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334 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
By JOSH SHAPIRO, Attorney General, et al.; :

Petitioners, :

v. :

UPMC, A Nonprofit Corp., et al.; :

Respondents. :

No. 334 M.D. 2014

UPMC’S ANSWER,
IN THE NATURE OF A MOTION TO DISMISS OR PRELIMINARY OBJECTIONS,
TO “COMMONWEALTH’S PETITION TO MODIFY CONSENT DECREES”

Respondent UPMC hereby files this Answer—in the nature of a Motion to Dismiss or Preliminary Objections—to the Commonwealth’s “Petition to Modify Consent Decrees.” For the reasons set forth below, and explained in detail in the attached supporting Memorandum, which is incorporated by reference herein, the Petition should be denied and the claims asserted therein should be dismissed.

INTRODUCTION

1. On February 7, 2019, the Attorney General filed the Commonwealth’s Petition to Modify Consent Decrees.
2. While titled as a “Petition,” and filed as an application for relief under an existing docket number, the Petition is really in the nature of a complaint or case-initiating pleading asserting four causes of action, for: (a) compelled modification of the Consent Decree between UPMC and the Commonwealth; (b) violation of the Charities Act; (c) violation of the Nonprofit Corporations Law

(“NCL”); and (d) violation of the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”).

3. Because the Petition fails to state any legally sufficient cause of action, UPMC accordingly files this Answer in the nature of a Motion to Dismiss or Preliminary Objections and moves the Court to dismiss the Petition in full with prejudice.

BACKGROUND

4. After UPMC announced that it intended to terminate its provider agreements with Highmark, the Commonwealth intervened in 2012 to mediate an orderly wind-down of the parties’ relationship. It intervened again in 2014 to extend the wind-down period.

5. On or about June 27, 2014, after considerable negotiations, UPMC and Highmark entered into separate, nearly identical, reciprocal Consent Decrees (which are collectively referred to as the “Consent Decree”) with the Commonwealth of Pennsylvania, acting through three independent departments — the Attorney General, the Insurance Commissioner, and the Secretary of Health.

6. The purpose of the Consent Decree was to provide for an extended, orderly wind-down of the UPMC/Highmark relationship and a transition period for members of the public to allow them to prepare for the end of UPMC’s provider contracts with Highmark.

7. The term of the Consent Decree runs for five years from the date it was entered, expiring on June 30, 2019. In a unanimous decision in July 2018, the Pennsylvania Supreme Court confirmed that the Consent Decree expires on June 30, 2019, and that the Consent Decree only requires UPMC to remain in its Medicare Advantage (“MA”) contracts with Highmark through that date. *See Shapiro v. UPMC*, 188 A.3d 1122, 1124 (Pa. 2018). The Court expressly rejected the

Commonwealth's effort to compel UPMC's participation in the Consent Decree beyond that date. *See id.* at 1134 (finding "no basis upon which to alter [the Expiration Date], to which the parties agreed . . .").

8. By petition filed February 7, 2019, General Shapiro (acting alone, without the Insurance Commissioner or Secretary of Health, the other Commonwealth parties to the Consent Decree) now asks the Court to "modify" the Consent Decree by replacing it with a new and fundamentally different set of terms that would bind UPMC forever and force it to contract with Highmark (and anyone else) in perpetuity.

9. The Attorney General demands the following perpetual new terms by way of "modification":

- (a) By January 1, 2020, UPMC must replace a majority of its board members who were on its boards as of April 1, 2013, with new board members who have not had any relationship with UPMC for the past five years, and make certain other unspecified changes to its executive management;
- (b) UPMC providers must contract with any insurer that wants a commercial or MA contract with that provider;
- (c) the UPMC Health Plan must contract with any healthcare provider that seeks an MA or commercial contract;
- (d) the parties to these forced contracts must submit to binding arbitration if they cannot agree on the rates to be paid for healthcare services;
- (e) UPMC is prohibited from utilizing Provider-Based Billing, defined to mean "charging a fee for the use of the . . . building or facility at which a patient is seen;"
- (f) UPMC is prohibited from including six other types of non-rate provisions in any of its contracts, including a provision that limits the dissemination of cost information;
- (g) UPMC must accept rates for out-of-network emergency services at rates established by General Shapiro;
- (h) UPMC is prohibited from engaging in any public advertising that General Shapiro determines is unclear or misleading in fact or by implication; and

- (i) UPMC is barred from exercising any right to terminate a contract without cause.

**SUMMARY OF THE REASONS TO DISMISS THE
PETITION TO MODIFY AS LEGALLY INSUFFICIENT**

10. The specific reasons why the Petition fails to state any legally sufficient cause of action are fully set forth in the attached Memorandum, which is incorporated by reference herein. By way of summary, the Petition should be dismissed for the following reasons:

11. First, the Attorney General's claims are barred as a matter of law because they are released, forfeited, or unripe. (Memorandum, Argument § I.) The claims relating to facts that allegedly occurred before the Consent Decree were all released, forever, by the Commonwealth as an essential term of the Consent Decree; they cannot be reasserted now. Other claims, according to principles of claim preclusion, are now barred in light of the Supreme Court's decision just last year. The unripe claims are purely speculative and conclusory, and they cannot support a claim for relief.

12. Second, the Petition wrongly seeks to "modify" the Consent Decree to regulate UPMC beyond the Decree's expiration date on June 30, 2019. (Memorandum, Argument § II.) The expiration date is plainly stated in, and is a material term of, the Consent Decree; it was confirmed by the Pennsylvania Supreme Court last year; and it cannot be extended through nonconsensual "modification" — particularly on the basis of conduct that the Attorney General explicitly agreed was lawful. The Petition, moreover, fails to plead facts capable of demonstrating that the sweeping relief it seeks would actually advance the public interest. That is no accident. In fact, consistent with common sense, the Attorney General's Office has repeatedly stated under oath and in court pleadings that removing competition from the healthcare delivery market in Pennsylvania would harm consumers in violation of federal and state law. Indeed, the Attorney General cannot tell UPMC, the public, and Pennsylvania courts since 2014 that the public interest is served by a slow wind-down of the relationships between Highmark and UPMC — the purpose of the Consent

Decree — and now, on the eve of the expiration of that Decree, turn heel and claim that the same public interest demands that they remain in contract forever. Estoppel principles — as well as longstanding legal prohibitions against enforcing contracts that violate the law — preclude the relief sought by General Shapiro.

13. Third, the Petition must be dismissed because the Attorney General is proceeding alone and without the proper parties. (Memorandum, Argument § III.) As to the Consent Decree, the Commonwealth is represented by three, independent agencies: the Office of the Attorney General, the Insurance Department, and the Department of Health. Here, General Shapiro is not joined by the two other Commonwealth agencies in seeking the proposed modifications. Simultaneously, on the Respondent's side, the Petition erroneously seeks relief against parties either not alleged to have done anything wrong, outside the Attorney General's purported enforcement authority, or both.

14. Fourth, these requested modifications dramatically exceed General Shapiro's powers to regulate nonprofit entities in Pennsylvania. (Memorandum, Argument § IV.) The Attorney General's *parens patriae* powers are limited and concern only major transactions involving nonprofits and the preservation of charitable assets — they simply do not include the power to reimagine a nonprofit's entire business model and those of all Pennsylvania nonprofits delivering healthcare. It is, moreover, beyond dispute that the Attorney General lacks any legal basis under Pennsylvania law to compel the principal relief seeks here: forced contracts between UPMC entities and Highmark (or any other willing insurer or provider). Indeed, such a forced contracting system of healthcare delivery has been rejected over and over again by both the Pennsylvania General Assembly and U.S. Congress — as well as by PID and the Attorney General's Office itself.

15. Fifth, Counts II, III, and IV of the Petition, alleging violation of the Charities Act, NCL, and UTPCPL, were improperly commenced and do not state a claim. (Memorandum, Argument § V.) A new action may not be commenced through petition, and the Attorney General failed to follow the required procedure for alleging new violations of law. Nor has the Attorney General stated a claim for violation of the Charities Law. Nowhere does UPMC’s charitable mission say that UPMC must provide high-quality accessible healthcare *to everyone at in-network rates*, which is the fundamentally flawed premise of the claim. The Attorney General likewise cannot find support for his imprudent policymaking in the Unfair Trade Practices and Consumer Protection Law; that statute only regulates “trade and commerce” — a specialized definition that does not include UPMC’s commercial relationships with insurance companies. General Shapiro’s proposed modifications also fail as a matter of law because they intrude on a regulatory field that the Pennsylvania General Assembly *exclusively* delegated to the Department of Health and Insurance Department.

16. The Attorney General Shapiro’s actions are both unwise and illegal. As a matter of law, the Petition should be dismissed for all of the reasons set forth above and in the attached supporting Memorandum incorporated herein.

WHEREFORE, for the foregoing reasons and those set forth in UPMC's supporting Memorandum, UPMC respectfully requests that this Court reject General Shapiro's Petition to Modify Consent Decrees; deny the relief sought in the Petition; and dismiss the claims therein as a matter of law.

Dated: February 21, 2019

Respectfully submitted,

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