

OFFICE OF THE COMMISSIONER OF INSURANCE
STATE OF GEORGIA

IN THE MATTER OF:)
)
NORTHEAST GEORGIA CANCER)
CARE, LLC & PETROS)
NIKOLINAKOS, M.D.)
)
v.)
)
BLUE CROSS AND BLUE SHIELD)
OF GEORGIA, INC. AND BLUE)
CROSS BLUE SHIELD HEALTHCARE)
PLAN OF GEORGIA, INC.)
)
_____)

CASE NUMBER 11001573

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ADMINISTRATIVE
PROCEDURE

ORDER

As required by the Procedural Order I issued to govern the captioned matter, a hearing was held on February 18, 2010 to consider the oral arguments of parties and certain interested non-parties regarding the applicability of O.C.G.A. § 33-20-16 to HMOs. The parties raised some additional legal issues pursuant to § 2(d) of the Procedural Order. Subsequent to the hearing I exercised my discretion to accept additional briefs consistent with the instructions I gave during the hearing. I have considered all of the arguments presented to me by brief and by oral argument. The last argument was received via written briefs on March 17, 2010.

I. LEGAL RULINGS

In accordance with § 4 of the procedural order I have ruled on the legal issues presented to me by the parties. I have issued two rulings in this matter, captioned as follows:

RULING #1 RULING OF THE COMMISSIONER ON THE APPLICABILITY OF O.C.G.A. § 33-20-16 TO PPO OF BCBSGA; and

RULING # 2 RULING OF THE COMMISSIONER ON THE APPLICABILITY OF O.C.G.A. § 33-20-16 TO BCBSHP

Both rulings are issued contemporaneously with this Order and are attached herewith.

II. HEARING ORDERED

In accordance with § 5 of the Procedural Order, it is **ORDERED**, that a factual hearing be held consistent with the requirements of the Procedural Order.

IT IS FURTHER ORDERED, that the law will be applied to the Dispute in a manner that is consistent with the Ruling #1 and Ruling #2, as appropriate.

So ORDERED this, 7th day of April, 2010.



John W. Oxendine
Insurance and Safety Fire Commissioner
State of Georgia

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ADMINISTRATIVE
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RULING # 1

RULING OF THE COMMISSIONER ON THE APPLICABILITY OF
O.C.G.A. § 33-20-16 TO THE PPO OF BCBSGA

On December 17, 2009, I issued a procedural order to govern the captioned dispute. The order was subsequently amended on December 21, 2009 and I later issued a clarifying order on January 27, 2010. Those orders are attached herewith. The use of term "Procedural Order" herein shall refer to the original order as amended and supplemented.

I. PROCEDURAL HISTORY

The dispute between Northeast Georgia Cancer Care, LLC ("NEGACC") and Blue and Cross Blue Shield of Georgia ("BCBSGA") and Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. ("BCBSHP") has a rather lengthy procedural history, which dates back to June 11, 2007 when NEGACC filed a lawsuit in the

Superior Court of Athens-Clarke County against BCBSGA and BCBSHP, civil action number 07-CV-1342.

BEFORE THE SUPERIOR COURT

In relevant part, count III of NEGACC's amended complaint sought a declaratory judgment that O.C.G.A. § 33-20-16 applied to Health Maintenance Organizations ("HMO") pursuant to O.C.G.A. § 33-21-28. See, NEGACC Ex. 21. The Superior Court ultimately rejected NEGACC's argument in its order granting the BCBSGA and BCBSHP motion to dismiss, dated February 25, 2008. The Superior Court also rejected the argument of BCBSGA and BCBSHP that the Commissioner for the Georgia Department of Insurance ("Commissioner") and not the Superior Court had subject matter jurisdiction over the dispute at bar pursuant to O.C.G.A. § 33-20-30. Instead the Superior Court ruled that it had subject matter jurisdiction because the dispute before it was a contract dispute, which was not within the purview of O.C.G.A. § 33-20-30. The Superior Court went on to rule that the O.C.G.A. § 33-20-16 did not apply to HMOs. NEGACC appealed the Superior Court's Order.

BEFORE THE GEORGIA COURT OF APPEALS

The Georgia Court of Appeals affirmed the Superior Court's order of dismissal, though the Court rejected the Superior Court's ruling as it pertained to O.C.G.A. § 33-20-30.

Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield

of Georgia, Inc. et al., 297 Ga. App. 28 (2009). The Northeast Court's decision is discussed extensively in my legal analysis below.

BEFORE THE GEORGIA DEPARTMENT OF INSURANCE

The instant matter arises from a dispute which was filed in my office (Georgia Department of Insurance, "DOI" hereafter) on October 28, 2009. See, NEGACC Demand for Hearing ("October demand"). Subsequently, on December 4, 2009, an additional dispute was filed which alleged additional facts and joined an additional party, but which involved substantially the same facts and legal issues. See, NEGACC and Dr. Nikolinakos Demand for Hearing ("December demand"). To expedite resolution of the disputes, I consolidated both demands into one case (collectively "Dispute"). The parties to the Dispute are NEGACC, Petros Nikolinakos, M.D., BCBSGA and BCBSHP (collectively referred to as "parties"). I will refer to NEGACC and Dr. Nikolinakos as "petitioners" collectively and BCBSGA and BCBSHP as "respondents" collectively hereinafter.

Both the October dispute and the December dispute seek the application of O.C.G.A. § 33-20-16 to BCBSHP. In addition to the argument of the petitioners' that O.C.G.A. § 33-21-28(a) incorporates O.C.G.A. § 33-20-16, see, October demand ¶ 46-49 and December demand ¶ 17-20, petitioners argue that O.C.G.A. § 33-20-1 et seq. applies to BCBSHP because BCBSGA, the Health

Care Corporation ("HCC"), organized BCBSHP, the HMO. See, October demand ¶ 45 and December demand ¶ 16. In support of this position the petitioners point to the language in O.C.G.A. § 33-21-25 which provides that a HCC may "directly or through a subsidiary or affiliate organize and operate a health maintenance organization." Id. Petitioners conclude that O.C.G.A. § 33-20-16 does not conflict with Chapter 21. See, October demand ¶ 46 and December demand ¶ 17.

BCBSGA and BCBSHP responded to the October dispute on November 6, 2009, see, BCBSGA and BCBSHP Response to October demand ("October response"), and to the December dispute on December 15, 2009, see, BCBSGA and BCBSHP Response to December demand ("December response"). In both responses respondents argue that the Dispute is time barred and that neither NEGACC nor Dr. Nikolinakos are entitled to a hearing. I find no merit in the grounds cited by respondents.

COMMISSIONER'S PROCEDURAL ORDER

The Dispute that was filed in my office is one whose outcome will inevitably have a significant impact on the healthcare provider and insurer community in Georgia, and perhaps beyond. As the Court of Appeals observed: "Simply, this case seeks a determination as to whether [O.C.G.A. § 33-20-16] applies to HMO insurance networks under the regulatory scheme set forth in Title 33 and the Health Care Plan Act. Northeast,

297 Ga. App. at 31. This observation was specifically noted by NEGACC and Dr. Nikolinakos in the October and December disputes. See, October demand ¶ 49 and December demand ¶ 20. The relief requested by NEGACC and Dr. Nikolinakos requires me to interpret for the first time not only the applicability of O.C.G.A. § 33-20-16 to HMOs, but also the applicability of O.C.G.A. §§ 33-20-1 *et seq.* to HMOs organized by HCCs.

The Northeast decision marks the first time a reviewing court has concluded that “disputes concerning the regulation and supervision of HMOs” were required to be filed with my office. Northeast, 297 Ga. App. at 31; cf. O.C.G.A. § 33-20B-5.

Following on the heels of this decision the instant Dispute was filed with my office, the first of its kind. That the relief requested in the Dispute requires me to interpret the applicability of O.C.G.A. § 33-20-16 to all HMOs is the reason I decided to open up this legal matter to argument by parties and non-parties. The scope of Dispute was narrowed by the petitioners in their briefing and argument, however, and for that reason I decline to rule on the applicability of O.C.G.A. § 33-20-16 to HMOs in general at this time, but I reserve the right to so rule in the future.

II. DISCUSSION OF THE BRIEFS AND HEARING

As I expected there was significant interest and participation by Georgia’s healthcare community. Moreover, the

parties to the Dispute ably presented their legal arguments in briefs and oral arguments, including an extensive analysis of the legislative history of O.C.G.A. §§ 33-18-1, 33-19-1, 33-20-1, and 33-21-1 *et seq.* The parties also discussed the evolution of BCBSGA and its unique history, legislative and otherwise. There are a few issues that were raised for the first time by the parties in their briefs and arguments. One of those items deserves specific commentary.

THE FIRST MENTION OF O.C.G.A. § 33-20-31

O.C.G.A. § 33-20-31 reads as follows, *to wit*:

Except for corporations subject to this chapter which are surviving corporations, this chapter shall not apply to nor govern any corporation which is organized for profit or which contemplates any pecuniary gain to its shareholders or members. A corporation subject to this chapter may organize subsidiary or affiliated corporations to engage in allied business ventures in accordance with Chapters 13 and 14 of this title. (emphasis added).

This subsection cuts to the very heart of whether or not my office has subject matter jurisdiction over the Dispute as it relates to BCBSHP, a for-profit HMO. Although the Northeast court evidently concluded that O.C.G.A. § 33-20-31 did not preclude the application of Chapter 20 to HMOs, see, Northeast, 297 Ga. App. at 31-33 n. 6, I think the fact that the parties did not mention this subsection in their briefs to the Northeast court or in their initial filings with my office is worthy of mention.

As part of my consideration of the issue herein, I closely reviewed the Northeast court's decision and the briefs of the parties to that appeal. I note specifically that BCBSHP, in its brief to the Northeast court, see, Appellee Brief of BCBSGA and BCBSHP ("Appellee Brief") p. 16-18, argued that "the Code vests the DOI with exclusive jurisdiction" over the Dispute respecting the application of O.C.G.A. § 33-20-16. Contrast this argument with BCBSHP's argument before me that "because BCBSHP has never been a non-profit company or a health care corporation, BCBSHP is not subject to any provisions of Chapter 20. O.C.G.A. § 33-20-31." (emphasis added). See, BCBSGA and BCBSHP's Response Brief ("BCBS Response") p. 13. It appears that BCBSHP was for it before they were against it, respecting the application of Chapter 20 to the Dispute. Yet BCBSHP argued, and successfully so, that at least one provision of Chapter 20 did apply to the Dispute; namely, O.C.G.A. § 33-20-30. See, Appellee Brief p. 16-18.

III. HISTORY OF BCBSGA

BCBSGA has a unique history, legislatively and otherwise. Respondents ably presented the legislative history of Chapter 20. See, BCBSGA and BCBSHP's Introductory Brief ("BCBS Brief") p. 14-17. Suffice it to say that the various Blue Cross and Blue Shield plans operated for most of their history in Georgia (and elsewhere in the United States) as non-profits whose

principal purpose was to provide medical services to ordinary people. See, Conversion Transcript ("CT") p. 116. The statutory history bears this out. See, O.C.G.A. §§ 33-18-1 et seq. and O.C.G.A. 33-20-1 et seq. prior to Ga. L. 1995, p. 745.

Until 1986 all Blue Cross and Blue Shield plans were exempt from federal taxes pursuant to 42 U.S.C. § 501(c)(4). The year 1986 brought many significant changes to the tax treatment of insurers and insurance generally, Blue Cross and Blue Shield plans included. Ostensibly, the federal government no longer considered Blue Cross and Blue Shield plans to be operating in a manner that differed in substance from commercial insurers. Consequently, after the 1986 tax law change, BCBSGA, like other Blue Cross and Blue Shield plans, was no longer a tax exempt entity. Nonetheless, BCBSGA and other such plans retained many tax advantages so long as they met the requirements of 26 U.S.C. § 833. One of the requirements is that the entity be operated as a non-profit.

A. BCBSGA's Conversion to a For-Profit HCC

I remember the BCBSGA conversion hearing as it was one of the first major issues to confront me as Commissioner. The law authorizing and governing the conversion of BCBSGA from a non-profit to a for-profit HCC was enacted the same year as the hearing. See, Ga. L. 1995, p. 745. As to the conversion, the law authorized it and I followed the law. Nonetheless, BCBSGA

as a HCC was subject to several rules that did not change regardless of the conversion.

During that hearing a member of the public raised several concerns that BCBSGA might try to change rules governing it and I specifically addressed that concern, *to wit*: "[i]f Blue Cross wants to change the rules later on, of course, I will be there to look after the citizens' interests." CT at p. 191. It has been nearly fifteen years since that hearing, and the people of Georgia have given me the honor of serving as Commissioner ever since. I remember that pledge, and I state here categorically that the rules have not changed, nor will they while I hold this office.

B. BCBSHP Organized and Capitalized by BCBSGA

BCBSHP was created, organized, and capitalized by BCBSGA (a chapter 20 non-profit HCC). Later, after BCBSGA converted to a for-profit HCC, BCBSGA made an extraordinary distribution of its ownership in BCBSHP to the newly created Cerulean Companies, Inc. ("Cerulean") yielding the current corporate structure. Namely, BCBSGA and BCBSHP are now both wholly owned subsidiaries of Cerulean and affiliates of one another. Nonetheless, every dime that went initially to capitalize BCBSHP was derived from BCBSGA's operations as a non-profit HCC, not from Cerulean. See, Supplemental Brief of BCBSGA and BCBSHP ("Supplemental Brief") p. 3. When Cerulean acquired BCBSHP it did not pay any

consideration to BCBSGA, it was merely a gift, ostensibly for the nefarious purpose of trying to avoid the requirements of O.C.G.A. § 33-20-16. Id. at p. 7.

IV. ENUMERATION OF LEGAL QUESTIONS ANSWERED IN THIS RULING

WHETHER O.C.G.A. § 33-20-16 APPLIES TO THE PPO OF BCBSGA;

AND

WHETHER NEGACC IS A "PROVIDER" AS DEFINED BY O.C.G.A. § 33-

21-1(9).

V. LEGAL ANALYSIS AND CITATION OF AUTHORITY

BCBSGA is the surviving entity into which all of Georgia's Blue Cross and Blue Shield plans merged. See, BCBSGA and BCBSHP's Introductory Brief ("BCBS Brief") p. 14. BCBSGA, like all Blue Cross and Blue Shield plans, began its existence as a non-profit company. Indeed prior to 1995, the law declared all HCCs, like BCBSGA, "to be charitable and benevolent institution[s]." See, Ga. L. 1976, p. 1461, § 1. Ultimately, BCBSGA took advantage of a change in the law to convert to a for-profit entity, yielding its current corporate form. Nevertheless, the transformation of BCBSGA to a for-profit entity did not alter its identity as a HCC subject to Chapter 20.

A. O.C.G.A. § 33-20-16 Applies to BCBSGA's PPO network

O.C.G.A. § 33-20-16 applies to BCBSGA's PPO. BCBSGA is a HCC and as such it is regulated by Chapter 20. Absent a

specific statute stating otherwise, Chapter 20 governs BCBSGA and its PPO network. Respondents' claims notwithstanding, there is nothing in O.C.G.A. §§ 33-30-20 et seq. that exempts BCBSGA from complying with O.C.G.A. § 33-20-16.

1. O.C.G.A. § 33-20-16 applies to PPO Networks

Respondents take the position that NEGACC does not have a right to participate in its PPO network because O.C.G.A. § 33-20-16 does not apply to PPOs. See, BCBS Response p. 15-16, and 25. This assertion is baseless. O.C.G.A. § 33-20-16 reads as follows:

Every doctor of medicine, every doctor of dental surgery, every podiatrist, and every health care provider within a class approved by the health care corporation who is appropriately licensed to practice and who is reputable and in good standing shall have the right to become a participating physician or approved health care provider for medical or surgical care, or both, as the case may be, under such terms or conditions as are imposed on other participating physicians or approved health care providers within such approved class under similar circumstances in accordance with this chapter. (emphasis added)

There is nothing in this statute that limits its application to only traditional indemnity plans. Indeed, the statute references "participating provider" and "classes approved," which are terms and concepts that are at the heart of a managed care plan, such as those described in O.C.G.A. §§ 33-30-20 et seq. This is no coincidence. BCBSGA, as a HCC, has long had the express authority to create different classes of providers and different payment levels for participating and

nonparticipating facilities. See, O.C.G.A. § 33-20-13. BCBSGA, as noted by petitioners, has always had the authority to enter into contracts with providers to "furnish" health care services. See, NEGACC & Dr. Nikolinakos, M.D.'s Response to BCBSGA and BCBSHP's Introductory Brief ("NEGACC Response") p. 10-15; see also, O.C.G.A. §§ 33-20-6 and 13. Indeed, "health care plan" is defined in O.C.G.A. § 33-20-3(3) as a "plan or arrangement under which health care services are or may be rendered to a subscriber ... at the expense of a health care corporation..." (emphasis added) O.C.G.A. § 33-20-3(3); *compare* O.C.G.A. § 33-20A-3(7). Even before the enactment of O.C.G.A. §§ 33-30-20 *et seq.* BCBSGA was authorized to operate plans and negotiate provider contracts in the same manner as described therein.

2. O.C.G.A. § 33-30-20 et seq.

O.C.G.A. §§ 33-30-20 *et seq.* was enacted to ensure that all health care insurers could enter into preferred provider arrangements. See, O.C.G.A. § 33-30-21. The central thrust of O.C.G.A. §§ 33-30-20 *et seq.* is found in O.C.G.A. § 33-30-23(a), which reads "[n]otwithstanding any provisions of law to the contrary, any health care insurer may enter into preferred provider arrangements as provided in this article..." (emphasis added). Thus a health care insurer, broadly defined by O.C.G.A. § 33-30-22(3), can clearly execute the agreements described by O.C.G.A. § 33-30-23(a). It is noteworthy that this subsection

is the only provision in O.C.G.A. § 33-30-20 *et seq.* that applies to the exclusion of other laws. This circumstance is significant concerning the assertion that O.C.G.A. § 33-30-25 prevents the application of O.C.G.A. § 33-20-16 to its PPO network. See, BCBS Response p. 16.

3. O.C.G.A. § 33-20-16 specifically applies to a HCC

Respondents assert that O.C.G.A. § 33-20-16 does not apply to the BCBSGA PPO network because O.C.G.A. § 33-30-25 is the more specific provision. Id. In relevant part O.C.G.A. § 33-30-25 states that:

[s]ubject to the approval of the Commissioner under such procedures as he may develop, health care insurers may place reasonable limits on the number or classes of preferred providers which satisfy the standards set forth by the health care insurer, provided that ... all health care providers within any defined service area who are licensed and qualified to render the services covered by the preferred provider arrangement and who satisfy the standards set forth by the health care insurer shall be given the opportunity to apply and to become a preferred provider. (emphasis added)

Respondents' assertion is not accurate. Consequently, respondents' position that BCBSGA is not required to grant NEGACC a provider contract is not sustainable.

O.C.G.A. §§ 33-30-25 does not preempt O.C.G.A. § 33-20-16. O.C.G.A. § 33-30-26 very clearly provides that "[h]ealth care insurers as defined in this article shall be subject to and shall be required to comply with all other applicable provisions of this title and rules and regulations promulgated pursuant to

this title." O.C.G.A. § 33-30-26.¹ The laws that are applicable to BCBSGA, such as O.C.G.A. § 33-20-16, plainly apply to its PPO network.

Nor is respondents' assertion that O.C.G.A. § 33-30-25 applies to the exclusion of O.C.G.A. § 33-20-16 correct. See, Department Ex. 8 p. 16. O.C.G.A. § 33-20-16 applies specifically to HCCs whereas O.C.G.A. § 33-30-25 applies generally to "health care insurers." The law of construction that respondents allude to, O.C.G.A. § 33-1-5, requires the application of O.C.G.A. § 33-20-16 to the PPO network BCBSGA.

4. BCBSGA's refusal to contract with NEGACC

Respondents take the position that the application of O.C.G.A. § 33-20-16 to BCBSGA is largely moot because all of NEGACC's physicians already have provider contracts with BCBSGA. See, BCBS Response p. 25. BCBSGA claims that NEGACC "offers no valid reason why BCBSG[A] is required to contract with each of the individual physicians and also contract with the entity itself..." Id. at p. 26. Plainly, BCBSGA is not required to engage in contract redundancy by any provision in Title 33. Nonetheless, if the physicians of NEGACC prefer to contract with BCBSGA through NEGACC, as was the previous arrangement, then BCBSGA should do so.

¹ Note that O.C.G.A. § 33-30-26 does not exclude "all laws inconsistent" with O.C.G.A. §§ 33-30-20 *et seq.*

B. WHETHER NEGACC IS A "PROVIDER" AS DEFINED BY O.C.G.A. § 33-21-1(9)

NEGACC is a limited liability company. NEGACC is a group physician practice specializing in treatment of cancer and blood disorders. See, NEGACC & Dr. Nikolinakos, M.D.'s Opening Brief in Support of Contested Claims Pending Before the Commissioner ("NEGACC Brief") p. 7. Before the instant Dispute, the respondents contracted with NEGACC directly to provide health care services. See, BCBS Response p. 4. O.C.G.A. § 33-20-3(9) defines provider as any physician, hospital, or other person who is licensed or otherwise authorized in this state to furnish health care services." (emphasis added) O.C.G.A. § 33-20-3(9). Person is defined as "any natural person, a partnerships, an association, a common-law trust, or a corporation." O.C.G.A. § 33-20-3(8). So long as NEGACC is licensed or otherwise authorized to provide health care services it is a "provider" as defined by O.C.G.A. § 33-20-3(9). Curiously, respondents take the position that NEGACC must submit evidence proving that NEGACC is "licensed" or "otherwise authorized" to provide health care services despite the fact that respondents readily admit that they previously contracted directly with NEGACC for the provision of health care services. See, BCBS Response p. 25. In any event, the law clearly provides that a physician group like NEGACC can be a "provider."

VI. Conclusion

Based upon the forgoing it is my ruling that O.C.G.A. § 33-20-16 applies to the PPO network of BCBSGA. Further, it is my ruling that a provider group that is organized as a limited liability company can be a provider as defined in O.C.G.A. § 33-20-4(9).

This, 7th day of April, 2010.



John W. Oxendine
Insurance and Safety Fire Commissioner
State of Georgia

OFFICE OF THE COMMISSIONER OF INSURANCE
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RULING # 2

RULING OF THE COMMISSIONER ON THE APPLICABILITY OF
O.C.G.A. § 33-20-16 TO BCBSHP

This is a companion ruling to Ruling #1 RULING OF THE COMMISSIONER ON THE APPLICABILITY OF O.C.G.A. § 33-20-16 TO PPO OF BCBSGA. Sections I, II, and III from of Ruling #1 are incorporated by reference herein.

IV. ENUMERATION OF LEGAL QUESTIONS ANSWERED IN THIS RULING

WHETHER O.C.G.A. § 33-20-16 APPLIES TO BCBSHP; AND

WHETHER NEGACC IS A "PROVIDER" AS DEFINED BY O.C.G.A. § 33-21-1(9).

V. LEGAL ANALYSIS AND CITATION OF AUTHORITY

The Georgia Insurance Code of Title 33 ("Code") is designed to regulate a complex industry. Inevitably, Georgia courts are called upon to apply the Code in a variety of contexts, such as

in the instant matter. Ultimately, Georgia's courts, be they trial or appellate, are called upon to interpret the Code, which is as complex as the industry it regulates. Georgia courts work very hard to maintain consistency of the law and uphold precedent, all to the end of justice under the law. The Northeast court did no different.

A. The Northeast Decision

The Northeast decision is important inasmuch as it held that "O.C.G.A. § 33-20-30 applies to disputes concerning the regulation and supervision of HMOs pursuant to O.C.G.A. § 33-21-28(a)." Northeast, 297 Ga. App. at 31; cf. O.C.G.A. § 33-20B-5. Although this appears to be a simple legal conclusion, there is much implied by it. For instance, the Northeast court seems to have concluded that O.C.G.A. § 33-20-31 is no barrier to the applicability of Chapter 20 to HMOs in general, or BCBSHP (a for-profit HMO) specifically. Northeast, 297 Ga. App. at 31-33. Nor did the Northeast court conclude that "health care corporation" as used in the dispute resolution provision of O.C.G.A. § 33-20-30 and defined in Chapter 20 *inter alia*, was in conflict with the statutes governing "health maintenance organizations" in Chapter 21. Id. Instead, the Northeast court read "HMO" in place of "health care corporation" in concluding that O.C.G.A. § 33-20-30 applied to the "disputes concerning the

regulation and supervision of HMOs.” Northeast, 297 Ga. App. at 31.

Respondents argue that Chapter 20 does not apply to any for-profit HMO pursuant to O.C.G.A. § 33-20-31. Put simply the respondents want me to ignore the Northeast ruling because they think that court got it wrong. I categorically refuse to second guess the Northeast court. I will not assume, as respondents do, that the Northeast court failed to consider or properly construe O.C.G.A. § 33-20-31. Indeed, I assume that the Northeast court considered and rejected the construction of O.C.G.A. § 33-20-31 urged by respondents before me.

1. Stare Decisis

The instant legal questions do not come to me *tabula rasa*, but rather the legal issue has, in some measure, been ruled upon. The Northeast decision must be followed. The Georgia Supreme Court noted in Etkind v. Suarez, 271 Ga. 352, 358 (1999), “Even those who regard *stare decisis* with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute.” Indeed, the Supreme Court went so far as to write “[i]f this Court has been wrong from the beginning [regarding the interpretation of a statute] let the legislative power be invoked to prescribe a new rule for the future...” Id. The precept of *stare decisis* cuts to the very heart of the

separation of government powers, see Ga. Const. Art. 6, § 5, ¶ 3 and Ga. Const. Art. 6, § 6, ¶ 6, and the consistent and predictable application of the laws of the State of Georgia.

2. Invitation to Rule

Although the Northeast court declined to rule on the ultimate question of whether or not O.C.G.A. § 33-20-16 applies to HMOs, it did provide important guidance with respect to the proper legal construction of O.C.G.A. § 33-21-28. In providing this guidance, the Northeast court observed that a Ga. Comp. R. & Regs. r. 120-2-2-.05(3) provided for a declaratory ruling by the Commissioner. Northeast, 297 Ga. App. at 31. Fortunately, the Northeast court provided a significant guide respecting the proper legal construction and scope of O.C.G.A. § 33-21-28. Id.

B. WHETHER O.C.G.A. § 33-20-16 APPLIES TO BCBSHP

O.C.G.A. § 33-20-16 does apply to BCBSHP. Plainly, O.C.G.A. § 33-20-16 does not conflict with anything in Chapter 21, and as such the statute applies to BCBSHP. See, O.C.G.A. § 33-21-28(a); see also, Northeast, 297 Ga. App. at 31. It follows, therefore, that O.C.G.A. § 33-20-16 applies to BCBSHP pursuant to O.C.G.A. § 33-21-28(a).

In addition, it is clear that were BCBSGA, a health care corporation ("HCC"), to organize and operate a HMO directly, as specifically authorized by O.C.G.A. § 33-21-25, then O.C.G.A. § 33-20-16 would apply. To sustain a legal construction that

would allow BCBSGA to sidestep otherwise applicable legal requirements by operating the Blue Cross HMO through a subsidiary (*i.e.*, BCBSHP), is to put form over substance. See, O.C.G.A. § 1-3-1. Such an interpretation contradicts the Northeast court's statutory construction and is inconsistent with the legislative intent manifested in O.C.G.A. §§ 33-20-16, 31, and 33-21-25.

1. APPLYING O.C.G.A. § 33-20-16 TO BCBSHP PURSUANT TO O.C.G.A. § 33-21-28(a)

The Dispute is before me because the Northeast court determined that "O.C.G.A. § 33-20-30 applies to disputes concerning the regulation and supervision of HMOs pursuant to O.C.G.A. § 33-21-28(a)." Northeast, 297 Ga. App. at 31 (emphasis added). In analyzing the applicability of O.C.G.A. § 33-20-16 to BCBSHP it is useful to analyze relevant excerpts of the text of both §§ 33-20-30 and 33-20-16.

O.C.G.A. § 33-20-30

Any dispute arising within the purview of this chapter with reference to the regulation and supervision of any health care corporation shall ... be submitted by the aggrieved person to the Commissioner for his decision with reference thereto[.] (emphasis added).

O.C.G.A. § 33-20-16

Every doctor of medicine, every doctor of dental surgery, every podiatrist, and every health care provider within a class approved by the health care corporation ... shall have the right to become a participating physician or approved health care provider ... under such terms or

conditions as are imposed on other participating physicians or approved health care providers within such approved class under similar circumstances in accordance with this chapter. (emphasis added).

O.C.G.A. § 33-20-30 applies to disputes and O.C.G.A. § 33-20-16 is a statute which governs, or regulates, the actions of a HCC. Given that HMO should be read in place of “health care corporation” when construing O.C.G.A. § 33-21-28(a), the primary issue becomes whether O.C.G.A. § 33-20-16 conflicts with any provision of Chapter 21. See, Northeast, 297 Ga. App. at 31, O.C.G.A. § 33-21-28.

Respondents’ arguments that no provision of Chapter 20 that applies to “health care corporations” can apply to HMOs, such as in BCBSGA and BCBSHP’s Introductory Brief (“BCBS Brief”) p. 5-8, are inconsistent with both the Northeast decision and the respondents’ brief to the Northeast court.¹ See, Appellee Brief of BCBSGA and BCBSHP (“Appellee Brief”) p. 16-18. I will not indulge respondents’ attempt to disregard the Northeast decision or their arguments to that court.

a. O.C.G.A. § 33-20-16 Does Not Conflict With Chapter 21

O.C.G.A. § 33-20-16 does not conflict with anything in Chapter 21. Respondents cite three statutes in their primary arguments that O.C.G.A. § 33-20-16 is inconsistent with Chapter 21, *to wit*: O.C.G.A. §§ 33-20A-9.1, 33-20B-3(b), and 33-21-

¹ The respondents’ brief to the Northeast court reads HMO in place of “health care corporation” in its argument that Chapter 20 grants the “DOI with exclusive jurisdiction” over the dispute against both BCBSGA and BCBSHP. See, Department Ex. 11 p. 16-18.

8(a)(3). See, BCBSGA and BCBSHP's Response Brief ("BCBS Response") p. 18. None of these statutes creates an inconsistency, however.

O.C.G.A. § 33-20A-9.1

Essentially, O.C.G.A. § 33-20A-9.1 allows an enrollee of a HMO to nominate a provider, subject to several requirements, including the provider agreeing to a provider contract and enrollee bearing additional financial burdens. See, O.C.G.A. § 33-20A-9.1. On its face, this statute differs from O.C.G.A. § 33-20-16 in that it pertains to the rights of an enrollee, not a provider. Moreover, the right of the enrollee is to nominate "one or more out of network health care providers ... for use by that enrollee[.]" See, O.C.G.A. § 33-20A-9.1(c). A provider that is nominated pursuant to O.C.G.A. § 33-20A-9.1 is not *ipso facto* an in network provider; rather, that provider, pursuant to the nomination by his or her patient, agrees to treat only the nominating enrollee not every enrollee in the plan. Id. This statute allows a provider to remain out-of-network and still be paid for health care services rendered to a particular patient/enrollee. It plainly does not conflict with the broad right of a provider to choose to accept all of the requirements of an in-network provider.

O.C.G.A. § 33-20B-3(b)

O.C.G.A. §§ 33-20B-3(b) provides, in relevant part, that “[a]ll essential rural health care providers within a defined service area who meet the conditions established in subsection (a) of this Code section shall be given the opportunity to apply to become a participating provider in a plan.” (emphasis added). An essential rural health care provider is defined as “a hospital, federally qualified health center, or rural health clinic, as such terms are defined in this Code section, which is located in a rural area and which complies with the provisions of Code Section 33-20B-3.” O.C.G.A. § 33-20B-2(1). In other words a rural health care provider is a “facility” that meets the very restrictive definitional requirements of O.C.G.A. § 33-20B-1 et seq., not a physician or provider defined by Chapter 20 or 21. The latter are of course the objects of O.C.G.A. § 33-20-16.²

O.C.G.A. § 33-21-8(a)(3)

Finally, respondents assert that the application of O.C.G.A. § 33-21-8(a)(3) would conflict with a HMO's authority to provide health care services through employees rather than through provider agreements. See, BCBS Brief p. 12. Respondents argue further that the application of O.C.G.A. § 33-

² There is an obvious potential that a “provider” defined in Chapters 20 or 21 could also be an “essential rural health care provider” so there is the possibility of some overlap.

20-16 to HMOs would lead to the untenable situation of HMOs being forced to employ any provider that demands employment.

Id. Respondents' arguments are not valid. O.C.G.A. § 33-20-16 does not require a staff model HMO to "employ" any provider that demands employment. The right to become a "participating physician or approved health care provider" does not give a physician or a provider the right to demand employment. See, O.C.G.A. § 33-20-16.

b. O.C.G.A. § 33-20-16 applies to BCBSHP

In sum there is no inconsistency between O.C.G.A. § 33-20-16 and Chapter 21. It therefore follows, that O.C.G.A. § 33-20-16 applies to BCBSHP.

2. A HMO THAT IS ORGANIZED BY A HCC IS SUBJECT TO O.C.G.A. § 33-20-16

The rules that applied to BCBSGA as a non-profit HCC apply to BCBSGA as a for-profit HCC. BCBSGA continues to operate pursuant to the authority granted it under Chapter 20. BCBSGA cannot avoid the requirements of the very Chapter that authorizes it to act as a HCC. See, O.C.G.A. §§ 33-20-1 et seq. Nor can BCBSGA avoid the application of O.C.G.A. § 33-20-16 to its HMO by claiming that BCBSHP is a separate entity. See, O.C.G.A. §§ 33-20-31 and 33-21-25.

The principle involved here is whether BCBSGA should be able to use the money it has gained from its unique status as a

non-profit HCC to organize and capitalize an HMO as a for-profit subsidiary and thereby avoid otherwise applicable laws; *i.e.*, Chapter 20. Fortunately, the law forecloses this dubious result as a possibility. Id. Although a HCC is authorized to set up an HMO "directly or through a subsidiary or affiliate[,] " the law does not allow a HCC to avoid otherwise applicable law by claiming that its HMO is a subsidiary or an affiliate. See, O.C.G.A. §§ 33-21-25 and 33-21-28. Respondents cannot simply ignore inconvenient laws in Chapter 20 (*i.e.*, O.C.G.A. § 33-20-16), and avail themselves of those laws that serve their turn (*i.e.*, O.C.G.A. § 33-20-30). Here, BCBSHP was formed by BCBSGA to operate an HMO, as authorized by O.C.G.A. § 33-21-25. Nothing in that subsection or in Chapter 20 relieves respondents from the obligations of O.C.G.A. § 33-20-16.

C. WHETHER NEGACC IS A "PROVIDER" AS DEFINED BY O.C.G.A. § 33-21-1(9)

NEGACC is a limited liability company. NEGACC is a group physician practice specializing in treatment of cancer and blood disorders. See, NEGACC & Dr. Nikolinakos, M.D.'s Opening Brief in Support of Contested Claims Pending Before the Commissioner ("NEGACC Brief")p. 7. Before the instant Dispute, the respondents contracted with NEGACC directly to provide health care services. See, BCBS Response p. 4. O.C.G.A. § 33-21-1(9) defines provider as "any physician, hospital, or other person

who is licensed or otherwise authorized in this state to furnish health care services." (emphasis added); compare O.C.G.A. § 33-20-3(9). Person is defined as "any natural or artificial person including but not limited to individuals, partnerships, associations, trusts, or corporations." O.C.G.A. § 33-21-1(8); compare O.C.G.A. § 33-20-3(8). So long as NEGACC is licensed or otherwise authorized to provide health care services it is a "provider" as defined by O.C.G.A. § 33-21-1(9). Curiously, respondents take the position that NEGACC must submit evidence proving that NEGACC is "licensed" or "otherwise authorized" to provide health care services despite the fact that respondents readily admit that they previously contracted directly with NEGACC for the provision of health care services. See, BCBS Response p. 25. In any event, the law clearly provides that a physician group like NEGACC can be a "provider."

VI. CONCLUSION

Based upon the forgoing it is my ruling that O.C.G.A. § 33-20-16 does apply to BCBSHP pursuant to O.C.G.A. § 33-21-28(a) and, in addition, because BCBSHP was organized, capitalized, and controlled by BCBSGA, a HCC. Further, it is my ruling that a provider group that is organized as a limited liability company can be a provider as defined in O.C.G.A. § 33-21-1.

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served copies of the within and foregoing Order and Rulings by placing one copy in the United States Mail, first class, with adequate postage thereon, properly addressed as follows:

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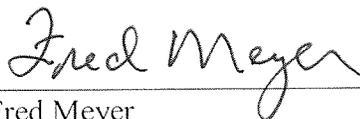
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