

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
By KATHLEEN G. KANE, Attorney General :
PENNSYLVANIA DEPARTMENT OF :
INSURANCE, By TERESA D. MILLER, :
Acting Insurance Commissioner; and :
PENNSYLVANIA DEPARTMENT OF :
HEALTH, By DR. KAREN MURPHY, :
Acting Secretary of Health, : NO. 334 M.D. 2014
Petitioners, :
v. :
UPMC, A Nonprofit Corp.; UPE, a/k/a :
HIGHMARK HEALTH, A Nonprofit Corp.; :
and HIGHMARK INC., A Nonprofit Corp., :
Respondents. :

BRIEF OF *AMICI CURIAE*, SENATE AND HOUSE DEMOCRATIC LEADERS
ON BEHALF OF THE MEMBERS OF THE DEMOCRATIC CAUCUSES OF
THE SENATE OF PENNSYLVANIA AND PENNSYLVANIA HOUSE OF
REPRESENTATIVES, IN SUPPORT OF PETITIONERS' MOTION TO
ENFORCE CONSENT DECREES AND COMPEL ARBITRATION

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae, Senate and House Democratic Leaders on behalf of the members of the Senate of Pennsylvania and the Pennsylvania House of Representatives, file this brief in support of Petitioners' Motion to Enforce Consent Decrees and Compel Arbitration.

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43rd Senate District including Allegheny County. Senator Costa serves as the Leader of the Senate Democratic Caucus. State Senator Wayne D. Fontana is a duly elected member of the Senate of Pennsylvania representing the 42nd Senate District including Allegheny County. Senator Fontana serves as Caucus Chair of the Senate Democratic Caucus. State Senator Jim Brewster is a duly elected member of the Senate of Pennsylvania representing the 45th Senate District including Allegheny and Westmoreland Counties. Senator Brewster is a member of the Senate Banking and Insurance Committee. State Representative Frank Dermody is a duly elected member of the Pennsylvania House of Representatives representing the 33rd House District including Allegheny and Westmoreland Counties. Representative Dermody serves as the Leader of the House Democratic Caucus. State Representative Michael Hanna is a duly elected member of the Pennsylvania House of Representatives representing the 76th House District. Representative Hanna serves as the Whip of the House

Democratic Caucus. State Representative Dan Frankel is a duly elected member of the Pennsylvania House of Representatives representing the 23rd House District 23 including Allegheny County. Representative Frankel serves as the Chairman of the House Democratic Caucus. State Representative Rosita C. Youngblood is a duly elected member of the Pennsylvania House of Representatives representing the 198th House District. Representative Youngblood serves as the Secretary of the House Democratic Caucus. State Representative Joe Markosek is a duly elected member of the Pennsylvania House of Representatives representing the 25th House District including Allegheny County. Representative Markosek serves as the Democratic Chairman of the House Appropriations Committee. State Representative Mike Sturla is a duly elected member of the Pennsylvania House of Representatives representing the 96th House District. Representative Sturla serves as the Policy Chairman of the House Democratic Caucus. State Representative Tony DeLuca is a duly elected member of the Pennsylvania House of Representatives representing the 32nd House District including Allegheny County. Representative DeLuca serves as the Democratic Chairman of the House Insurance Committee. As elected leaders of the Senate and House Democratic Caucuses, *Amici Curiae* represent and advocate the interests of the Democratic members of the General Assembly.

The Democratic members of the General Assembly have had a keen interest in the dispute between UPMC and Highmark since 2011 when UPMC, the largest provider of health care services in western Pennsylvania, announced its intent to terminate contracts with Highmark, the largest health plan in western Pennsylvania. In response, the General Assembly held several legislative hearings looking into the dispute and the effect on the citizens of western Pennsylvania.¹ At these legislative hearings, the General Assembly received input from interest groups, and legislators and consumers voiced concerns about the impact of UPMC's decision. On June 27, 2014, the Commonwealth entered into separate consent decrees with UPMC and Highmark (hereinafter "Consent Decrees") striving to resolve the dispute between the parties and protect healthcare consumers of Western Pennsylvania.² By executing the Consent Decrees, the parties agreed to provide access to UPMC for certain services, facilities and categories of people. Brief for Petitioners at 3, *Commonwealth of Pennsylvania v. UPMC*, No. 334 M.D.

¹ The General Assembly held the following legislative public hearings on the issues surrounding UPMC and Highmark: *Public Hearing on UPMC-Highmark Dispute*, Banking and Insurance Committee, Senate of Pennsylvania (Sept. 13, 2011); *Second Public Hearing on UPMC-Highmark Dispute*, Banking and Insurance Committee, Senate of Pennsylvania (Sept. 22, 2011); *Hearing on UPMC/Highmark Provider Contract*, Insurance Committee, Pennsylvania House of Representatives (Oct. 18, 2011 - Oct. 19, 2011); *UPMC-Highmark West Penn Hearing*, Banking and Insurance Committee, Senate of Pennsylvania (Nov. 30, 2011); *Informational Hearing on Integrated Delivery Networks*, Health Committee, Pennsylvania House of Representatives (Dec. 18, 2013); and *Highmark/UPMC Transition Agreement*, Democratic Policy Committee, Pennsylvania House of Representatives (Oct. 10, 2014).

² The Consent Decrees were approved as orders of this Court on July 1, 2014. Brief for Petitioners at 3, *Commonwealth of Pennsylvania v. UPMC*, No. 334 M.D. 2014 (Pa.Cmwlt. 2014).

2014 (Pa.Cmwlt. 2014). Despite the agreements made in the Consent Decrees, UPMC, on March 20, 2015, sent notices to Highmark terminating all of its Medicare Advantage contracts- contracts that serve the region's most vulnerable citizens- as of December 31, 2015. *Id.* at 6.

Amici Curiae have a substantial interest in the case because the question before this Court regarding UPMC's termination of the Medicare Advantage contract with Highmark directly impacts senior citizen constituents represented by members of the Senate and House Democratic Caucuses in western Pennsylvania. The Consent Decrees highlight that there are vulnerable populations that need special protection, and specifically, senior citizens on Medicare are noted as a vulnerable population. The confusion of rapidly changing health care plans and the cancelation of service will be disproportionately felt by the vulnerable populations in western Pennsylvania, who may be forced to look for not only a new doctor, but a new insurance policy without a guarantee of coverage.

In Highmark's western region, encompassing 29 counties, approximately 55% of seniors in the in the affected region use Medicare Advantage plans. Medicare Advantage/Part D Contract and Enrollment Data, Centers for Medicare

& Medicaid Services (May 21, 2015).³ In twelve western Pennsylvanian counties, where a majority of their senior citizens on Medicare utilize Medicare Advantage, up to 40% use some form of Highmark Medicare Advantage plans. *Id.* If UPMC is permitted to terminate the Medicare Advantage contract with Highmark, 25% of all people on Medicare in those twelve counties would be affected, which equates to approximately 156,000 Pennsylvanians being forced to locate new health care insurance or health care professionals. *Id.* The total affected population of Highmark Medicare Advantage consumers is estimated to be 182,000. *Id.* *Amici Curiae* support the Commonwealth's objective of protecting the health care consumers of western Pennsylvania especially the vulnerable populations impacted by UPMC's termination of the Medicare Advantage contract with Highmark.

³ <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAAdvPartDEnrolData/MA-State-County-Penetration-Items/MA-State-County-Penetration-2015-05.html?DLPage=1&DLEntries=10&DLSort=1&DLSortDir=descending>.

ARGUMENT

I. **UPMC’s unilateral termination of its Medicare Advantage contract with Highmark violates the Consent Decree executed between UPMC and the Commonwealth and puts thousands of vulnerable Pennsylvanians at immediate risk.**

Amici Curiae implore this Court to order UPMC and Highmark to abide by the legally binding Consent Decrees. Thousands of senior citizens in western Pennsylvania will be affected by UPMC’s termination of its Medicare Advantage contract with Highmark. Absent the Court’s intervention, the Commonwealth’s vulnerable aging population will be disproportionately affected and face difficulties accessing health care.

In Pennsylvania, the courts interpret consent decrees as legally binding contracts. *Lower Fredrick Twp. v. Clemmer*, 518 Pa. 313, 329 (1988) (“A consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties - a contract binding the parties thereto to the terms thereof: (citation omitted). As a contract, the court, in the absence of fraud, accident or mistake, had neither the power nor the authority to modify or vary the terms set forth...”). In interpreting the Consent Decrees, the Court must look to the intent of the parties and the circumstances surrounding the transaction.

Id.

In the instant case, the intent of the Consent Decrees was to protect the public. Brief for Petitioner at 19. “[W]here a public interest is affected, an interpretation is preferred which favors the public.” *City of Philadelphia v. Philadelphia Transp. Co.*, 26 A.2d 909, 912 (Pa. 1942) (citing Restatement of Contracts, § 236(f); *Mayor of Allegheny v. Ohio & Pennsylvania P.R.*, 26 Pa. 355, 360 (1855); *Johnson v. Philadelphia*, 60 Pa. 445, 451 (1869); *Junction Passenger Ry. v. Williamsport Passenger Ry.*, 154 Pa. 116, 127, 26 A. 295 (1893)).

By executing the Consent Decrees, the parties agreed to provide access to UPMC for certain services, facilities and categories of people, including vulnerable populations. Brief for Petitioners at 3. Despite the agreements made in the Consent Decrees, UPMC, on March 20, 2015, sent notices to Highmark terminating all of its Medicare Advantage contracts as of December 31, 2015. *Id.* at 6.

The Consent Decrees expressly state the commitments by UPMC and Highmark to vulnerable populations as follows:

Vulnerable Populations – UPMC and Highmark mutually agree that vulnerable populations include: (i) *consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage*, (ii) Medigap health plans, (iii) Medicaid and/or (iv) CHIP. With respect to Highmark’s covered vulnerable populations, UPMC shall continue to contract with Highmark at in-network rates for all of its hospital, physician and appropriate continuity of care

services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark, does not make unilateral material changes to these programs. *UPMC shall treat all Medicare participating consumers as In-Network regardless of whether they have Medicare as their primary or secondary insurance.* UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.

Consent Decrees at ¶ IV(A)(2) (emphasis added).

The UPMC Consent Decree explicitly states that “UPMC *shall* treat all Medicare participating consumers as In-Network regardless of whether they have Medicare as their primary or secondary insurance.” *Id.* (emphasis added). It is widely accepted that Medicare Advantage is a form of Medicare. *See* Medicare Advantage Plans.⁴ Thus, pursuant to the Consent Decree, UPMC is required to treat consumers with Medicare Advantage through Highmark as in-network.

UPMC’s termination of its Medicare Advantage contract with Highmark is contrary to the Consent Decree and puts thousands of vulnerable Pennsylvanians at risk. Further, UPMC’s termination of its Medicare Advantage contract with Highmark contradicts the assurances made by UPMC’s Senior Vice President and Chief Legal Officer, Tom McGough, in his testimony at an informational

⁴ <http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/medicare-advantage-plans.html>.

legislative hearing on integrated delivery networks before the Health Committee of the Pennsylvania House of Representatives. At that hearing on December 18, 2013, Mr. McGough testified in response to a question regarding whether the dispute between UPMC and Highmark would affect access to UPMC by senior citizens who participate in the Medicare and Medicare Advantage programs:

MR. MCGOUGH: No, it will not impact seniors moving forward. Highmark and UPMC have already agreed and have taken joint newspaper advertisements and individual advertisements that specify that Medicare Advantage and Medicaid patients will not be affected by the expiration of the commercial contracts at the end of 2014.

Health Committee Hearing Transcript, *Informational Hearing on Integrated Delivery Networks*, Health Committee, Pennsylvania House of Representatives, p. 163, lines 16-21 (Dec. 18, 2013).⁵

Because the UPMC's termination of its Medicare Advantage contract with Highmark violates the Consent Decree, *Amici Curiae* support the Commonwealth's Motion to order UPMC to rescind the termination and compel the parties to participate in binding arbitration thereby ensuring the senior citizens of western Pennsylvania receive the health care services they need.

II. Binding arbitration is necessary to resolve the remaining issues between UPMC and Highmark.

Amici Curiae urge the Court to order UPMC and Highmark to submit all disputed issues between UPMC and Highmark to binding arbitration so they can be

⁵ http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2013_0219T.pdf.

resolved in an expedited manner to ensure that the people of western Pennsylvania have access to health care.

The terms of the Consent Decrees require UPMC and Highmark to reach agreement on a host of issues or submit their disputes for resolution through binding arbitration. *See generally*, Consent Decrees at ¶ IV(A) and (C).

The following are examples of the outstanding issues between the parties:

(1) *Emergency room and trauma services.* UPMC and Highmark have failed to agree on emergency room and trauma services. In the Consent Decrees, UPMC and Highmark agreed that they would decide in-network rates and patient transfer protocols by July 15, 2014, which they have failed to do. Motion to Enforce Consent Decrees and Compel Arbitration at 11, *Commonwealth of Pennsylvania v. UPMC*, No. 334 M.D. 2014 (Pa.Cmwlt. 2014). Predictability in emergency and trauma care is an integral aspect of any health care system. In respect to Pennsylvanians' need for predictability with their health care costs, the Court should compel respondents to binding arbitration.

(2) *Out-of-Network Billing Procedures and Disputed Claims Processing.* UPMC and Highmark continue to disregard the well-being of the residents of western Pennsylvania by failing to agree upon out-of-network billing procedures and disputed claims processing which has resulted in the failure to address an

alarming backlog of disputed claims. *Id.* at 12. Currently, due to the failure of both UPMC and Highmark to agree to electronic claim processing, there are more than 24,000 unresolved and disputed claims pending. Ordering binding arbitration would alleviate this backlog by forcing both non-profit entities to resolve the disputed claims of the population they serve. *Id.*

(3) *Oncology and Cancer Services.* The failure of UPMC and Highmark to abide by the Consent Decrees also disparately affects those currently receiving oncology treatments as they have refused to agree on reimbursement rates for cancer treatments and resulting illnesses. *Id.* As a result, patients currently receiving expensive lifesaving or life sustaining treatment are left wondering if they will be reimbursed for the costs of their treatments. *Id.* This action by UPMC and Highmark directly contravenes the Consent Decrees.

It is important to note that UPMC and Highmark both operate charitable entities that receive favorable tax treatment in Pennsylvania. Consent Decrees ¶ II(G) and (P). As evidenced above, the failure of UPMC and Highmark to resolve their disagreements because of their financial bottom lines threatens to disrupt health care for thousands of Pennsylvanians, imposing undue stress, financial burdens, and irreparable health concerns for those innocent individuals seeking health care in western Pennsylvania. The conduct of the parties throughout this

ongoing dispute have established a pattern of placing their own financial interests before the interests of the public, which is clearly inconsistent with their stated charitable purpose. Coming to an expedited resolution of the pending issues between UPMC and Highmark is in the best interest of the people of the Commonwealth of Pennsylvania. Therefore, *Amici Curiae* support the Commonwealth's Motion to compel the parties to participate in binding arbitration.

CONCLUSION

For all the foregoing reasons, *Amici Curiae* respectfully request this honorable Court to grant Petitioners' Motion to Enforce Consent Decrees and Compel Arbitration.

Respectfully submitted,

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