

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: MVP Health Plan, Inc.)
2019 Individual and Group Market) GMCB-008-18rr
Rate Filing)

OPPOSITION TO MVP HEALTH PLAN, INC.'S FIRST MOTION IN LIMINE

Michael Fisher's expert opinion is proper because Mr. Fisher meets the statutory criteria governing who may qualify as an expert witness, and because his opinion meets the statutory criteria governing expert opinion evidence. Specifically, Mr. Fisher has superior knowledge regarding the consideration and enactment of Act 48 based on his experience as a legislator; his opinion regarding the legislature's recognition of the effects of a lack of affordability and the legislative history of the rate review section of Act 48 is based on a reliable method--reviewing the recordings of the proceedings of all the Committees of jurisdiction of the bill; and that opinion is relevant to the Board's factual determination as to whether MVP's proposed premium prices meet the applicable statutory standard.

To be sure, MVP is correct in stating that an expert witness is neither permitted "to provide legal opinion, legal conclusion, or interpret legal terms," nor "to establish the meaning of a law." MVP Mot. In Limine. Mr. Fisher's opinion regarding the legislature's recognition of the effects of a lack of affordability, however, clearly does not fall into any of those categories.

Mr. Fisher's opinion regarding the statutory standards "affordable," "promote quality care," and "promote access to health care" is a closer case. Nevertheless, because he is not interpreting the meaning of or assigning content to any particular standard, but simply stating that those standards have some meaning, his opinion too does not interpret legal terms or opine on ultimate conclusions of law and therefore does not run afoul of V.R.E. Rule 702. See Reiss v. A.O Smith Corp., 150 Vt. 527, 532 (1988).

Mr. Fisher qualifies as an expert based on his experience as a legislator and his leadership role on the House Health Care Committee.

Mr. Fisher has extensive experience with and knowledge of the legislative process, having served as a legislator for fourteen years, during three of which he served as Chair of the House

Health Care Committee, one year as Vice-Chair of the House Health Care Committee, and six years as Vice-Chair of the House Human Services Committee.

Mr. Fisher's expert opinion regarding the legislature's recognition of the effects of a lack of affordability and the rate review section of Act 48 is reliable because he applied a systematic method to analyze the legislative record.

Under Vermont law, an administrative body looks at three criteria when it evaluates the reliability of expert opinion: (1) whether the testimony is based on sufficient facts or data; (2) whether the testimony is the product of reliable principles and methods; and (3) whether the witness has applied the principles and methods reliably to the facts of the case. See V.R.E 702; F.R.E. 702. Applying that three factor test makes clear that Mr. Fisher's opinion is reliable.

First, Mr. Fisher reviewed historical materials--the recordings of the proceedings of the Committees of jurisdiction--related to the rate review section of Act 48. Second, Mr. Fisher's method of reviewing the legislative record to determine legislative history is an accepted method for legislative history research. See, e.g., Vermont Secretary of State, Legislative Research Guide, <https://www.sec.state.vt.us/archives-records/state-archives/research-guides/legislative-research-guide.aspx> (last visited 7.19.2018); Deborah E. Bouchoux, Legal Research Explained (4th Ed. 2017); Julia Taylor, Legislative History Research: A Guide to Resources for Congressional Staff (2013), <https://fas.org/sgp/crs/misc/R41865.pdf> (last visited 7.19.2018). Third, Mr. Fisher's expert opinion is based on the application of an explicated method and was applied to the data in a consistent fashion. Mr. Fisher's opinions are not "mere speculation," as MVP asserts, but rather are based on his systematic review of the legislative record related to the rate review section of Act 48.

MVP argues that the reliability of Mr. Fisher's expert opinion should be evaluated using four criteria including whether the method by which the opinion is generated has been subjected to "peer review and publication" and the method's "rate of error," citing State v. Streich, 163 Vt. 331, for this proposition. MVP Mot. In Limine at 4. Streich, however, dealt with the admissibility of expert testimony related to the use of novel DNA population frequency statistics in a rape case. If the reliability evaluation were reduced to the Streich criteria, as MVP proposes, only physical and natural scientists could provide expert testimony. As the United States Supreme Court has made clear, however, the fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge

and the reliability criteria evaluated are flexible and practically applied. See Kumho Tire Co., Ltd. v. Carmichael, 525 U.S. 137, 139 (1999) (holding that the Daubert factors “or any other set of reasonable reliability criteria” are used to evaluate expert testimony); see also Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999) (stating that expert testimony should be “evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”).

MVP also asserts that Mr. Fisher’s report cherry picks the legislative record, thus making it unreliable. MVP Mot. In Limine at 10. However, MVP cites various legislators’ explanations of their vote on the *entire Act 48* to support that assertion. Id. Mr. Fisher’s expert opinion, however, does not concern the entire Act 48, but rather concerns only the rate review section of Act 48. Mr. Fisher’s review of all the Committee proceedings relating to that section thus is a reliable method for forming his expert opinion.

Mr. Fisher’s expert opinion is relevant because it provides the Board with factual information related to the matter under consideration.

The fundamental standard for determining the relevance of expert opinion is “whether the expert's testimony ... will ‘assist the trier of fact’ in understanding the evidence or determining a fact in issue.” In re LIBOR-Based Financial Instruments Antitrust Litigation, 299 F.Supp.3d at 468 (quoting F.R.E. 702); see also, State v. Wigg, 179 Vt. 65 (2005); USGen New England, Inc. v. Town of Rockingham, 177 Vt. 193 (2004); Soutiere v. Soutiere, 163 Vt. 265 (1995).

Here, Mr. Fisher, the Vice-Chair of one of the Committees with jurisdiction over the bill that became Act 48, has reviewed the recordings of the proceedings of all the Committees of jurisdiction over the bill. His personal experience and analysis of the legislative record related to the rate review criteria is clearly germane to the current proceeding.

Further, Mr. Fisher’s testimony is relevant to points MVP has put at issue. MVP argued in its June 25, 2018 objections to the HCA’s non-actuarial questions that questions about affordability, access to care, and quality of care were “beyond the scope of inquiry” of the Board’s rate review proceedings. GMCB 08-18rr, MVP’s Responses and Objections to the HCA’s Non-actuarial questions.” Again, Mr. Fisher’s testimony is not interpreting the meaning of or assigning content to any particular standard, but is stating that, in the context of rate review, the standards of affordable, promote quality care, and promote access to care have some meaning.

MVP has also made a practice at hearings of explicitly asking its actuary, a witness, to opine on whether MVP's proposed premium prices meet the rate review statutory criteria of affordability, access to care, and quality care.

Q. Okay. Now, I want to run through – we do this every year run – through the statutory criteria, all right? Do the MVP rates meet the standard of affordability? A. Yes. Q. Why? A. Because the premium rates that we're offering, although, again, we recognize that they may be unaffordable for a number of Vermonters and somebody like myself or could be very unaffordable or challenging to meet, but we are doing everything we can to meet our contribution to reserves... [full response omitted for brevity]. Q. Do the rates promote quality of care and access to health care? A. Yes... [full response omitted for brevity]." GMCB 07-17rr, Hearing Transcript, p.60-61.

Mr. Fisher's testimony, in contrast, will not go so far as to opine on the ultimate issue of law. Instead, Mr. Fisher will simply review the factual legislative history to assist the Board.

Conclusion

In short, Mr. Fisher's qualifies as an expert and his opinion is clearly helpful to the Board. Therefore, his report should be admitted and he should be allowed to testify.

For the foregoing reason, the HCA respectfully requests that the Board deny the Motion in full.

Dated at Montpelier Vermont this 20th day of July, 2018.

s/Eric Schultheis

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CERTIFICATE OF SERVICE

I, Eric Schultheis, hereby certify that I have served the above Notice of Appearance on Judith Henkin, General Counsel to the Green Mountain Care Board; Sebastian Arduengo, Green Mountain Care Board Staff Attorney; Agatha Kessler, Green Mountain Care Board Health Policy Director; and Gary Karnedy, representative and filing contact of MVP Health Care, Inc., by electronic mail, return receipt requested, this 20th day of July, 2018.

s/ Eric Schultheis

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