 (1985), is instructive. In *Appeal of Boston & Maine*, the New Hampshire Supreme Court upheld a ruling of the Public Utilities Commission against a similar challenge by Boston & Maine. Acting on a petition from the Town of Newmarket, the PUC ordered Boston & Maine to repair a railroad bridge that crossed a road in neighboring Newfields. *Id*. at 361-62. Boston & Maine argued on appeal that Newmarket had no standing to petition, nor to seek the relief requested, because the bridge was not within its boundaries. *Id*. at 363. The Supreme Court rejected that argument, concluding that Newmarket had standing under the statute to seek to petition the PUC for the action, and the fact that the bridge was in a neighboring town did not restrict the PUC's power to act in the public interest—or, presumably, Newmarket's ability to offer evidence concerning the state of the bridge during the PUC hearings. *Id*. at 364-65. Here, the Department has concluded that Ms. McCarthy has standing to challenge the network adequacy of Anthem's Health Insurance Marketplace ("Exchange") available plans in an adjudicatory proceeding. The Department's authority to redress any shortfall in network adequacy revealed by that proceeding is not

similarly not limited by the particular impact on Ms. McCarthy. *See id.* Rationally, therefore, Ms. McCarthy cannot be limited in the evidence she wishes to submit concerning the deficiencies in Anthem's narrow network.

7. There is no law supporting the Department's position that Ms. McCarthy cannot challenge the statewide effects of a Department action that has affected her personally. There is a substantial body of case law standing for the opposite proposition.[2] Given that Ms. McCarthy's standing enables her to challenge the adequacy of Anthem's narrow network, writ large, in the State of New Hampshire, evidence concerning the inadequacy of that network as to any other party or region of the state is relevant and admissible. Consequently, the Department's Motion *in Limine* should be denied.

8. Moreover, as a matter of public policy, Ms. McCarthy is challenging a regulatory decision by the Department with a statewide impact on tens of thousands of citizens. Among the goals of the underlying statute, the Patient Protection and Affordable Care Act, (the "ACA" or "Obamacare") were increased access to primary and preventive care and increased health insurance coverage. Ms. McCarthy is arguing that the Department's approval of Anthem's narrow network plan, which omits nearly half the hospitals in the State and their affiliated primary and specialty care providers, jeopardized these goals by failing to ensure an adequate network. If the network is adequate, then neither Anthem nor the Department should be

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[2] In fact, any case in which associational standing deriving from an injury in fact sustained by a member permits an interest group to litigate a broad regulatory framework. *E.g., La. Environmental Action Network v. U.S. EPA*, 172 F.3d 65, 67-68 (D.C.Cir. 1999) (holding that environmental group in Louisiana had standing to challenge national EPA regulation because it had three members living near a landfill in Louisiana that was subject to that regulation).

concerned about the evidence to be submitted at the upcoming hearing. As a matter of public policy, therefore, and to ensure that the maximum public scrutiny is applied to the review of a decision that lacked any transparency at the time it was made, the hearing officer should deny the Department's Motion in Limine.

Respectfully submitted,

Margaret McCarthy

By her attorneys,

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