STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: MVP Health Care 2019 Vermont Health Connect Rate Filing	)	DOCKET NO. GMCB-008-18rr
SERFF No. MVPH-131497138	)	

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

MVP Health Plan, Inc., ("MVP") by and through its counsel, Primmer Piper Eggleston & Cramer PC, moves in limine to exclude and bar in its entirety the testimony of the Health Care Advocate's ("HCA") expert witness Mike Fisher at the July 24th hearing of this matter, and to strike his expert report and any related evidence.

First, the HCA has designated Fisher as an expert, thereby limiting the scope of his testimony to the four corners of the "legislative history" subject matter contained in his expert report. Second, his expert report should be stricken in its entirety and any related testimony should be barred, since it is no more than an opinion on legislative history and the law, which is subject matter solely within the province of the Green Mountain Care Board (the "Board"). Third, since Mr. Fisher is barred from testifying as an expert about the legislative history subject matter of his report, and was not disclosed on July 16th as a fact witness on any other matters, he should be entirely barred from testifying at the July 24th hearing.

PROCEDURAL BACKGROUND

At the May 4, 2018 pre-hearing conference, MVP requested that the Board move up the HCA's expert report deadline for non-actuarial experts to provide sufficient time for MVP to retain and prepare any rebuttal witnesses. MVP's request was declined at least in part because the Board's General Counsel, Judy Henkin anticipated that at least the subject matter of the

HCA's expert witness testimony would be made apparent in the HCA's expert disclosures. General Counsel Henkin also stated that MVP could object to the HCA's experts at a later date.

On May 31, 2018 the Board issued a Scheduling Order requiring HCA expert witness disclosures by June 4 and HCA expert reports on July 10 (including the identification of the facts, opinion, data, and documents relied on as basis for the expert opinion). The Board further ordered a pre-hearing conference on July 17 to discuss, among other things, the potential submission of any prehearing motions anticipating evidentiary objections, which would be ruled on at the July 24 hearing.

On June 4, 2018, the HCA disclosed HCA Hotline Supervising Attorney Marjorie Stinchcombe and HCA Chief Advocate Fisher as expert witnesses (the "Expert Disclosures").

On July 10, 2018, the HCA filed Fisher's expert report, (the "Fisher Report"). The July 10, 2018 Fisher Report is attached as Exhibit 1. The HCA did not file a report on behalf of Marjorie Stinchcombe and represented that Fisher would be the only expert witness the HCA would call to testify. The scope of the Fisher Report is limited solely to legislative history.

Pursuant to the Scheduling Order, the HCA was required to disclose all fact witnesses on July 16, 2018. The HCA did not disclose any fact witnesses.

LEGAL STANDARD

Pursuant to 3 V.S.A. § 810, the Board should only admit expert witness testimony and evidence which satisfies the requirements of the Vermont Rules of Evidence. 18 V.S.A. § 9380.[1] To the extent that the Board has not specifically promulgated rules of evidence, 3 V.S.A. § 810 provides that: "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded. The

[1] The Board is authorized to promulgate rules of procedure pursuant to 3 V.S.A. chapter 25. Neither Board Rule 2.00 nor the Board's operative statutes specify rules of evidence for experts.

Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed." [2]

Pursuant to V.R.E. 702, expert testimony is permitted, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." In previous rate review hearings, the Board has adopted this threshold gatekeeper test in determining whether an HCA actuarial expert can testify. *See* Exhibit 2, *MVP Health Plan, Inc. VT 2014 Exchange Rate Filing*, Docket No. GMCB-15-13RR, Hr'g Tr. p. 105, June 18, 2013.

V.R.E. 702 requires that expert testimony be relevant, reliable and helpful to the trier of fact. The goal of the rule is "to keep misleading 'junk science' propagated primarily for litigation purposes out of the courtroom while simultaneously opening the door to well-reasoned but novel scientific or technical evidence." *985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 183 Vt. 208, 213, 945 A.2d 381, 384 (2008). Expert witnesses in Vermont who base their testimony on practical experience, rather than formal education or training, remain subject to the reliability requirements of V.R.E. 702. (Reporter's Notes – 2004 Amendment); *State v. Kinney*, 171 Vt. 239, 250, 762 A.2d 833, 842 (2000).

"Reliability" is assured if the expert testimony is supported by "'scientific knowledge,' defined as information that is more than a subjective belief or unsupported speculation, and that

[2] The Vermont Rules of Evidence are essentially identical to the Federal Rules of Evidence and Vermont courts apply federal principles governing the admissibility of expert testimony. *985 Assocs., Ltd.*, 183 Vt. at 212, 945 A.2d at 383 (2008); *citing State v. Brooks*, 162 Vt. 26, 30, 643 A.2d 226, 229 (1993).

is grounded in the methods and procedures of science." *State v. Streich*, 163 Vt. 331, 343, 658 A.2d 38 (1995). Four factors assist a trial court in determining whether an expert opinion is "sufficiently rooted in 'scientific knowledge' to be admissible: (1) whether the expert's theory or technique is capable of being tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether the theory or technique has a known or potential rate of error, and (4) whether the theory or technique has been generally accepted in the scientific community. *Id.* at 343, 658 A.2d 38 (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993)).

"Relevancy" is determined by considering whether the expert's testimony "will assist the trier of fact to understand or determine a fact in issue." *USGen New England,* 177 Vt. 193, 862 A.2d 269 (quoting *Daubert,* 509 U.S. at 592) (emphasis added). An expert witness is not permitted to provide legal opinions, legal conclusions, or interpret legal terms—those roles fall solely within the province of the Board. *See Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 470 (S.D.N.Y. 2005); *citing Roundout Valley Cent. Sch. Dist. v. Coneco Corp.,* 321 F. Supp. 2d 469, 480 (N.D.N.Y.2004). Accordingly, "[e]xpert testimony proffered solely to establish the meaning of a law is presumptively improper." *Bartlett v. Mut. Pharm. Co.*, 742 F. Supp. 2d 182, 187 (D.N.H. 2010) (*citing United States v. Mikutowicz*, 365 F.2d 65, 73 (1st Cir. 2004)).

Although this motion in limine to exclude evidence is filed by MVP, HCA bears the burden of establishing that the proposed testimony is reliable based on the standards discussed above. *Mann v. Adventure Quest, Inc.*, No. 460092004, 2013 WL 2735814, at *1 (Vt. Super. 2013) (*citing 985 Associates, Ltd.*, 183 Vt. at 213, 945 A.2d at 381 (2008)).

ARGUMENT

I. The Subject Matter Of Fisher's Testimony At The July 24, 2018 Hearing Is Restricted To The Four Corners Of His Expert Report.

The HCA was required to disclose all of the subject matter on which its expert was expected to testify on July 10th, 14 days before the July 24th rate hearing. *See Scheduling Order.*[3]

Fisher should be precluded from offering any testimony at the July 24th hearing related to any matter beyond the scope of the legislative history subject and opinions disclosed. *Greene v. Bell*, 171 Vt. 280, 284, 762 A.2d 865, 869 (2000). Fisher's expert testimony must be confined to the scope of the Fisher Report, and not extend to any other matter. *See Rotman v. Progressive Ins. Co.*, 955 F. Supp. 2d 272, 282 (D. Vt. 2013) (precluding expert from testifying as to plaintiff's general motorcycle competency where expert report disclosed only two opinions: (1) there was a reasonable distance between motorcycles involved in the accident; and (2) the specific maneuvers plaintiff used which caused the motorcycle to go off the road causing the injury).

To allow Fisher to testify to undisclosed matters outside of the scope of the Fisher Report (which solely discusses legislative history) would be unfair and prejudicial to MVP. *White Current Corp.*, 158 Vt. at 223 (1992) (in finding no abuse of discretion in the trial court's decision to exclude expert testimony which was disclosed on the eve of trial, the Vermont Supreme Court stated that "[t]o permit the witnesses to testify would frustrate the primary purpose of liberal civil discovery rules: the prevention of surprise to one's opponent."). MVP would not be able to prepare responsive evidence to this undisclosed testimony, or identify

[3] See also, Fed. R. Civ. P. 26(a)(2); Vt. R. Civ. P. 26(b)(5)(A)(i). Several years ago, when the Board first considered what expert disclosures would be required in its scheduling order and these proceedings, it looked to the federal and state Rules of Civil Procedure for guidance. Although the Board is not bound by these rules, they do provide a helpful guide in this instance.

rebuttal witnesses to bring to the hearing. Furthermore, Fisher was not otherwise disclosed as a fact witness.

II. Fisher's Testimony And The Fisher Report Are Inadmissible.

A. Fisher's Opinions Are Inadmissible Legal Conclusions.

From the plain language of V.R.E. 702, expert testimony is permitted where it "will assist the trier of fact to understand the evidence or to determine a fact in issue." (emphasis added). V.R.E. 702 does not authorize testimony as to issues of law. This intuitive proposition is affirmed in Vermont case law, where expert and lay witnesses are prohibited from testifying as to what the law is. "As a general rule, a witness may not give his opinion on questions of law for the determination of such questions is exclusively within the province of the court." *Town of Brighton v. Griffin*, 148 Vt. 264, 271 (1987) (upholding the trial court's exclusion of testimony by a State employee as to the meaning of provisions of Title 24 of the Vermont Statutes and the town zoning ordinance) (internal citation omitted) (citing *Holton Estate v. Ellis*, 114 Vt. 471, 476 (1946)); *Villa v. Heilmann*, 162 Vt. 543, 551, 649 A.2d 768, 773 (1994) (upholding the Superior Court's exclusion of the testimony of purported expert, a law professor, which would have interpreted a provision of the Code of Professional Responsibility which applies to attorneys as inapplicable to a specific contingency fee allocation agreement between former law firm partners).

Legal conclusions are not relevant evidence and not admissible because they do not assist the trier of fact in making a decision. *U.S. v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994). Because

Fisher's opinions are conclusions of law, not fact, Fisher's testimony does not meet the definition of "relevant evidence," [4] and therefore, is inadmissible.[5]

Moreover, courts in the Second Circuit have also held that "although an expert may opine on an issue of fact within the jury's province, [s]he may not give testimony stating ultimate legal conclusions based on those facts." *Hiramoto v. Goddard College Corp.*, 184 F. Supp. 3d 84, 97 (D. Vt. 2016) (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991)). In other words, "experts are not permitted to present testimony in the form of legal conclusions." *Densberger v. United Techs. Corp.* 297 F.3d 66, 74 (2d Cir. 2002).

Fisher's proposed testimony does not assist the Board because it merely offers legal conclusions on the interpretation of statute—which is the exclusive province of the Board. *See In re MVP Health Ins. Co.*, 203 Vt. 274, 155 A.3d 1207 (2016). The interpretation of 8 V.S.A. § 4062(a) and 8 V.S.A. § 5104(a) is within the primary jurisdiction of the Board, and "the body charged with interpreting [its own operative statute] is the most appropriate tribunal to interpret them." *C.V. Landfill, Inc. v. Envtl. Bd.*, 158 Vt. 386, 392, 610 A.2d 145, 148 (1992) (wherein the court was not compelled to exercise jurisdiction and deferred to the Environmental Board in its interpretation of Act 250 where the Environmental Board exercised primary jurisdiction and had the expertise to decide the dispute).

Legal conclusions under the guise of expert testimony have routinely been rejected in case law interpreting the federal rules of evidence and in states, including Vermont, which have adopted the federal standard as discussed above. *Riess v. A.O. Smith Corp.*, 150 Vt. 527, 531–

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[4] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added). V.R.E. 401.

[5] "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible." V.R.E. 402.

32, 556 A.2d 68, 71 (1988) ("In *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981), the court held it was error to allow the expert witness for the defendant in a medical malpractice case to testify that the defendant doctor was not negligent. The court held that the testimony did more than "embrace" the ultimate issue—it was "a bald statement of an opinion as to the ultimate issue."). *Tiedmann v. Radiation Therapy Consultants, P.C.*, 299 Or. 238, 243, 701 P.2d 440, 444 (1985) (testimony is inadmissible because it is "a pure opinion which merely tells the jury which result to reach."); *Bornn v. Madagan*, 414 N.W.2d 646, 649 (Iowa Ct.App.1987) (testimony that automobile accident was caused by defendant's failure to yield the right of way properly excluded as a legal conclusion); *Dale v. Bridges*, 507 So.2d 375, 378 (Miss.1987) (testimony about who was "at fault" in automobile accident excludable as allowing "the witness to tell the jury what result to reach"); *Murrow v. Daniels*, 85 N.C.App. 401, 408, 355 S.E.2d 204, 209 (1987), *rev'd on other grounds*, 321 N.C. 494, 364 S.E.2d 392 (1988) (error to allow witness to testify that defendant's actions were gross negligence because testimony was a "legal conclusion"); *DeLeon v. Louder*, 743 S.W.2d 357, 361 (Tex.Ct.App.1987) (testimony that plaintiff' conduct was "proximate cause" of accident erroneously admitted because "it involved a legal definition").

B. Expert Testimony About Legislative History Is Inadmissible.

Expert testimony regarding legislative history is an opinion on what the law is and should be stricken. *See Bacchi v. Massachusetts Mut. Life Ins. Co.*, No. 12-CV-11280-DJC, 2016 WL 1170958, at *4 (D. Mass. Mar. 23, 2016) (striking, in its entirety, expert report devoted to discussing legislative history of statute and stating that Plaintiff was otherwise free to offer her own view of legislative history and construction in a motion for summary judgment or appropriate legal brief); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1507 n.6 (9th Cir.

1994) (striking affidavits explaining legislative history of relevant statute and stating that "interpretation of legislative history [is] unequivocally [a] question for the court"); *U.S. Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 582 F.3d 1131, 1151 (10th Cir. 2009) (holding that expert testimony about federal aircraft regulations "violates the rule against experts testifying as to the law governing the jury's deliberations"); *United States v. Lupton*, 620 F.3d 790, 799 (7th Cir. 2010) (excluding testimony of an attorney in a kickback prosecution because "the meaning of statutes, regulations, and contract terms is a subject for the court, not for testimonial experts" (quotations omitted)), *cert. denied*, 131 S. Ct. 1544 (2011). *Karp v. CIGNA Healthcare, Inc.*, 882 F. Supp. 2d 199, 205 n.4 (D. Mass. 2012) (granting motion to strike expert declaration to the extent that it consisted of legal arguments and legal conclusions); *Convertino v. U.S. Dept. of Justice*, 772 F. Supp. 2d 10, 13 (D.D.C. 2010) (excluding expert testimony that was "nothing more than a legal analysis of the Privacy Act and a legal conclusion that the actions of the defendants amounted to a violation of that Act.").

Because expert testimony on the legislative history of a statute is testimony as to what the law is, it is irrelevant to the Board's determination and inadmissible. *See United States v. Monaghan*, 648 F. Supp. 2d 658, 662 (E.D. Pa. 2009) (striking testimony regarding the legislative history of the Pennsylvania Public Official and Employee Ethics Act by the Executive Director of the Pennsylvania State Ethics Commission as irrelevant to a determination under the statute). *See also United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008) (affirming exclusion of expert testimony about meaning of statutes and regulations, stating that "[t]hat's a subject for the court, not for testimonial experts.") (*citing Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 900 (7th Cir.1994)).

The Fisher Report is an opinion on and summary of legislative history and Fisher's testimony on this issue should be excluded, and the Fisher Report and all related evidence stricken.

C. The Legislative History Speaks For Itself And This Rate Hearing Should Not Devolve Into a Debate About Cherry-Picked Legislative History.

Fisher claims that the purpose in offering the Fisher Report and presumably in testifying is not to advise the Board of what any statutory standards mean, "or how to apply them. Rather, [his] purpose is to outline the legislative history of this one particular part of Act 48." *Fisher Report*, p. 2.

However, this "outline" cherry-picks various statements made by legislators during the course of the legislative process, and draws self-serving conclusions. *Fisher Report*, p. 7. The Fisher Report references, without producing in its entirety, specific quotations from various legislators and witnesses during the testimony portion of House and Senate committee hearings leading up to Act 48 (H.202) of the 2011 Legislative Session ("Act 48") to support the proposition that the issues of affordability, promotion of quality care and promotion of access to care were all important considerations for legislators—and that, by further extension, they should be given weight in these proceedings. *Fisher Report,* pp. 4-8. Where a trier of fact considers legislative history, the dangers of considering stray statements by individual legislators without considering the complete record are obvious. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1978) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."). The Fisher Report demonstrates the perils of reading selective quotations from legislative history in isolation. Although the Fisher Report describes them as important

considerations, the legislative history just as well shows the statutory criteria were added into the statute at the early drafting stages and were not focused on by the legislature.

For example, the legislative history of Act 48 shows, without a doubt, that far from having an articulable intent with regard to the meaning of the statutory criteria, many legislators lacked clarity even as to the fundamental nature of the bill.

Representative Dickinson of St. Albans explained her vote as follows:

> . . . There are too many unanswered questions and the process for this bill has not been thoughtful and complete enough to answer these important questions.

See 2011 Journal of the House 650 (March 24, 2011).

Representative Fagan of Rutland City explained his vote as follows:

> . . . Not having answer to all of our questions thus leaving unanswered concerns of Vermonters is not what I had envisioned for the most important bill to perhaps ever pass this body. I would have liked to support this bill but I am unable to support it because we do not have the entire process, relevant methodologies, costs and taxes that this bill will use to affect Vermonters which would enable Vermonter's questions to have been answered.

Id., at 650-651.

Representative Morrissey of Bennington explained her vote as follows:

> I cannot support H202, at this time, based upon the total disregard to one of our very own Health Care Reform Principles, which I feel is critical to the success for any reform. The principle that I am referring to is that – "The Health Care System" must be transparent in design, efficient in operation and accountable to the people it serves. The state must ensure public participation in the design, implementation, evaluation and accountability mechanisms of the health care system. We are seriously lacking on all accounts.

Id., at 653.

Instead of specifically evidencing an intent with respect to the definition of each of the statutory terms, the legislature left those terms general and open ended in the final text and left it to the Board's discretion to determine whether a rate met the required statutory standard. *See In re MVP Health Ins. Co.*, 203 Vt. 274, 284, 155 A.3d 1207, 1214 (2016). Presumably, if the legislature intended those terms to have specific meanings as Mr. Fisher now peddles, or to be given a specific amount of weight in the Board's determination, it would have stated as much in the operative statute.

Inexplicably, nowhere does the Fisher Report explain why it considers only Act 48 (H.202) of the 2011 Legislative Session ("Act 48"), but not Act 79 (H.107) of the 2013 Legislative Session which amended 8 V.S.A. § 4062 and actually transferred the reins of rate review wholly to the Board.

The Fisher Report, nevertheless, cites solely to selective portions of committee hearing recordings, and quotes the testimony of various legislators and responses to questions. *See Fisher Report*, p. 1. Committee hearing testimony has been accorded only limited probative value in Vermont courts. *In re Dept. of Bldgs. and General Services*, 838 A.2d 78, 83, 176 Vt. 41, 47 (Vt., 2003); *citing State v. Madison,* 163 Vt. 360, 373, 658 A.2d 536, 545 (1995) ("the remarks of a witness at a committee hearing are accorded little weight in determining the intent of the legislature in enacting a statute."). Statements subsequent to the enactment of legislation, such as the Fisher Report, are not probative of legislative intent and are therefore not relevant. *See Salem-Keizer Ass'n of Classified Employees v. Salem-Keizer Sch. Dist. 24J*, 186 Or. App. 19, 26–27, 61 P.3d 970, 974–75 (2003) ("The rule in this state is that '[s]ubsequent statements by legislators are not probative of the intent of statutes already in effect.' *United Telephone Employees PAC v. Secretary of State*, 138 Or.App. 135, 139, 906 P.2d 306 (1995)). It is a rule

that appears to have been adopted by nearly every other court that has addressed the issue. *See, e.g., Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 n. 3, 102 S.Ct. 1235, 71 L.Ed.2d 432 (1982) (post-enactment affidavit of legislator is entitled to no weight); *State Wholesale Grocers v. Great Atlantic & P. Tea Co.*, 154 F. Supp. 471, 484–85 (N.D.Ill.1957), *rev'd on other grounds*, 258 F.2d 831 (7th Cir.1958) (post-enactment book authored by congressional sponsor is not competent evidence of legislative intent); *Picture Rocks Fire Dist. v. Pima County*, 152 Ariz. 442, 444, 733 P.2d 639, 641 (Ariz.Ct.App.1986) (upholding exclusion of post-enactment deposition of state senator on issue of intended meaning of disputed statute)"). "Subsequent writings may be nothing but wishful thinking, and unless they are uttered as part of the process of enacting a later law (and therefore show assumptions on which Congress as a whole acted at least once) they are of no account. *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438–39 (7th Cir. 1988), *certified question answered*, 543 N.E.2d 382 (Ind. 1989) (*citing Quern v. Mandley*, 436 U.S. 725, 736 n. 10, 98 S.Ct. 2068, 2075 n. 10, (1978).

In preparing its legal decision in this matter, the Board may or may not choose to review legislative history to interpret its statutes. Furthermore, a party may reference legislative history in its brief. However, a biased expert advocacy "summary" of legislative history, such as the Fisher Report, is not admissible because it is a legal argument in the guise of expert witness testimony. The Board should not allow the evidentiary hearing of MVP's proposed rates to devolve into a legislative history stroll down memory lane.

CONCLUSION

For the foregoing reasons, the Board should entirely exclude Mike Fisher from testifying as an expert or fact witness at the July 24th hearing, and strike the Fisher Report and any related materials as inadmissible.

Dated at Burlington, Vermont, this 17th day of July, 2018.

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STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

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CERTIFICATE OF SERVICE

I, Gary F. Karnedy, Esq., hereby certify that I have served MVP Health Plan, Inc.'s ***First Motion in Limine*** via e-mail and U.S. Mail and upon the following:

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EXHIBIT 1

Michael Fisher

Expert Witness Report

Chief Advocate

Office of the Health Care Advocate

Submitted July 10, 2018, to the Green Mountain Care Board for

GMCB-08-18rr

Vermont Legal Aid

Working for Justice

Contents

Qualifications

I served as a Vermont State Representative for fourteen years (2001–2014). During that time, I served in a variety of leadership roles including three years 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. As one of the key legislators who assisted in navigating Act 48 through the whole legislative process, I have extensive knowledge of the politics and policies that led to the creation of the Green Mountain Care Board and Vermont's current rate review process. I also have knowledge of the legislative process and the records documenting it.

I am currently Chief Advocate for the Office of the Health Care Advocate. I have held the position since January 2017.

Methodology

As Vice-Chair of the House Health Care Committee in 2011, I was at the table for many conversations about H. 202 both in committee, in planning meetings about the bill and as a member of the conference committee. In order to ensure that I am accurately relating the events from six years ago, I have spent considerable time reviewing the recordings from the committees of jurisdiction for the rate review section of the bill. My review focused on testimony from witnesses before the legislature who spoke about insurance rate review, including insurance executives, and on bill markup and committee discussions. Finally, I reviewed the amendments to Act 48 offered by members of both houses.

Specifically, I reviewed the State Archives' recordings from 2011 from House Health Care, the Senate Health and Welfare and Senate Finance Committee Hearings of Act 48 with a specific focus on the sections of the bill that addressed insurance rate review. I referred to the meeting agendas on file to determine which recordings pertained to Act 48. I also reviewed notes from House Health Care Committee Meetings 2011.

Act 48

Background

The Vermont statutes contemplate a more comprehensive evaluation of proposed insurance rate increases than most other states.[1] In almost all other states, individual insurance rates are lawful as long as they are actuarially justified--the statutory language typically requires that rates not be "excessive, inadequate, or unfairly discriminatory." That is the only standard the insurer must meet, and only a person who is knowledgeable about actuarial principals has the expertise necessary to determine whether that standard is met.

In Vermont, the Green Mountain Care Board (the Board) must similarly determine whether a proposed rate is actuarially justified when determining whether the rate is lawful.[2] Vermont is different, though, in that the Board must also determine whether the proposed rate meets other standards: whether it is affordable; whether it promotes quality care; whether it promotes access to health care; whether it protects insurer solvency; and whether it is not unjust, unfair, inequitable, or misleading.[3] It is important for us to remind ourselves how those standards became part of Vermont law.

My purpose in offering this statement is not to advise the Board on what those standards mean, or on how to apply them. Rather, my purpose is to outline the legislative history of this one particular part of Act 48. I draw on my experience as the Vice-Chair of the House Health Care Committee when Act 48 (H.202) of 2011 was drafted, moved through the legislative process, and passed. I also draw on my fourteen years of experience as a Vermont legislator and my review of the legislative history of Act 48 to do this.

My hope is that a description of this process, based on my knowledge of the development of the bill, my experience on the Health Care Committee, my experience in navigating the legislative process, and my detailed review of the legislative materials, will assist the Board in understanding the evidence introduced at the hearing and in making the determinations required by statute.

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[1] See Consumer Union, *50 State Overview: Statutes, Types of Rate Review and Public Participation*, https://consumersunion.org/wp-content/uploads/2014/06/AppendixA.pdf (2016).
[2] GMCB Rule 2.301(b); GMCB Rule 2.401; *see also*, 8 V.S.A. §4062(a)(3).
[3] Id.

The Legislative History of Act 48

Act 48 (H.202) of the 2011 legislative session was introduced by the Chair of the House Health Care Committee. This original draft was a proposal from the Shumlin administration.[4] The bill framed up the creation of Vermont's health insurance exchange, the creation of the Green Mountain Care Board, and laid out the steps that would need to take place to move toward a single payer financing system.[5] As it is widely known, the third part of the bill hit significant roadblocks and a single payer system did not come to be in Vermont.[6]

H. 202 touched on many parts of the health care system here in Vermont. Most importantly for this proceeding, it made important changes to the standards for insurance rate review and the process for conducting that review.[7]

The original draft language of the insurance rate review section of the bill included the new criteria that a rate be affordable, promote quality care, and promote access to care. These provisions remained in the bill throughout the legislative process.[8] Additionally, on March 16, 2011, the House Health Care Committee accepted an amendment offered by Representative Poirier that made the rate review process more transparent by requiring plain language summaries and comment periods.[9] These additional rate review standards and the Poirier transparency amendment eventually were codified in Vermont statue as part of Act 48.[10]

When describing the rate review section of the bill to Senate Finance on April 19, 2011, Robin Lunge, a representative from the Vermont Department of Banking, Insurance, Securities, and Health Care Administration (BISHCA), described the new rate review standards as being based on Rhode Island's rate review process, which includes a number of factors including an assessment of affordability.[11]

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[4] H. 202, *An Act Relating to a Single-Payer and Unified Health System* (As Introduced February 8, 2011).
[5] Id.
[66] *E.g.*, Sarah Wheaton, *Vermont Bails on Single-Payer Health Care*, Politico, https://www.politico.com/story/2014/12/vermont-peter-shumlin-single-payer-health-care-113653 (2014).
[7] Fn. 4.
[8] Id.
[9] House Health Care Committee, March 16, 2011, *H. 202 (As Passed By the House): An Act Relating to a Single-Payer and Unified Health System*, 126-127.
[10] Vt. Act No. 48, 2011.
[11] Senate Finance Committee, April 19, 2011, *H. 202: An Act Relating to a Single-Payer and Unified Health System*, Testimony of Robin Lunge, Assistant General Counsel, BISCHA.

On that same day, BISHCA's general counsel, Cliff Peterson, presented an amendment to Senate Finance regarding which types of insurance products should be included in the new rate review process and which products should remain in the former process at BISHCA. Peterson described the new rate review process as a "higher level of scrutiny" than the previous process. Peterson noted that this was true both because of the Board's role as well as the public disclosure provisions.[12]

The concept of affordability was a major theme in the discussion and the development of Act 48. This concept appears 17 times in the bill (not including references to the Affordable Care Act).[13] During the development of H.202 the legislature heard from numerous consumers about issues they faced with health care affordability, and the resulting challenges to getting needed health care services.

There is one particular exchange in the legislative record where the affordability standard in the rate review process was clearly articulated. On April 19, 2011, Senator Brock addressed the tension between actuarial soundness and affordability and anticipated a scenario in which a rate is actuarially sound but unaffordable to the average consumer.[14] Then Senator Brock asked a representative of BISHCA a question about the tension between the rate review criteria:

> you can envision a situation in which you can design a plan that meets all of the cost targets, in other words it is an appropriate charge given what it is that is being insured against, but it simply isn't affordable by anyone other than someone who is earning far more than the average wage. How do you meet both tests?

Cliff Peterson, general counsel for BISHCA at the time, responded to this question by noting that actuarial soundness includes a range. He then stated:

> the Green Mountain [Care] Board, which has general responsibility for cost containment elsewhere in the statute... might look at those [proposed rates] and say these may be actuarially sound but they do not promote affordability, you are squeezing Vermonters for every last penny your actuaries will allow. The Board may have a view on that.

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[12] Senate Finance Committee, April 19, 2011, *H. 202: An Act Relating to a Single-Payer and Unified Health System*, Testimony of Clifford Peterson, Counsel, BISHCA

[13] Vt. Act No. 48, 2011

[14] Senate Finance Committee, April 19, 2011, *H. 202: An Act Relating to a Single-Payer and Unified Health System*, Exchange between Clifford Peterson, Counsel, BISHCA, and Senator Randy Brock.

At no point in the legislative process was it discussed that affordability refers to actuarial soundness or that simply filling out forms as to actuarial reasonableness would meet the affordability criterion.

I did not find any legislative discussion that explored the meanings of the promote quality of care and promote access to care language of the rate review standard section of the bill. I note, however, that the purpose of the bill, as defined in statute, is "to promote the general good of the state by: (1) improving the health of the population; [and] reducing the per-capita rate of growth in expenditures for health services in Vermont across all payers while ensuring that access to care and quality of care are not compromised."[15]

House and Senate members in the committees of jurisdiction and on the House and Senate floors largely did not discuss the addition of the "affordable, promotes quality care and promotes access to care" language to the insurance rate review standards. The addition of this language was presented to legislators and adopted without controversy. After a review of all relevant recordings, other than the events described above and a number of additional hearings where the relevant sections of the bill were walked through by legislative council, there were no questions or expressions of concern about the new rate review standards or process.

The rate review standards were similarly not objected to by third parties. Both Don George and Kevin Goddard of Blue Cross Blue Shield of Vermont and William Little of MVP Healthcare testified in front of the House Health Care, Senate Health and Welfare, and Senate Finance committees.[16] The comments made by insurance representatives at the time did not address the new rate review process or standards. Instead, they commented on whether the small group definition in Vermont should be for businesses under fifty or under one hundred as well as the question of how many insurers should be allowed to participate in the exchange.

Additionally, on April 5, 2011, Don George from Blue Cross Blue Shield of Vermont testified in front of the Senate Health and Welfare Committee. At this hearing, the committee was chaired by the then Vice Chair of the Committee, Kevin Mullin. George made three comments suggesting changes to the bill that would require the state to include insurer

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[15] 18 V.S.A. §9372.

[16] Senate Health and Welfare Committee, April 5, 2011, H.202 - An act relating to a universal and unified health system, Testimony from Don George, Blue Cross & Blue Shield of Vermont.

perspectives before making key decisions laid out in the bill.[17] Acting Chair Kevin Mullin asked George whether there was anything else Blue Cross objected to in the bill. George responded that BCBSVT was committed to being a productive partner in the reform effort.[18]

H.202 had many significant policy areas that demanded a great deal of focus from witnesses, from members of the administration, and from legislators. However, the addition of the standards of affordability, promotion of access to care, and promotion of quality of care to rate review were adopted without controversy.

It is also clear from the legislative record that the additional rate review standards would apply to either a single-payer health care system or the existing Vermont health care system. Legislators discussed that a single-payer health care system was one possible path to health care reform, but certainly not the only path considered at the time.

The Legislature did not tie the rate review process to the implementation of the single-payer health care system that was discussed in Act 48. Further, five legislative sessions have occurred since Governor Shumlin announced his decision not to pursue a single-payer health care system in Vermont, and the Legislature has not changed the rate review standards.[19] As Robin Lunge (then of BISHCA) testified, the expanded rate review process was designed to apply to all existing health insurance plans, well before any single-payer health care system would have been implemented.[20]

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[17] Id.
[18] Id.
[19] Fn. 2.
[20] Fn. 11.

Expert Opinion

Based on my review of the historical legislative record detailed above and my experience as a legislator during the passage of Act 48, it is my opinion that:

1. The inclusion of the affordability standard in the rate review process was a recognition that a lack of affordability interferes with Vermonters' ability to get the care that they need.
2. Among the criteria the Board must consider in rate review, the terms affordable, promote quality care, and promote access to health care are independent standards, separate from a traditional actuarial analysis that considers whether proposed rates are "excessive, inadequate or unfairly discriminatory" and an analysis of insurer solvency.

EXHIBIT 2

STATE OF VERMONT
DEPARTMENT OF FINANCIAL REGULATION

IN RE: EXCHANGE RATE FILINGS - 2013

June 18, 2013
9:00 a.m.

Vermont Statehouse
Montpelier, Vermont

Rate filing hearing held on behalf of the Green Mountain Care Board at the Vermont Statehouse, Room 11, Montpelier, Vermont.

P R E S E N T:

HEARING OFFICER: Judith Henkin, Esquire
BOARD CHAIR: Anya Rader Wallack
STAFF: Michael N. Donofrio, Esquire

COURT REPORTER: Deborah J. Simon, RPR, CSR

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affiliations, there is only one that makes reference to health insurance; correct? That was the --

MR. SCHWARTZ: Okay. Actuary, associated in --

MR. KARNEDY: Sir, my question was, there is only one professional affiliation that makes reference, uses the word health, and that is on the second page, life, accident, health actuarial task force of the NIC in 1987. That's my only question. That's the only reference to health; am I correct?

MR. SCHWARTZ: I think the only word in that sentence the word health shows up.

MR. KARNEDY: And your work experience, you would agree with me that over the years from the beginning to date, your work experience generally is property casualty and Workers' Comp. In recent years you have done some health insurance work; correct?

MR. SCHWARTZ: In more than recent years. And when I look at the North Carolina Department of Insurance, I also dealt with the actuary issues in health insurance

actuary there. That's on my resume.

MR. KARNEDY: And you are a Fellow of the Casualty Actuarial Society; correct?

MR. SCHWARTZ: Yes.

MR. KARNEDY: And you are not a Fellow of the Society of Actuaries in the health section; correct?

MR. SCHWARTZ: Correct.

MR. KARNEDY: Sir, the Exhibit 13 which was provided to you, Exhibit 13, in the e-mail.

THE HEARING OFFICER: Why don't you tell him what that is so we can move through this.

MR. KARNEDY: Sure. It's the on-line directory of actuarial memberships.

Are you familiar with that?

MR. SCHWARTZ: Let me get to it. I'm not sure. I might have seen this before, but I don't have a strong recollection of it.

MR. KARNEDY: So just my question is, do you have the document in front of you? Sir, can you hear me?

MR. SCHWARTZ: Yes, I can.

MR. KARNEDY: I'm sorry, do you have the document in front of you, Exhibit 13?

MR. SCHWARTZ: Yes, I do.

MR. KARNEDY: And you see your personal information identifies you as primary practice property and casualty. Do you see that?

MR. SCHWARTZ: Yes.

MR. KARNEDY: So I would like to make a motion, if I might. I would move that this witness not be allowed to testify in this matter and his report not be allowed in evidence. He is not an expert in health insurance rates. His testimony in voir dire was that he has testified twice in recent time on health issues. The balance of the time he is a property and casualty expert.

Because his testimony does not fairly assist this Board in determining whether health rates are reasonable and meet statutory requirements, we would move that he not be allowed to testify. His background is not in the complex health insurance area and he is not qualified to assist this Board in the trier of fact.

THE HEARING OFFICER: Ms. Kuiper.

MS. KUIPER: I could ask Allan some more

questions about his health care background, if we would like to take the time to do that.

I guess just to respond directly to what was just said, the qualifications for an expert witness doesn't require actually any background in expert testimony. The question is whether or not the expert has scientific, technical, or specialized knowledge that will assist the trier of fact in understanding the evidence. And so, if it's all right, I could ask our expert a few questions about his background.

THE HEARING OFFICER: I'm going to deny the motion right now and I'm going to let you continue, if you want to ask those questions. The Board will give weight to this testimony as to whether it's as an expert he is not as qualified as other experts is not the issue. It's whether he does meet the threshold and would help the trier of fact. I'm going to allow the questioning. And let the Board weigh his expertise.

MS. KUIPER: I would like to ask that Allan Schwartz be certified as an expert witness.

almost that we don't know.
In the absence of any strong evidence that says it will be different, you stick with the '13 under '12. What we do know is our contracting department. So essentially is what we submitted for the five, two going down to the four, eight, that means we turn around to the contracting department, even though they give us our best estimate what they can hit. You don't do better than your best estimate. Whether they do it or not, we'll see. You hope the ultimate scorecard is (inaudible). Don't blame Vermont.
Q And the last question was, as an actuary, a Fellow, relying on another company's management's opinions about a rate filing, that's appropriate --
A No, it's not.
Q -- some?
Thank you very much.
THE HEARING OFFICER: Do you have questions of this witness in two minutes?
MS. KUIPER: I don't.
DR. RAMSAY: Did you ask Express Scripts for a comparison of their national sample to the Vermont experience?
MR. LOPATKA: No, we did not.
THE HEARING OFFICER: Con.
MR. HOGAN: You made a reference to

income statements. I missed the implication of it?
MR. LOPATKA: I was -- I am kind of timing a few things and take the time just about. Al was asking questions earlier, how do you know whether you were right or wrong in terms of setting your rate. The income statement tells you.
If you are underestimated you are going to be losing money. And if you overestimate you are going to hear from your sales and marketing, and growth departments because they are going to say I can't sell their stuff. It's too expensive.
THE HEARING OFFICER: Okay. We are going to close this hearing at this time. And I'm sorry that we did not possibly get every little nuance that we needed to get, but you are going to file a memo to this. And those are due next Monday, I believe, at noon.
So we are going to close the hearing. Thank you all very much. We have to vacate the room, so we should do that.
Thank you everybody for coming out.

(WHEREUPON, the Rate Filing Proceeding was concluded at approximately 12:55 p.m.)

CERTIFICATE

I, Deborah J. Slinn, Certified Shorthand Reporter, certify:

That the foregoing proceedings were reported stenographically by me at the time and place herein set forth;

That the foregoing is a true and correct transcript of my shorthand notes so taken;

That I am not a relative or employee of any attorney of the parties nor financially interested in the action.

The certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

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Deborah J. Slinn

My commission expires February 10, 2015.