

IN THE SUPREME COURT OF PENNSYLVANIA

No. 39 MAP 2019

COMMONWEALTH OF PENNSYLVANIA, by Josh Shapiro, Attorney General; Pennsylvania Department of Insurance, by Jessica K. Altman, Insurance Commissioner and Pennsylvania Department of Health, by Rachel Levine, Secretary of Health,

v.

UPMC, a Nonprofit Corp.; UPE, a/k/a Highmark Health, a Nonprofit Corp. and Highmark Inc., a Nonprofit Corp.

Appeal of: Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General

BRIEF OF *AMICI CURIAE*, MEMBERS OF THE DEMOCRATIC CAUCUSES OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE SENATE OF PENNSYLVANIA, IN SUPPORT OF THE APPEAL FILED BY THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the order of the Commonwealth Court of Pennsylvania entered on April 3, 2019 at No. 334 M.D. 2014

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The members of the Democratic Caucuses of the Pennsylvania House of Representatives (“House Democratic Caucus”) and the Senate of Pennsylvania (“Senate Democratic Caucus”) named below and on Attachment A attached hereto (collectively, “*Amici Curiae*”) file this brief in support of Appellant, the Commonwealth of Pennsylvania (the “Commonwealth”).

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 Jordan A. Harris is a duly elected member of the Pennsylvania House of Representatives representing the 186th House District including Philadelphia. Representative Harris serves as the Whip of the House Democratic Caucus. State Representative Joanna E. McClinton is a duly elected member of the Pennsylvania House of Representatives representing the 191st House District including Philadelphia. Representative McClinton serves as the Chair 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 including Philadelphia. Representative Youngblood serves as the Secretary of the House Democratic Caucus. State Representative Matthew Bradford is a duly

elected member of the Pennsylvania House of Representatives representing the 70th House District including Montgomery County. Representative Bradford serves as the Democratic Chairman of the House Appropriations Committee. State Representative Neal P. Goodman is a duly elected member of the Pennsylvania House of Representatives representing the 123rd House District including Schuylkill. Representative Goodman serves as the Caucus Administrator of the House Democratic Caucus. State Representative Mike Sturla is a duly elected member of the Pennsylvania House of Representatives representing the 96th House District including Lancaster County. 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. State Representative Dan B. Frankel is a duly elected member of the Pennsylvania House of Representatives representing the 23rd House District including Allegheny County. Representative Frankel serves as the Democratic Chairman of the Health Committee of the House. State Representative Dan Miller is a duly elected member of the Pennsylvania House of Representatives representing the 42nd House District including Allegheny County. Representative Miller serves as the Chairman of the Allegheny County Delegation of the House Democratic Caucus.

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 Lindsey M. Williams is a duly elected member of the Senate of Pennsylvania representing the 38th Senate District including Allegheny County. State Senator-Elect Pam Iovino is a duly elected member of the Senate of Pennsylvania representing the 37th Senate District including Allegheny County. State Senator Arthur Haywood is a duly elected member of the Senate of Pennsylvania representing the 4th Senate District including Montgomery and Philadelphia Counties. Senator Haywood serves as the Democratic Chairman of the Senate Health and Human Services Committee. State Senator Sharif Street is a duly elected member of the Senate of Pennsylvania representing the 3rd Senate District including Philadelphia County. Senator Sharif Street serves as the Democratic Chairman of the Senate Banking and Insurance Committee.

In 2014, the Commonwealth entered into two separate but identical Consent Decrees with the University of Pittsburgh Medical Center (“UPMC”), the largest health services provider in Western Pennsylvania, and UPE a/k/a Highmark Health

and Highmark, Inc. (“Highmark”), the largest healthcare insurer in Western Pennsylvania. In 2015, Democratic Members of the Pennsylvania House of Representatives and the Senate of Pennsylvania filed an *amici curiae* brief supporting the Commonwealth’s efforts to enforce the Consent Decrees and compel arbitration to resolve the ongoing issues between UPMC and Highmark. Since that time, *Amici Curiae* have closely followed the negotiations and litigation surrounding the Consent Decrees and the ongoing dispute between UPMC and Highmark.

Amici Curiae support the Commonwealth’s underlying Petition to Modify Consent Decrees and have a substantial interest in this appeal because the outcome directly impacts the health and welfare of millions of Pennsylvanians, including constituents represented by members of the House and Senate Democratic Caucuses. Modification of the Consent Decrees is necessary for the Commonwealth to protect the public interest by requiring UPMC and Highmark to offer open and affordable access to their healthcare services consistent with their charitable missions and in accordance with the laws of the Commonwealth of Pennsylvania. *Amici Curiae* support the Commonwealth’s public interest objective to protect the healthcare consumers of Pennsylvania, especially vulnerable populations that will be disproportionately impacted by the Commonwealth

Court's decision to not allow modification of the termination date in the Consent Decrees.¹

Pursuant to Pa.R.A.P. 531(b)(2), *Amici Curiae* disclose that no other person or entity other than *Amici Curiae*, its members, or counsel paid in whole or in part for the preparation of this *Amici Curiae* brief, nor authored in whole or in part this *Amici Curiae* brief.

¹ Although there are two identical but separate Consent Decrees, for ease of citation to the underlying matter and previous opinions, further references will be to the singular "Consent Decree" referring to the Consent Decree entered into by the Commonwealth and UPMC, which is at issue in this appeal by the Commonwealth Court's partial granting of UPMC's Motion to Dismiss/Preliminary Objections.

ARGUMENT

Modification of the Consent Decree, including the termination date, is not prohibited under Pennsylvania law because the Consent Decree expressly provides for any modification that is in the public interest without limitation.

The Commonwealth Court erred by holding that it did not have the authority to consider modification of the termination date in the Consent Decree based on its reading of this Court’s opinion in *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018). In *Shapiro*, the Commonwealth sought to enforce the terms of the Consent Decree by extending UPMC’s obligation to contract for in-network access to its facilities for Highmark’s Medicare Advantage Plan subscribers past the Consent Decree termination date of June 30, 2019. *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122, 1124 (Pa. 2018). This Court determined that the termination date is an unambiguous term of the Consent Decree. *Id.* at 1134. However, this Court did not rule on whether the Commonwealth could seek modification of the termination date in the Consent Decree.

Modification of the Consent Decree is not prohibited under Pennsylvania law because it was the intent of the parties to allow for such modification. In *Shapiro*, this Court ruled that “[a] consent decree is a judicially sanctioned contract that is interpreted in accordance with the principles governing all contracts; [the] primary objective is ascertaining the intent of the parties.” *Id.* at 1131 (citations omitted). In the absence of fraud, accident, or mistake, courts do not have the

power or authority to modify or vary the terms set forth in the Consent Decree. *Id.* at 1132 (citations omitted). When those terms are unambiguous, they are considered to reflect the intent of the parties. *Id.* at 1131 (citations omitted).

In denying all but one of UPMC’s Motion to Dismiss/Preliminary Objections, the Commonwealth Court determined that the Commonwealth’s request for modification is ripe and that the Commonwealth is expressly authorized to petition the Commonwealth Court for modification as provided in the Consent Decree. *Commonwealth by Shapiro v. UPMC*, No. 334 M.D. 2014, *slip op.* at 31 (Pa. Cmwlth. filed Apr. 3, 2019). The provision in the Consent Decree providing for modification (the “Modification Clause”) is an unambiguous, material term of the Consent Decree. The Modification Clause states: “If [any party] believes that modification of this Consent Decree would be in the public interest... [and] [i]f the parties cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.” *Mem. Op.*, *slip op.* at 27. As previously recognized by this Court, the Consent Decree further provides that any party may apply to the Commonwealth Court for “such further orders and directions as may be necessary and appropriate for the interpretation, **modification** and enforcement of this Consent Decree.” *Mem. Op.*, *slip op.* at 27-28; *Shapiro*, 188 A.3d at 1125 n. 7 (emphasis added).

The Consent Decree explicitly allows any party to petition the Commonwealth Court for modification by establishing that such modification is in the public interest. Mem. Op., *slip op.* at 27. Otherwise, there is no restriction placed on the modification that may be sought or granted. *Id.* The express language of the Modification Clause clearly reflects the intent of the parties to allow for modification of any provision, including, but not limited to the termination date so long as the modification is in the public interest. Therefore, consistent with its ruling in *Shapiro*, the Court should find that the Commonwealth has the right to modify the Consent Decree, including the termination date, as provided for in the Modification Clause of the Consent Decree. *See Shapiro*, 188 A.3d at 1134.

Moreover, modification is proper because it is in the public interest. The Commonwealth argues that it entered into the Consent Decree with the understanding that seniors and other vulnerable populations needing specialized care would never be affected by UPMC's contractual disputes. Cmwlth.'s Mem. in Opp'n to Resp't's Mot. Dismiss at 1. Both UPMC and Highmark agreed to comply with their charitable commitments that they owe to the public-at-large by providing vulnerable populations access to quality health care at a reasonable rate. Without modification of the Consent Decree, millions of Pennsylvanians will be denied cost-effective in-network access to healthcare. Pennsylvanians with serious

illnesses currently receiving medical treatment will no longer be eligible to receive treatment in-network. The Commonwealth's most vulnerable citizens will suffer. The intent of the Consent Decree was and continues to be to protect this very public interest. "[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 R.R.*, 26 Pa. 355, 360 (Pa. 1855); *Johnson v. Philadelphia*, 60 Pa. 445, 451 (Pa. 1869); *Junction Passenger Ry. v. Williamsport Passenger Ry.*, 26 A. 295, 297 (Pa. 1893)).

Since the original intent of the Consent Decree was to protect the public interest, modification of the duration of the Consent Decree is needed to prevent citizens of this Commonwealth from being denied care or being forced to pay a much higher price for it. Upon termination of the Consent Decree, UPMC intends to demand up-front payments in full from all out-of-network patients resulting in payments in excess of the value of the services; utilizing facilities based billing for services in new circumstances; and transferring medical procedures to its higher cost specialty providers; all of which are contrary to the best interest of the people of the Commonwealth. Cmwlth.'s Pet. to Modify Consent Decrees at 39.

Modification of the termination date is needed to ensure that "the operative terms of the original Consent Decree" are met and that the public interest is advanced.

See Salazar v. District of Columbia, 896 F.3d 489, 498 (D.C. Cir. 2018) (citations omitted).

Granting UPMC's Motion to Dismiss, with regard to the termination date, based solely on this Court's decision in *Shapiro* is improper. The parties have agreed, unambiguously, that the Commonwealth may petition for modification. The parties have also agreed, unambiguously, that the Commonwealth Court may direct or order the modification sought if the Commonwealth meets its burden of establishing that modification is in the public interest. As this Court reiterated in *Shapiro*, courts have no power or authority to modify or vary those unambiguous terms in the absence of fraud, accident of mistake, which has not been alleged in this matter. *Shapiro*, 188 A.3d at 1132. *See* Mem. Op., *slip op.* at 35. The Commonwealth Court erred by granting/sustaining UPMC's Motion to Dismiss/Preliminary Objection regarding the termination date and not considering the unambiguous Modification Clause of the Consent Decree to ascertain the parties' intent consistent with this Court's ruling in *Shapiro*.

CONCLUSION

For all the foregoing reasons, *Amici Curiae* respectfully request this honorable Court by granting the relief sought by the Commonwealth.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 2,093 words, exclusive of the cover page, tables and signature block.

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CERTIFICATE OF SERVICE

I, Matthew Salkowski, do hereby certify that I have this day served the foregoing *Amici Curiae* Brief by electronic service via PACFile and via electronic mail.

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Attachment A

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