HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

March 20th, 2023

RE: AN ACT to amend the public health law and the social services law, in relation to health coverage for medical marihuana

A.4713 (Peoples-Stokes)
S.2568 (Cooney)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The Blue Cross and Blue Shield Plans of New York strongly oppose the enactment of this legislation, which would require insurers that participate in the State's Medicaid, Child Health Plus, Elderly Pharmaceutical Insurance Coverage ("EPIC"), Essential Plan, and/or workers' compensation programs to provide enrollees with coverage of medical marijuana purchased from authorized dispensaries. The intent of this legislation – namely, providing participants in governmental insurance programs with affordable access to medications – is laudable. However, because cannabis is still a Schedule I substance under the federal Controlled Substances Act ("CSA") and therefore an illegal drug, this bill: (1) could expose insurers to criminal liabilities; (2) would be impossible to implement due to the dearth of peer-reviewed, clinical data on medicinal cannabis; and (3) would result in significant costs to the State.

Critically, multiple state's high courts, in evaluating similar legislative mandates, have determined that federal law precludes insurers from providing coverage of a drug that is illegal under the CSA. For example, the Supreme Court of Minnesota recently held that the CSA preempted a Minnesota workers' compensation law that required an employer to reimburse an injured employee who used medical cannabis for the treatment of a work-related injury.[1] Specifically, the court found that requiring the employer (and, by extension, its workers' compensation insurer) to pay for cannabis would expose the employer to criminal liability under federal law for aiding and abetting the employee's unlawful possession of cannabis.[2] In doing so, the Court relied on opinions from other states' high courts, including the Supreme Judicial Court of Maine's decision in *Bourgoin v. Twin Rivers Paper Co., LLC* (CSA precluded application of

[1] Musta v. Mendota heights Dental Center et al., 965 N.W. 2d 312 (Minn. 2021).
[2] *Id.*

the Maine Medical Use of Marijuana Act as a predicate for compelling employer to reimburse workers' compensation claimant for medical marijuana; were employer to comply with the order and knowingly make the reimbursement, employer would be aiding and abetting claimant by acting with knowledge that it was subsidizing claimant's purchase of marijuana) and the Supreme Judicial Court of Massachusetts's opinion in *Wright's Case* (while a state may authorize individuals to use medical cannabis products, and thereby voluntarily assume the risk of federal prosecution, it could not require a third-party employer or insurer to participate in such conduct at the risk of being prosecuted themselves).[3]

However, as the high courts of New Jersey and New Hampshire each issued opinions conflicting with the *Bourgoin* line of cases, the United States Supreme Court has been asked to resolve this split; and requested that the Solicitor General, who represents the federal government before the high court, provide guidance before it fully undertakes the question.[4] Notably, in her brief issued in May, Solicitor General Elizabeth Prelogar stated that "[t]he judgments below are correct for the straightforward reason that when a federal law such as the CSA prohibits possession of a particular item, it preempts a state law requiring a private party to subsidize the purchase of that item. The decisions below, however, rest on a more complex rationale that unnecessarily explores the scope of federal aiding-and-abetting liability outside the context of any federal prosecution… No further review is warranted at this time."[5] **In light of these divergent judicial opinions as to whether the mandate proposed by this bill is permissible, the legislature should not enact laws that could subject payors to criminal liability until consensus is reached**.

Additionally, even if insurers were able to legally provide coverage of medical marijuana, the lack of necessary scientific data would preclude implementation. Stakeholders throughout the healthcare system, including patients and health care practitioners, rely on clinical data derived from peer-reviewed, placebo-controlled trials to guide prescribing decisions. Such information is also critical to insurers and other payors that require such information for utilization review processes that allow them to ensure patients receive the most clinically appropriate care. Unfortunately, due to the continued designation of cannabis as a Schedule I drug, there is no scientific or medical review of data from clinical trials to support determinations regarding proper dosing, methods of administration, active ingredients, interactions and contraindications, etc. Until more is known regarding the intended and unintended effects of cannabis, it – like any other experimental treatment – should not be the subject of mandated insurance coverage.

Finally, because coverage under the above-delineated governmental insurance programs would be required regardless of federal financial participation, this bill would result in enormous costs to the State. In fact, applying utilization estimates based on New York's eligible citizens, the

---

[3] *Bourgoin v. Twin Rivers Paper Co.*, LLC, 187 A.3d 10, 20 (Me. 2018), *and Wright's Case*, 156 N.E.3d 161 (Mass. 2020).

[4] Andrew G Simpson, "Supreme Court Asked to Resolve Federal Drug Law v. State Medical Marijuana Laws Debate," Insurance Journal, February 2022, *available at* https://www.insurancejournal.com/news/national/2022/02/28/655818.htm.

[5] Elizabeth B. Prelogar, Solicitor General, Amicus Curiae brief to the United States Supreme Court, *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.gov/DocketPDF/21/21-676/225493/20220516152424323_21-676%20Musta%20and%2021-998%20Bierbach.pdf.

fiscal impact to the State would be around $300 million annually. Notably, these costs would exceed the total revenues that are expected to be generated by the bourgeoning adult-use program until at least 2027 – and these funds have already been largely allocated to education, community reinvestment, drug treatment programs, and municipalities.

For these reasons, the Blue Cross and Blue Shield Plans of New York oppose the enactment of this legislation.

Respectfully submitted,

HINMAN STRAUB ADVISORS, LLC
Legislative Counsel for the Blue Cross and Blue Shield Plans

4866-2634-0948, v. 1