

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF:)
PROPOSED AFFILIATION OF)
BCBSD, INC., d/b/a) **C.A. No. 04A-07-004-JRS**
BLUE CROSS AND BLUE SHIELD)
OF DELAWARE, WITH)
CAREFIRST, INC.,)

Date Submitted: September 10, 2004

Date Decided: October 4, 2004

Revised and Corrected: October 5, 2004

MEMORANDUM OPINION

Upon Appeal from the Decision and Amended Order
of the Insurance Commissioner Dated June 30, 2004.

AFFIRMED.

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SLIGHTS, J.

I.

In this appeal from a decision of the Delaware Insurance Commissioner (“the Commissioner” or “the Delaware Commissioner”), the Court addresses the scope of the Commissioner’s authority to consider and approve a unique structural affiliation between two non-profit health service plans, the appellant, CareFirst, Inc. (“CareFirst”) and one of the appellees, Blue Cross and Blue Shield of Delaware, Inc. (“BCBSD”). The affiliation created by the parties and submitted to the Commissioner for approval resulted in a transaction not specifically addressed, and perhaps not even contemplated by, the statutory scheme that regulates the health insurance industry in Delaware. The Commissioner approved the affiliation in March, 2000. By order dated June 30, 2004, the Commissioner withdrew her approval after concluding that recently enacted legislation in Maryland rendered the affiliation no longer in the best interests of BCBSD or its Delaware subscribers.

CareFirst now argues that the Commissioner lacked the authority to approve the affiliation in 2000 and lacked the authority subsequently to withdraw her approval in 2004. According to CareFirst, neither act was within the Commissioner’s statutorily prescribed power. CareFirst also argues that even if the Commissioner was authorized to approve and then disapprove of the affiliation, her decision to order the disaffiliation of BCBSD and CareFirst was not supported by substantial evidence.

For the reasons that follow, the Court finds that the Commissioner was authorized both to approve the affiliation with conditions and subsequently to withdraw that approval when a dramatic change in circumstances compelled her to do so. In addition, the Court is satisfied that the Commissioner's decision to order disaffiliation is supported by substantial evidence. Accordingly, the decision must be **AFFIRMED**.

II.

A. The Parties

The parties to this appeal are the appellant, CareFirst, and the appellees, the Delaware Department of Insurance (the "Department"), the Delaware Department of Justice, and BCBSD. CareFirst is a non-profit Maryland corporation regulated as a health service plan under the Maryland Insurance Code. CareFirst operates as a holding company that originally was formed by an affiliation between CareFirst of Maryland, Inc. ("CFMD") and Group Hospitalization and Medical Services, Inc. ("GHMSI"), two non-profit subsidiaries that provide Blue Cross and Blue Shield services in the State of Maryland and the District of Columbia, respectively.¹ BCBSD is a non-profit Delaware corporation regulated as a health service corporation under

¹D.I. 12, B- 8, 9.

the Delaware Insurance Code.² The Commissioner is the “chief officer” of the Department and is charged with regulatory responsibility over domestic and foreign “insurers” as provided by the Delaware Insurance Code.³

B. The 1998 Affiliation Agreement

On December 23, 1998, CareFirst and BCBSD executed an Affiliation Agreement (the “Agreement”) to capitalize on marketing and administrative synergies between the two companies and to allow BCBSD to remain competitive and economically viable through its relationship with the larger and more resourceful CareFirst.⁴ Prior to entering into the Agreement, the BCBSD board conducted extensive due diligence on CareFirst, the CareFirst Board and its management. BCBSD felt comfortable at the time of the Affiliation that CareFirst was a company focused on fiscal discipline and market competitiveness, that it understood and would respect the unique Delaware market, and that it shared BCBSD’s vision for the future.⁵

Under the Agreement, CareFirst would become the sole member of BCBSD,

²See DEL. CODE ANN. tit.18, §§ 102, 310 (1999). Title 18 of the Delaware Code Annotated of 1974 shall hereinafter be referred to as the “Delaware Insurance Code.”

³*Id.*

⁴D.I. 12, B-10.

⁵D.I. 12, B-169, Tr. at 86.

as well as the primary licensee for use of the Blue Cross and Blue Shield service trademarks (the “Marks”) in Delaware. BCBSD would become an affiliate of CareFirst and would maintain “controlled affiliate” licenses to use the Marks in Delaware. CareFirst paid no consideration for either its membership interest in BCBSD or the primary licenses for use of the Marks in Delaware. The Agreement required BCBSD and CareFirst to amend their respective charters and bylaws to implement this unique affiliated structure. Despite the structural changes, BCBSD remained a locally-controlled entity with its own Delaware-based board of directors.⁶

The Agreement contemplated three classes of CareFirst directors comprised in total of twenty-one members, including six “Class I Directors” from the District of Columbia affiliate, twelve “Class II Directors” from the Maryland affiliate, and three “Class III Directors” from the Delaware affiliate. Under the Agreement, each class of directors maintained the exclusive right to elect or remove any director within its class.⁷ Moreover, the size of the CareFirst Board could not be changed without the approval of each class of directors, and the existence and powers of the separate classes of directors or members could not be altered in any manner, directly or

⁶This was accomplished through amendments to the BCBSD and CareFirst charters that prevented CareFirst from electing anyone to the BCBSD board of directors except those persons nominated by the BCBSD board. D.I. 12, B-310, 335.

⁷D.I. 12, B-336-37.

indirectly, without the consent of the potentially effected class of directors.⁸

C. The 2000 Affiliation Order

In 1999, BCBSD and CareFirst requested approval of the Agreement from the Commissioner under Chapters 3 and 50 of the Delaware Insurance Code. The parties believed this approval to be necessary and in concert submitted themselves and the Affiliation they had constructed to the jurisdiction of the Commissioner.⁹ Even though it was understood by all concerned that the Affiliation was not a “change in control” transaction or merger of the companies, the parties agreed that the provisions of the Delaware Insurance Code relating to such transactions may provide helpful guidance to the Commissioner as she considered the unique transaction they had submitted to her for approval.¹⁰

In October 1999, a public hearing was held on the matter before the Honorable Battle R. Robinson, the Hearing Officer appointed by the Commissioner to consider the transaction in the first instance. Three months later, on January 4, 2000, the Hearing Officer issued her findings and conclusions in which she recommended approval of the Affiliation with several conditions. On March 20, 2000, the

⁸D.I. 14, Ex. B, Affiliation Agreement, App. B § 3(b).

⁹D.I. 12, B-1.

¹⁰D.I. 12, B-11.

Commissioner issued her Order in which she adopted most of the Hearing Officer’s recommendations as conditions to her approval of the Affiliation (the “Affiliation Order”).¹¹ The following conditions, to which the parties agreed, are relevant here:

- CareFirst and BCBSD must comply with the provisions of 18 Del. C. Ch. 50, and CareFirst must further agree to the “general supervisory authority” of the Commissioner pursuant to 18 Del. C. Ch. 3.¹²
- The CareFirst and BCBSD boards of directors must be restructured to comply with the terms of the draft amended certificates of incorporation and bylaws submitted for approval by the parties. Any change in the corporate structure of either CareFirst or BCBSD “must receive prior approval of the [Department].”¹³
- Certain transfers of assets are now subject to the prior approval of the Commissioner.¹⁴
- CareFirst and BCBSD must maintain their separate corporate identities for legal, financial, accounting, tax, and insurance regulatory purposes.¹⁵

¹¹The Commissioner modified and augmented some of the Hearing Officer’s proposed conditions to “strengthen and give more specificity” to the Department’s ability to oversee and regulate the future activities of the parties, and to “better assure that no substantial alteration of BCBSD health services as currently provided in Delaware can occur absent prior notice and approval of the Insurance Commissioner and the Attorney General.” D.I. 12, B-3.

¹²D.I. 12, B-58 at ¶ 3.

¹³D.I. 12, B-58 at ¶ 4.

¹⁴D.I. 12, B-58 at ¶ 5.

¹⁵D.I. 12, B-58 at ¶ 1.

- BCBSD must maintain its not-for-profit status for at least two years from the date the Affiliation becomes effective. Thereafter, it may not convert to for-profit status without the approval of the Commissioner.¹⁶
- Any change in the corporate structure of CareFirst or any of the affiliates which is required to be filed with another regulator must also simultaneously be filed with the Department.¹⁷
- The conditions to the approval of the Affiliation are “subject to further order as circumstances may require.” The Hearing Officer’s Report and Affiliation Order “are subject to further modification or amendment or further review either sua sponte by the Commissioner or by motion of a party.”¹⁸

After the Affiliation was approved by the Commissioner, the parties continued to deliver services to BCBSD subscribers in accordance with the terms of the Agreement and the Affiliation Order. By all accounts, the Affiliation has been and continues to be a success.

D. The Maryland Legislation

In response to growing concerns of the Maryland Insurance Commissioner (“the Maryland Commissioner”) regarding a perceived change in the focus and direction of CareFirst, on May 22, 2003, the Maryland General Assembly enacted legislation addressing the regulation of nonprofit health service plans incorporated

¹⁶D.I. 12, B-60 at ¶ 9.

¹⁷D.I. 12, B-61 at ¶ 10.

¹⁸D.I. 12, B-62 at ¶ 19.

in or licensed by the State of Maryland (the “Maryland Legislation”).¹⁹ The Maryland legislators made no secret of the fact that the Maryland Legislation targeted CareFirst and its affiliates.²⁰ Several features of the Maryland Legislation, effective June 6, 2003, altered the Affiliation, including provisions that:

- Prohibited an acquisition or conversion of CareFirst to a for-profit corporation for a period of five years, and allowed that any decision to convert thereafter may be vetoed by any three members of CareFirst’s Board of Directors;
- Changed the membership of the CareFirst Board by causing the removal and replacement of all twelve Class II Directors by July 1, 2004, irrespective of their current term limit status, without approval by Delaware or District of Columbia regulators;
- Provided that five of the new Class II directors on the CareFirst Board would be nominated by a committee designated by the Maryland General Assembly and the Governor by December 31, 2003, and that the remaining seven Class II directors would be selected by the previously elected Class II directors from a special pool of applicants determined by the nominating committee to meet the minimum qualifications established by the Maryland Legislation;
- Reduced the term of a CareFirst director to two years and limited total service to six years (down from nine);

¹⁹On November 20, 2001, CareFirst entered into an agreement with WellPoint Health Networks, Inc. whereby CareFirst and its affiliates, including BCBSD, would be acquired by WellPoint and converted to for-profit status. In March, 2003, the Maryland Commissioner declined to approve the transaction and criticized CareFirst’s management and Board for not respecting CareFirst’s nonprofit mission, for failing to seek and consider material information relevant to the decision to convert, for approving large bonuses and permanent roles for management, and for conducting a flawed bidding process. D.I. 12, B-436.

²⁰D.I. 10, Ex. 7 at 6-7; Ex. 8 at 8-9; Ex. 19 at 7.

- Limited compensation of CareFirst directors to \$12,000 per calendar year and \$15,000 per year for Board or Committee Chairs;
- Required CareFirst directors to adhere to a newly stated non-profit mission;
- Sanctioned CareFirst directors if they strayed from the non-profit mission;
- Expanded the number of CareFirst directors from twenty-one to twenty-three by adding two non-voting members to the CareFirst Board, one to be appointed by the Speaker of the Maryland House of Delegates and the other to be appointed by the President of the Maryland Senate;
- Identified six categories of CareFirst and BCBSD management decisions that must now be approved by the CareFirst Board or by delegation to one of its committees; and
- Authorized the creation of an oversight committee of Maryland government appointees to examine and evaluate CareFirst.²¹

E. The Commissioner’s Standstill Order, Rule to Show Cause and the Administrative Services and Business Affiliation Agreement

In response to the Maryland Legislation, citing her concern that the new law would adversely affect BCBSD and its Delaware subscribers, the Commissioner

²¹The Maryland Legislation triggered a flurry of litigation among the Blue Cross and Blue Shield Association and the State of Maryland. The litigation resulted in an Order and Consent Judgment in the United States District Court for the District of Maryland. This consent order purportedly modified the Maryland Legislation in several respects, including its provisions regarding the composition of the CareFirst board. D.I. 12, B-505-08. In 2004, the Maryland General Assembly passed an amendment to the Maryland Legislation intended, *inter alia*, to make clear that the statute applied only to insurers actually conducting business in Maryland. D.I. 12, B-535-36.

issued a so-called “Standstill Order” on April 10, 2003, in which she prohibited BCBSD or CareFirst from changing their charters, bylaws or the composition of their Boards of Directors without the Commissioner’s prior written approval.²² Subsequently, on May 22, 2003, the Commissioner issued a Rule to Show Cause requiring the parties to demonstrate why: (1) the Maryland Legislation would not contravene the Affiliation Order, (2) the Affiliation Order should not be terminated, (3) BCBSD’s participation in the Affiliation should not be withdrawn, (4) any assets, licenses, authorities, or the like yielded by BCBSD to CareFirst should not be returned, and (5) any other and necessary Order should not be entered protecting the rights of Delaware citizens to the full benefits offered prior to the Affiliation Order.

To address the Commissioner’s concerns, in the Fall of 2003, BCBSD and CareFirst proposed to modify the Affiliation by adopting an Administrative Services and Business Affiliation Agreement (the “ASBAA”). The ASBAA provided for: (1) the restoration of majority membership of BCBSD to the BCBSD Board of Directors; (2) an ongoing business relationship between BCBSD and CareFirst; (3) continued oversight by the Commissioner; and (4) the surrender of the primary licenses to use the Marks in Delaware by CareFirst back to BCBSD. In November 2003, CareFirst and BCBSD submitted the ASBAA to the Delaware and Maryland Insurance

²²D.I. 12, B-516.

Commissioners for approval. On December 1, 2003, after receiving evidence from the parties, the Delaware Commissioner approved the ASBAA on the condition that it be consummated by December 31, 2003.

For his part, the Maryland Commissioner withheld approval and notified the parties by letter dated December 23, 2003, that the ASBAA was “disapproved, as submitted, pending my further review.” As of this writing, the Court is not aware of the Maryland Commissioner’s decision regarding the ASBAA.²³

Because CareFirst and BCBSD did not obtain approval from the necessary Maryland authorities, they failed to close the ASBAA by the December 31, 2003 deadline set by the Delaware Commissioner. Consequently, the Commissioner convened hearings on March 9 and April 15, 2004 to receive evidence concerning whether the Affiliation Order had been violated by the Maryland Legislation and, if so, what the appropriate remedy for any such violation might be.

F. The Commissioner’s June 30, 2004 Decision and Amended Order

As a result of her hearings, the Commissioner issued a Decision and Amended Order on June 30, 2004, in which she found several violations of the Affiliation Order arising from the Maryland Legislation. Specifically, the Commissioner found that the Maryland Legislation:

²³See Footnote 76, *infra*.

- placed a significantly different Board, with significantly different goals, objectives and responsibilities, in control of CareFirst and that there is a substantial risk that this new majority will govern CareFirst in a manner that is inconsistent with the present long term objectives of the BCBSD Board;²⁴
- granted to the Maryland-controlled CareFirst Board new, specific and detailed authority to oversee the management of the affiliates, including indirectly BCBSD, that did not exist at the time of the review and approval of the Affiliation;²⁵
- created a non-profit mission that causes CareFirst to be governed, managed and operated in a way that does not give first priority to its financial fitness and is not consistent with the character of CareFirst as it existed when the Affiliation with BCBSD was approved, and provided for sanctions against individual board members for straying from this mission;²⁶
- created a five-year acquisition moratorium which, when coupled with the statutory non-profit mission of CareFirst, effectively precludes BCBSD from being acquired by a third party at least through May 22, 2008, and very likely for the indefinite future thereafter, notwithstanding that such an acquisition might be in the best interests of BCBSD and its subscribers.²⁷

The Commissioner's Order required that CareFirst and BCBSD take all steps necessary to return CareFirst's membership in BCBSD to the BCBSD Board of Directors, and to cause CareFirst to surrender its rights to use the Marks in Delaware.

²⁴D.I. 12, B-157.

²⁵D.I. 12, B-157-58.

²⁶D.I. 12, B-158-59.

²⁷D.I. 12, B-159-60.

Nevertheless, the Order permits the parties to preserve their Affiliation on a contractual basis if they desire, subject to the Commissioner's approval.²⁸

CareFirst timely filed its notice of appeal from the Commissioner's June 30, 2004 Order on July 16, 2004. Thereafter, the parties stipulated, and the Court agreed, to address this appeal on an expedited basis and, in the meantime, to enter a stay of the Commissioner's June 30 Order.

III.

CareFirst argues that the Delaware Commissioner exceeded her authority in several respects during the proceedings before the Department. First, CareFirst contends that, because the Delaware Insurance Code does not expressly address the role of the Commissioner in the context of an Affiliation like the one created here, the Commissioner lacks the authority either conditionally to approve the Affiliation or subsequently to vacate that approval. Alternatively, CareFirst argues that even if the Commissioner had the authority to order disaffiliation, she had no authority to order CareFirst and BSBSD into a particular business relationship, such as the ASBAA. Finally, CareFirst alleges that the Commissioner had no authority to determine whether there was a breach of the Agreement because that is a question for a court,

²⁸Both CareFirst and BCBSD have indicated that they would be willing to remain contractually affiliated.

not an administrative agency, to decide.

Next, CareFirst argues that the Commissioner's June 2004 Order is not supported by substantial evidence. Specifically, CareFirst contends that the record lacks substantial evidence to support the Commissioner's finding that the Affiliation Order caused a change in the structure of the CareFirst Board and thereby violated her Affiliation Order. In this regard, CareFirst observes that Class II directors have always been authorized by the CareFirst charter and bylaws to elect and remove Class II directors. The CareFirst corporate documents also allow the Board to take all steps necessary to comply with applicable laws. Thus, the steps taken to elect twelve new Class II directors in compliance with the Maryland Legislation were proper and consistent with the structure approved by the Delaware Commissioner in her Affiliation Order.

CareFirst also argues that the addition of the two nonvoting directors does not violate the Affiliation Order because the CareFirst charter expressly allows that the size of the Board may be increased or decreased, in accordance with the procedure set forth therein.²⁹ This provision was in the corporate documents approved by the Commissioner.³⁰ Moreover, because the two additional directors are nonvoting, their

²⁹D.I. 12, B-336.

³⁰*Id.*

addition to the CareFirst Board did not alter the voting balance or otherwise change the “structure” of the Board.

As to the remedy imposed by the Commissioner, CareFirst contends that she acted arbitrarily and abused her discretion by ordering the disaffiliation prior to allowing the Maryland Commissioner to consider and act upon the proposed ASBAA. According to CareFirst, the ASBAA has been approved by all necessary parties in Delaware, provides answers to all of the Delaware Commissioner’s concerns regarding the Maryland Legislation, and certainly provides a less drastic remedy than disaffiliation.

Finally, CareFirst argues that the Commissioner’s decision was based upon unsupported speculation that the Maryland Legislation “might put BCBSD and its subscribers at risk,” a conclusion directly at odds with the overall success that CareFirst and the Affiliation have continued to enjoy both before and after the Maryland Legislation was enacted.

Both BCBSD and the Department take issue with CareFirst’s position on the extent of the Commissioner’s authority.³¹ They contend that the Commissioner was operating properly under the broad grant of authority given to her by the Delaware

³¹While BCBSD did not brief the issue of the Commissioner’s authority, BCBSD indicates that it agrees with and has adopted the Department’s position.

Insurance Code when she approved the Affiliation and later when she vacated her Affiliation Order. They also argue that CareFirst should not be permitted to challenge the Commissioner's authority now because CareFirst affirmatively assented to her Affiliation Order when it was entered including each of the conditions imposed.

As to the merits of the Commissioner's decision, both BCBSD and the Department maintain that, at a minimum, there is substantial evidence that a gross change of circumstances occurred as a result of the Maryland Legislation that would enable the Commissioner to respond in her capacity as chief administrator and regulator. Alternatively, there is substantial evidence to support the Commissioner's conclusion that specific conditions of the Affiliation Order were violated. Additionally, they argue that the remedy was appropriate because the Commissioner was responding to a real threat of harm to Delaware subscribers and tailored the remedy to allow the parties to continue their relationship through a contractual relationship, rather than a structural one, if they both desired.

These contentions raise two issues for the Court to decide: (i) whether the Commissioner had the authority conditionally to enter the Affiliation Order and subsequently to vacate that Order and, if so; (ii) whether the Commissioner's decision to vacate her Affiliation Order and order disaffiliation was supported by substantial evidence.

IV.

This Court has appellate jurisdiction over this matter pursuant to Section 10142 of the Administrative Procedures Act.³² In exercising its jurisdiction, the Court's review is limited to determining whether the Commissioner's findings are supported by substantial evidence, whether they are free from legal error, and whether they are the product of an orderly and logical deductive process.³³ "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³⁴ In making the determination of whether substantial evidence supports the administrative findings, the Court does not weigh the evidence, determine questions of credibility, or make its own factual findings; it merely determines if the evidence is legally adequate to support the agency's factual findings.³⁵

³²DEL. CODE ANN. tit. 29, § 10142(a)(2003) ("Any party against whom a case decision has been decided may appeal such decision to the [Superior] Court.").

³³*In the Matter of Surcharge Classification 0133 By the Delaware Compensation Rating Bureau, Inc.*, 655 A.2d 295, 299 (Del. Super. Ct. 1994), citing *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973) ("Reversal is warranted if the administrative agency exercises its power arbitrarily, or committed an error of law, or made findings of fact insupportable by substantial evidence.").

³⁴*Canyon Construction v. Williams*, 2003 WL 1387137, at *1 (Del. Super.).

³⁵*Id.*; DEL. CODE ANN. tit. 29, § 10142(d)(2003).

V.

A. The Challenge To The Commissioner's Authority

Before determining whether the Commissioner's decision was supported by substantial evidence, the Court must first address the legal question of whether the Commissioner was authorized conditionally to approve the Affiliation between CareFirst and BCBSD and also whether she was authorized subsequently to vacate that order. For the reasons that follow, the Court concludes she was authorized to do both.

1. The Commissioner's Authority Conditionally to Approve the Affiliation

Chapter 3 of the Delaware Insurance Code outlines the Commissioner's general authority. It provides, in part, that "[t]he Commissioner shall enforce and execute the duties imposed by this title" and "...shall have the powers and authority expressly vested by or reasonably implied from this title."³⁶ This broad grant of authority allows the Commissioner to do all that is "reasonably necessary" to execute her powers and duties.³⁷ In addition to this broad grant of statutory authority, the

³⁶DEL. CODE ANN. tit. 18, § 310(a),(b) (1999).

³⁷*Dep't of Correction v. Worsham*, 638 A.2d 1104, 1107 (Del. 1994) ("An expressed grant of legislative power to an agency carries with it the authority to do all that is reasonably necessary to execute that power."); *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 713 (Del. 1979)(same); see *State Farm Mut. Auto. Ins. Co. v. Hale*, 297 A.2d 416, 418 (Del. Ch. 1972)(same).

Delaware Insurance Code addresses specific instances in which the Commissioner may exercise her regulatory powers. For instance, at Chapter 50, the Insurance Code grants the Commissioner express authority to approve mergers and change-of-control transactions involving Delaware insurers.³⁸ When evaluating a merger or change-of-control transaction, the Commissioner must strictly apply the criteria set forth in Section 5003(d)(1) and must approve the proposed transaction unless she determines that the transaction would implicate any of the concerns identified in the statute.³⁹

Under the Affiliation Order, CareFirst would become the sole member of BCBSD, as well as the primary licensee for use of the Marks in Delaware. BCBSD would become an affiliate of CareFirst and maintain “controlled affiliate” licenses to use the Marks in Delaware. CareFirst paid no consideration for either the transfer of the membership interest in BCBSD or the transfer of the primary licenses for use of the Marks in Delaware. Although the Agreement required BCBSD and CareFirst to

³⁸See DEL. CODE ANN. tit. 18, § 5003(a)(1999).

³⁹See DEL. CODE ANN. tit. 18, § 5003(d)(1)(1999)(“Section 5003”): “*Approval by Commissioner: Hearings.*- (1) The Commissioner *shall* approve any merger or other acquisition of control referred to in subsection (a) of this section unless, after a public hearing thereon, the Commissioner finds that [the transaction will implicate any of the following enumerated concerns....]”(emphasis added). See also *Dakota Nat’l Ins. Co. v. Comm’r of Ins.*, 54 N.W.2d 745, 748 (N.D. 1952)(“Giving this [mandatory] language its ordinary meaning, it seems clear to us that the exercise of discretion by the Commissioner of Insurance is limited to a determination of whether an insurance company has complied with the statutes and that when such a company has complied with all of the statutory prerequisites, it is the Commissioner’s duty to issue a certificate that it has so complied.”).

amend their respective charters and bylaws to implement this structure, BCBSD remained a locally-controlled entity with its own local board of directors. There was no merger or change-of-control effected by the Affiliation. By its terms, then, Section 5003 does not apply to the Affiliation. And the Delaware Insurance Code does not otherwise address the unique transaction undertaken by BCBSD and CareFirst here.

Notwithstanding the absence of a specific statutory grant of authority, CareFirst and BCBSD went to the Commissioner with the Agreement because they perceived a need to seek regulatory approval of the Affiliation in keeping with the broad authority of the Commissioner as set forth in Chapter 3.⁴⁰ Moreover, in apparent recognition of the unique nature of this arrangement, the parties agreed that the Section 5003 criteria could guide the designated hearing officer, and later the Commissioner, through the approval process,⁴¹ even if the statutory criteria were not

⁴⁰D.I. 12, B-1.

⁴¹D.I. 12, B-11.

the only factors to be applied in the analysis.⁴² In accordance with this understanding, the Hearing Officer applied the Section 5003 criteria to the proposed Affiliation, found that the concerns identified in the statute were not implicated by the Affiliation, and recommended approval of the Affiliation with several conditions.⁴³ The Commissioner adopted most of the Hearing Officer's recommendations and included them in her Order as conditions to her approval of the Affiliation.⁴⁴

CareFirst now argues that the Commissioner lacked the authority conditionally to approve the Affiliation because the applicable statutory scheme does not specifically authorize her to do so. While the Court agrees that the Section 5003 criteria normally should be applied strictly and unconditionally when the transaction involves a merger or change of control, no such limitations confine the Commissioner's review of a hybrid transaction, such as the Affiliation at issue here, particularly when the parties in concert subject themselves to the Commissioner's

⁴²*But see Blood Serv. Plan Ins. v. Williams*, 186 So.2d 33, 38 (Fla. Dist. Ct. App. 1966) (“Although the [State Insurance] Commissioner is accorded reasonable latitude of discretion in determining whether the requirements of the statute have been complied with, he is not authorized nor empowered to impose additional conditions and requirements as a prerequisite to granting a certificate of authority under the statute.”); *Dakota Nat’l Ins. Co.*, 54 N.W.2d at 748 (stating that the Commissioner must limit his inquiry to whether the company has complied with the statute); *New Hampshire-Vermont Hospitalization Serv v. Whaland*, 315 A.2d 191, 194-95 (N.H 1974) (stating absent statutory authority, “Insurance Commissioner does not have supervisory powers over the composition of the board of medical service corporations.”).

⁴³D.I. 12, B-53-57.

⁴⁴D.I. 12, B-3, 58-62.

authority and make no effort to seek boundaries upon her review.

Given the nature of the transaction under review and the understanding of the parties, the Commissioner was free to scrutinize the proposed transaction in accordance with criteria she deemed appropriate, and to place conditions upon her approval of the Agreement, so long as the process she employed comported with the Administrative Procedures Act and basic notions of due process.⁴⁵ Neither party has suggested that the Commissioner strayed from either precept. Indeed, after the Hearing Officer issued her recommendations, either party had the right to take exception to her findings under the Administrative Procedures Act, even on the issue of authority, but neither party chose to exercise that right.⁴⁶ When the Commissioner issued her Order approving the Affiliation, the parties could have appealed that Order, but again, did not.⁴⁷ Consequently, neither party can be heard to challenge her authority to approve the Affiliation now. It is simply too late.

⁴⁵*See generally* LEE R. RUSS, ET AL., *COUCH ON INSURANCE* § 2:10 (3d ed. 1997)(“The insurance commission or other regulatory body must exercise its jurisdiction in a matter which conforms to the concepts of due process of law imposed by federal and state constitutions.”).

⁴⁶*See* DEL. CODE ANN. tit. 29, § 10126(b)(1999)(“When the proposed order is submitted to the agency, a copy shall be delivered to each of the other parties who shall have 20 days to submit in writing to the agency exceptions, comments and arguments respecting the proposed order.”).

⁴⁷D.I. 12, B-1. The Commissioner’s Order approving the Affiliation was a final, not an interlocutory order. Because her Order was final, either party could have taken an appeal from it in accordance with the applicable rules. *See* Del. Super. Ct. Civ. R. 72; *Quaker Hill Place v. Saville*, 523 A.2d 947 (Del. Super. Ct. 1987)(an order must be final before it is subject to review).

The Commissioner’s authority to approve the Affiliation does not derive solely from the parties’ agreement to submit the matter to her. Her authority to review the Agreement is a logical extension of her implied powers under Chapter 3 of the Delaware Insurance Code.⁴⁸ As Commissioner, she is charged with evaluating mergers and other change-of-control transactions involving Delaware insurers to ensure that the combination will not be harmful or prejudicial to the interests of Delaware subscribers. Given this express authority, it is logical that the Commissioner, through her implied powers, is authorized to evaluate this Affiliation because the potential for injury to Delaware subscribers is equally as real.⁴⁹

2. The Commissioner’s Authority to Vacate Her Prior Order

Next, CareFirst contends that because nothing in Chapter 3 or Chapter 50 of the Delaware Insurance Code expressly permits the Commissioner to vacate her prior Order, she must be prohibited from doing so. Although CareFirst correctly observes that the Delaware Insurance Code does not *expressly* permit the Commissioner to

⁴⁸*Retail Liquor Delaers Ass’n of Delaware v. Delaware Alcoholic Beverage Control Comm’s*, 1980 WL 273545 at * 3 (Del. Ch.) (“When an agency is vested with a broad range of discretionary powers it is likely that the General Assembly intended to vest implied authority in such agency to do that which is incidental, implied, necessary and proper in light of the objective sought to be gained and in light of the express powers granted.”).

⁴⁹*See* LEE R. RUSS, ET AL., *supra* note 45, § 2:8 (“The authority granted the regulatory body entails a duty to exercise a broad surveillance over the operations of insurance companies with a view to instituting procedures and recommending changes which might prevent or reduce the likelihood of unsuccessful ventures.”).

vacate her Affiliation Order, this fact should come as no surprise given that the Delaware Insurance Code did not *expressly* authorize her to enter the Order in the first place. The Court already has determined that the broad grant of statutory authority to the Commissioner empowered her to act when she was requested by the parties to review and approve the Affiliation. Now the Court must consider whether this same authority empowered her to act when confronted with a potential violation of the letter and/or spirit of her Affiliation Order.

It is well recognized that courts have the inherent power to vacate their judgments or orders when justice requires.⁵⁰ This inherent power exists within administrative agencies as well. An administrative agency performing its regulatory functions has the inherent power to grant a rehearing or otherwise to reconsider a previous decision, even absent specific statutory authority.⁵¹

CareFirst argues that the Commissioner's jurisdiction over the Affiliation expired after the time to take an appeal of her Affiliation Order had passed.

⁵⁰*Lyons v. Delaware Liquor Comm'n*, 58 A.2d 889, 895 (Del. Gen. Sess. 1948) (“It is an inherent power of Courts of record to vacate their judgements or orders under proper circumstances, within a limited period after rendition.”).

⁵¹*See Henry*, 293 A.2d at 581 (“In Delaware, a public body exercising judicial functions inherently has the power, even without statutory authority, to reopen and reconsider a decision until it loses jurisdiction.”). *See also* E.H. Schopler, Annotation, *Power of Administrative Agency to Reopen and Reconsider Final Decision As Affected By Lack of Specific Statutory Authority*, 73 A.L.R. 2d. 939 §§ 2, 3 (2004) (“Some of the authorities proceed on the theory that administrative agencies, like courts, have the inherent or implied power to reconsider final decisions still under their control, and that such power necessarily follows from their powers to decide.”).

Consequently, her power to vacate the Affiliation Order also had expired. This argument ignores the fact that the Commissioner expressly retained jurisdiction to review the Order and to modify it either *sua sponte* or by motion of either BCBSD or CareFirst.⁵² As previously stated, CareFirst did not challenge the imposition of this condition or, for that matter, any of the other conditions imposed by the Commissioner. Instead, CareFirst accepted the Commissioner's conditions and has been operating under these conditions for the four years that have passed since its Affiliation with BCBSD was approved. Once again, CareFirst's challenge to the Commissioner's authority comes too late.

Because the Commissioner, as an administrator and regulator, has the inherent authority to reconsider a prior decision, and because she expressly retained jurisdiction over the Affiliation in her original Affiliation Order, the Court finds that she likewise had the authority to vacate her Affiliation Order. The Court next considers whether her exercise of that authority was proper in this case.

B. The Commissioner's Decision Was Supported By Substantial Evidence

To determine *vel non* the Commissioner properly exercised her authority, the

⁵²D.I. 12, B-62 at ¶ 19: "These conditions are subject to further order as circumstances may require. These Findings and Recommendations and the Commissioner's Order are subject to further modification or amendment or further review either *sua sponte* by the Commissioner or by motion of a party."

Court must consider whether her findings that the Affiliation Order was violated and that disaffiliation was the appropriate remedy were supported by substantial evidence.

The Court will consider these issues *seriatim*.

1. The Violation of the Affiliation Order

_____The Department argues that regardless of whether the Maryland Legislation violated any of the specific conditions of the Affiliation Order, as the “chief officer” of the Department, the Commissioner is vested with the authority continuously to examine the Affiliation to ensure that the letter and spirit of the Agreement and Affiliation Order remain in tact. The Court agrees. At the time she approved the Affiliation, the Commissioner made specific findings that the transaction would benefit Delaware subscribers.⁵³ She made these findings based upon a thorough understanding of the goals of the Affiliation and of the regulatory environment in which it would operate. This understanding was a predicate of her approval of the transaction. When the conditions that form the bases of her approval change, the Commissioner must be empowered to withdraw her approval if she finds that the changes render the Affiliation no longer in the best interest of Delaware subscribers. This is what regulators do. And this is precisely what the Commissioner did here. Her findings in this regard were amply supported by substantial evidence.

⁵³D.I. 12, B-1, B-5.

The gross effect of the Maryland Legislation was substantially to enhance the oversight role of the Maryland General Assembly in CareFirst's day-to-day operations.⁵⁴ The Maryland legislators injected themselves into CareFirst by directing a dramatic change in the CareFirst corporate structure and, in turn, a dramatic change in CareFirst's focus and priorities. First, the Maryland General Assembly reshaped the CareFirst Board of Directors by directly appointing two new members and by changing the requisite qualifications of Class II directors.⁵⁵ Then the Maryland General Assembly unceremoniously "sacked" each and every Class II director and

⁵⁴D.I. 12, B-169, Tr. at 84-85: "Second, the legislation requires routine management decisions made by CareFirst or any affiliate or subsidiary of CareFirst to be pushed up to the CareFirst board or a board committee for approval. These are decisions that are not limited to policy but involve substantial operations and, in effect, have board members without the expertise of their officers having to pass on actions not traditionally coming to board attention." *See also* D.I. 12, B-482 (Maryland Legislation appoints two new directors chosen by Maryland legislators); D.I. 12, B-505 (Maryland Legislation replaces all Class II directors).

⁵⁵D.I. 12, B-169, Tr. at 89: "[T]he CareFirst board now has two nonvoting members serving at the pleasure of the Maryland Senate and House of Delegates, whose apparent function appears to be to report board communications and actions back to the Maryland House and Senate leadership." *See Disney v. The Walt Disney Co.*, 2004 WL 1776688 at *3(Del. Ch.)(noting that "the private communications among or deliberations" of a board of directors are generally private and not subject to public disclosure.).

replaced them with directors hand-picked by the legislators or their designees.⁵⁶ The General Assembly also created an “oversight committee” to advance the interests of Maryland’s uninsured population by ensuring, *inter alia*, that “policies and processes are in effect to assess and improve the quality of health insurance products to [Maryland] subscribers and certificate holders.”⁵⁷

To ensure compliance with this new corporate direction, the Maryland General Assembly provided the Maryland Commissioner with the authority to sanction CareFirst directors individually for non compliance.⁵⁸ Specifically, the Maryland Legislation provided that CareFirst directors who engaged in “unsound or unsafe

⁵⁶D.I. 12, B-169, Tr. at 85, 88. “Fourth, the legislation, and the way it has been modified by Court order, causes the Maryland members’ removal and replacement within a year. And that applies to every one of the twelve Maryland directors on the CareFirst board, which constitute an absolute majority of the whole board, 12 out of 21.” ... “No less serious is the restructuring of CareFirst governance. By July 1, all the Maryland directors of CareFirst, constituting a majority of the whole board, will be replaced by persons who, in all likelihood, will have no personal understanding whatever of the history of CareFirst, its affiliates, or the challenges they face. These new directors, five of whom were picked by the State of Maryland, with the rest coming from a limited pool of applicants screened by the State of Maryland, will take office under increased responsibilities and liabilities including the threat of sanction for engaging in a so called “unsound and unsafe” practice if they fail to demonstrate a commitment to the ambiguous and legislatively ill-defined ‘nonprofit mission’ of CareFirst.”

⁵⁷See D.I. 12, B-473, (Maryland Legislation creates new non-profit mission); D.I. 12, B-483 (Maryland Legislation creates oversight committee).

⁵⁸D.I. 12, B-169, Tr. at 88. “These new directors ... will take office under increased responsibilities and liabilities, including the threat of sanction for engaging in a so-called “unsound and safe” practice if they fail to demonstrate a commitment to the ambiguous and legislatively ill-defined ‘non-profit mission’ of CareFirst.”

business practices” would be subject to sanctions, including possible removal.⁵⁹

In its opening brief, CareFirst evoked the image of a family when describing the Affiliation, claiming that the Affiliation brought BCBSD into the “CareFirst family” to join GHMSI and CFMD.⁶⁰ In most functional families, parents do their best to treat their children equally; they avoid, if at all possible, making decisions that will favor one child to the detriment of another. Here, the passage of the Maryland Legislation affected the “CareFirst family” in a manner that required the CareFirst Board to act first in the best interest of the Maryland child, even if such actions are detrimental to the other CareFirst children. As a result, CareFirst no longer was the same Affiliation partner that the Commissioner evaluated when she approved the Affiliation. Under these circumstances, even in the absence of a violation of any specific condition of the Affiliation Order, the Commissioner’s decision to vacate her Affiliation Order on the basis of the dramatic change in the environment in which the Affiliation was to operate constituted a proper exercise of her regulatory authority

⁵⁹D.I. 12, B-487 (Maryland Legislation provides for sanctioning of CareFirst directors who engage in unsound or unsafe business practices, defined generally as any practice that does not advance the newly adopted non-profit mission of CareFirst.).

⁶⁰D.I. 9, CareFirst Br. at 3.

and was supported by substantial evidence.⁶¹

Even assuming *arguendo* that the Commissioner was required to find a specific violation of her Affiliation Order before she could vacate it, the record is replete with evidence that the Maryland Legislation violated her Order in a manner that authorized her to act. The violations go to the very structure of this so-called “structural affiliation” and are matters that the Commissioner made clear from the outset of the parties’ relationship she would not countenance. Specifically, the Maryland Legislation caused a significant restructuring of the CareFirst Board of Directors without the prior approval of the Commissioner in violation of the Affiliation Order.⁶²

In recognition of the Commissioner’s directive that all “structural” changes to the CareFirst Board be pre-approved by the Department, the parties focused their presentations in the written submissions and at oral argument on what is, and what is not, a “structural” change to the Board. Having now reviewed the by-laws and

⁶¹CareFirst overstates the effects of the 2004 amendments to the Maryland Legislation. (D.I. 12, B-535-36). While it is true that these amendments clarified that the Maryland Legislation would directly apply only to those insurers that conduct business in Maryland, the amendments do nothing to lessen the indirect impact of the new law on the Delaware affiliate. By making CareFirst focus on its Maryland subscribers under threat of sanction, the Maryland Legislation altered the environment in which the Affiliation operated to the real potential detriment of Delaware subscribers.

⁶²D.I. 12, B-58 at ¶ 4: “The Boards of CareFirst and BCBSD shall be restructured, to the extent necessary, to (i) comply with the terms of the draft amended Certificates or Incorporation and By-Laws of the two companies...Any change in this structure must receive prior approval of the Insurance Department.”

certificates of incorporation submitted to the Commissioner for review as part of the approval process, and having considered the effect of the Maryland Legislation on the CareFirst Board, the Court is satisfied that the following mandates of the new law caused changes in the “structure” of the CareFirst Board in violation of the express provisions of the Affiliation Order:⁶³

- **The mandated replacement of the Class II directors with directors selected by the Maryland General Assembly or its designees:** The CareFirst Articles of Incorporation state that all classes of CareFirst directors had the right to approve changes in board membership within their respective classes.⁶⁴ The Maryland Legislation took this right from the Class II directors and placed it in the hands of the Maryland legislature.⁶⁵ This is contrary to the express text of CareFirst’s charter,

⁶³The structure of both the CareFirst and BCBSD boards, as approved by the Commissioner, were outlined in the corporate documents submitted to the Commissioner for review. The term “structure” as it appears in the Affiliation Order does not refer to the composition of the boards - - the Commissioner did not intend to direct that CareFirst or BCBSD elect particular individuals to their respective boards of directors. The parties were free to elect whomever they wished to serve so long as they complied with the process for doing so set forth in the corporate documents approved as part of the Affiliation Order. The structure of each board that the Commissioner addressed in her Affiliation Order included the number of directors, the classes of directors, the qualifications of directors, and the manner of selection of directors, all matters governed by the CareFirst and BCBSD charters and bylaws.

⁶⁴D.I. 12, B-336, 37: “During the Initial Period and the Second Period, (I) each class of Members has the exclusive right to elect or remove any Director of the corresponding class by a majority vote of the Members of that class...”

⁶⁵CareFirst argues that the fact that it replaced the Class II directors in accord with the Maryland Legislation cannot be deemed a violation of the Affiliation Order because the corporate documents submitted to the Commissioner for review provided that “[t]he composition of the Board shall comply with the requirements of Section 14-115 of the Maryland Insurance Code (as the same may be amended from time to time)[.]” This argument misses the mark. While it is true that CareFirst’s corporate documents contemplated possible changes in the law, the Commissioner made clear her requirement that any proposed change in the structure of the CareFirst or BCBSD boards must be presented to her for approval. She made no exception for changes in structure required by a change in law; her order requiring prior approval was unconditional. No such prior approval was obtained here.

as specifically approved by the Commissioner, and no change to this text was submitted to the Commissioner for approval.⁶⁶

- **The mandated increase in the size of the CareFirst Board from twenty-one to twenty-three:** The new board members were appointed by, and presumably accountable to, the Maryland General Assembly. To effect this increase, the Maryland Legislation required a change in the CareFirst charter that was not submitted for prior approval by the Commissioner.⁶⁷
- **The mandated change in the requisite qualifications of the Class II directors:** CareFirst chose to outline the qualifications of its directors in its Bylaws.⁶⁸ Now the qualifications of the twelve replacement directors are outlined by the Maryland Legislation as enforced by the statutorily created nominating committee.⁶⁹ This structural change was not approved by the Commissioner.
- **The mandated change in the term of CareFirst Board members from three years to two years and reduction of the total number of years each member may serve from nine to six:** These changes require modification of the CareFirst charter and neither change was submitted for approval by the Commissioner.⁷⁰

All of the changes to the CareFirst Board mandated by the Maryland Legislation modified CareFirst's charter and/or bylaws. As such, these changes are

⁶⁶D.I. 12, B-58 at ¶ 4.

⁶⁷D.I. 12, B-336: "The number of Directors of the Corporation shall be twenty-one (21), which number may be increased or decreased in the manner provided for in this Charter and in the Bylaws of the Corporation, but shall never be less than the minimum number permitted by the laws of the State of Maryland now or hereafter in force..."

⁶⁸D.I. 12, B-313, Article 2 § 2.

⁶⁹D.I. 12, B-505-508.

⁷⁰D.I. 12, B-485.

structural; they alter the basic corporate documents upon which the Commissioner approved the Affiliation. The Commissioner required that any structural change receive her prior approval. Neither CareFirst nor the Maryland legislature saw fit to seek this approval prior to effecting these structural changes to the CareFirst Board. This failure constitutes a clear violation of the Commissioner's Affiliation Order.⁷¹

In addition to these structural changes to the CareFirst Board, the Maryland Legislation also imposed upon CareFirst a newly formulated non-profit mission statement that the Delaware Commissioner concluded may require CareFirst to

⁷¹The Delaware General Corporation Law supports the notion that the changes mandated by the Maryland Legislation required structural changes to the CareFirst board: "The number of directors shall be fixed by, or in a manner provided in, the by-laws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number shall be made only by amendment of the certificate." *See* DEL. CODE ANN. tit. 8, § 141(b)(2001). Section 141(b) also provides that the qualifications for directors may be included in the certificate of incorporation or bylaws. *See* DEL. CODE ANN. tit. 8, § 141(b)(2001). In this case, CareFirst placed such qualifications in its bylaws. As such, the right to amend the qualifications for Class II directors rested with the members of the board entitled to vote to change such qualifications - - the then-existing Class II board members. *See* DEL. CODE ANN. tit. 8, § 109(a)(2001). D.I. 12, B-310-11.

remain in product lines that could jeopardize its financial fitness.⁷² This finding, supported by substantial evidence in the record, violated the Affiliation Order by “cause[ing] CareFirst to be governed, managed, and appointed in a way that does not give first priority to its financial safety and soundness [which] is not consistent with the type of company CareFirst was when BCBSD sought Affiliation, and at the time [the Commissioner] reviewed and approved the Affiliation.”⁷³ Moreover, the mandated sanctions for failing to advance CareFirst’s newly-stated non-profit mission arguably impact the ability of the CareFirst board to discharge its collective duty of care and/or loyalty to its affiliates by compelling it to act in a manner that is either inconsistent with the best interest of all affiliates or inconsistent with the interests of some affiliates to the benefit of others.

⁷²The shift in the CareFirst mission was in response to Maryland’s concerns that CareFirst was focusing its efforts on more financially rewarding markets. These concerns were expressed in the Maryland Commissioner’s July 8, 2003 report, in which he observed: “[T]he Conversion Report provides examples of business decisions made by CareFirst that were consistent with its declared intent to operate for profit. As noted in Section IV, CareFirst withdrew from the Medicaid and Medicare markets and from the SAAC program on the ground that those programs were not profitable, without exploring alternative means of supplying those markets or subsidizing those products while maintaining the corporation’s fiscal soundness. And, most significantly, the Conversion Report concludes that CareFirst gave no real consideration to its nonprofit mission in developing its strategic plan of conversion and acquisition. Indeed, when considering how to broaden its market and expand its access to capital, CareFirst dismissed an affiliation with Highmark out of hand, simply because it was a nonprofit entity. The withdrawal from markets that represent the most vulnerable and poorly served segments of the population and the lack of consideration of its nonprofit mission in adopting a strategic plan for the company make a prima facie case that the company was operated for profit.” D.I. 12, B-550.

⁷³D.I. 12, B-158.

Finally, the Commissioner concluded that the five-year acquisition moratorium imposed upon CareFirst by the Maryland Legislation violated the Affiliation Order by indirectly imposing a similar moratorium on an acquisition of BCBSD as long as the structural affiliation remains in tact.⁷⁴ This conclusion was supported by substantial evidence that has not been meaningfully controverted by CareFirst.⁷⁵

Having now concluded that the Maryland Legislation changed the conditions precedent upon which the Commissioner based her approval of the Affiliation, and that the Maryland Legislation violated several express provisions of the Affiliation Order, the Court now turns to the question of whether disaffiliation as ordered by the Commissioner was an appropriate remedy.

2. The Commissioner Framed An Appropriate Remedy

CareFirst argues that disaffiliation is not the proper remedy in this case because it need only receive the Maryland Commissioner's approval of the ASBAA in order

⁷⁴D.I. 12, B-159.

⁷⁵D.I. 12, B-169, Tr. at 91: "Let me also emphasize again the importance we attach to the five-year moratorium on the acquisition of CareFirst. As you know, the boards of all four of the CareFirst, all three of the CareFirst operating companies determined that a merger of CareFirst into WellPoint was in the best interest of the companies and their subscribers. This transaction was, unwisely in our judgment, disapproved by the Maryland Insurance Commissioner, and the Maryland legislation now forecloses a similar transaction by CareFirst for five years. Although this section of the legislation does not directly apply to [BCBSD], nevertheless, as long as [BCBSD] is structurally affiliated with CareFirst, it will not be able to be acquired in a WellPoint-type transaction, even though our board might again determine, as the experts have opined and should, that is in our subscribers' best interest."

to preserve the relationship with BCBSD in a manner that addresses the Delaware Commissioner's concerns while, at the same time, allows the parties to continue a mutually beneficial partnership. Disaffiliation, on the other hand, effectively requires both parties to walk away from the relationship in the absence of regulatory approval in Maryland.

Notably, the ASBAA contractually binds BCBSD to affiliate with CareFirst and requires that CareFirst return its membership in BCBSD and the Marks to BCBSD. The Commissioner's June 30, 2004 Order, on the other hand, does not *require* BCBSD to affiliate; it simply *permits* the affiliation to continue on a contractual basis if both parties agree. As a practical matter, however, BCBSD will not affiliate with CareFirst, either contractually or otherwise, unless and until CareFirst obtains regulatory approval for the affiliation in Maryland. Thus, while the Department and BCBSD suggest that the Commissioner's June 30 Order offered some middle ground by allowing the parties to affiliate contractually if they desired, for the reasons just stated, this "middle ground" offers little comfort to CareFirst

because, as of this writing, Maryland still has not passed on the ASBAA.⁷⁶

CareFirst's challenge to the remedy imposed by the Commissioner is, in essence, a challenge to her assessment of the risks posed by the Maryland Legislation and her effort to address those risks. Before undertaking to consider the Commissioner's decision in this regard, the Court takes this opportunity to emphasize two critical features of its limited standard of review. First, the Court notes that it is obliged to take due account of the experience and specialized competence of the agency and of the purposes of the law under which the agency has acted.⁷⁷ Second, when determining whether the administrator's decision is supported by substantial evidence, the Court must be mindful that substantial evidence is "more than a scintilla but less than a preponderance" of the evidence supplied by the parties in the appellate

⁷⁶On September 27, 2004, CareFirst requested this Court to delay the issuance of its decision in this case because CareFirst has received word that the Maryland Commissioner will be rendering a decision on the ASBAA within the next several days. The Court advised the parties on October 1, 2004 that it would be issuing its decision on October 4, 2004 by close of business. At 12:22 p.m. on October 4, the Court received from CareFirst a fax transmission that appears, at first glance, to be a copy of the long-awaited decision of the Maryland Commissioner on the proposed ASBAA. The transmission was not accompanied by any request for relief. The Court has not read the Maryland Commissioner's opinion. And, given the length of the Maryland Commissioner's delay, the Court cannot justify a purposeful delay in its decision-making (a process completed prior to the receipt of the Maryland Insurance Commissioner's opinion) particularly when the parties have stipulated to expedite this appeal rather than litigate CareFirst's application to stay the Commissioner's Order.

⁷⁷DEL. CODE ANN. tit. 29, § 10142(d)(2003)("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.").

record.⁷⁸ If the decision is supported by substantial evidence, then the agency’s findings “must be accepted even though the Court may have reached a different conclusion if presented with the evidence in the first instance.”⁷⁹

Here, the Commissioner determined that the most effective remedy to protect the interests of the Delaware provider, BCBSD, and Delaware subscribers, was to order the disaffiliation of CareFirst and BCBSD. After hearing all of the evidence in this matter, the Commissioner concluded that there were a number of risks to the continued ability of CareFirst to provide services to Delaware subscribers if the structural Affiliation was allowed to continue. She concluded that the change in the regulatory environment in which CareFirst now must operate in Maryland threatens the financial fitness of CareFirst and limits its ability to act in the best interests of its Delaware affiliate. Given the importance of CareFirst’s role in providing services to Delaware subscribers, the Commissioner determined that the risk of future harm was substantial enough to require her to act now.⁸⁰

⁷⁸*Electric Hose and Rubber Co. and Dravo Corp. v. Nai*, 2004 WL 304356, at *5 (Del. Super.).

⁷⁹*Patterson v. Super Dog Pet Food, Co.*, 2004 WL 1790128, at *2 (Del. Super.).

⁸⁰D.I. 12, B-162: “[I]f the financial condition of CareFirst deteriorates as a result of the changes in its mission and governance, it may be too late at that time to disentangle a structurally affiliated BCBSD from CareFirst before irreparable damage to the financial condition or reputation of BSBSD occurs. Real damage to the Affiliation has been done and action must be taken now.”

The insurance industry is highly regulated.⁸¹ Health insurance, in particular, has received, and likely will continue to receive, even more regulatory scrutiny.⁸² In Delaware, as in most states, the Insurance Commissioner is charged with the responsibility of providing this scrutiny and assessing risk to Delaware policyholders by enforcing the laws and regulations with their best interests in mind. The barometer by which she measures risk is calibrated by her experience. The Court concurs with her assessment of risk here. There is substantial evidence that the Maryland Legislation has created a new environment in which the Affiliation must now operate that will emphasize the interests of Maryland subscribers to the potential detriment of Delaware subscribers. The Court rejects the notion that the Commissioner must wait for the Affiliation to suffer actual harm before she acts. When the continued health insurance coverage of Delaware subscribers is potentially in jeopardy, the Commissioner acts properly when she takes reasonable measures to prevent the unacceptable result of interrupted coverage from ever happening. Her decision in this regard was the product of “an orderly and logical deductive process” and was supported by substantial evidence, both standards necessarily animated by her

⁸¹Lee R. Russ, Et Al., *supra* note 45, § 2:1, (“The insurance industry is subjected to a substantial amount of governmental regulation, since insurance is widely recognized to be a business that affects the public interest, rendering it a proper subject of regulation and control by the state through the police power.”).

⁸²*Id.*

regulatory expertise.

VI.

Based on the foregoing, the decision of the Delaware Insurance Commissioner is **AFFIRMED**.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary