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39 MAP 2019

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 by Josh Shapiro, Attorney General

REPLY BRIEF FOR APPELLANT

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED ON APRIL 3, 2019 AT NO. 334 MD 2014

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INTRODUCTION

If UPMC's brief was filed in a battle between Apple and Microsoft, or Coke and Pepsi, it might be easier to comprehend. In such a case, its over-the-top tone of no-holds-barred competition with Highmark; its accusation that "OAG's problem" is "not with the Consent Decree, but rather with the market-based realities of modern healthcare"; and its polemic insisting that OAG's "*ad hominem* arguments about non-profit duties" are "false and irrelevant" might not be quite so jarring. But UPMC's brief was not filed in a commercial dispute. And the Office of Attorney General would not be a signatory to a Consent Decree in such a matter. By definition, this litigation is fundamentally different from any dispute between two for-profit behemoths: Here, both UPMC and Highmark are charitable nonprofit entities, recognized as such by Pennsylvania and entrusted with certain legal responsibilities.

Conspicuously absent from UPMC's arguments is any glimmer of recognition that UPMC has and continues to benefit from its special status. UPMC's contention that the "benefit of the bargain to UPMC was that the conditions of the Consent Decree would end on June 30, 2019, and yield to free-market forces" overlooks that the decree is to be interpreted "to protect consumers and UPMC's chartable mission." UPMC brief at 2; Consent Decree §I(A), RR.153a. The Consent Decree is not an albatross around UPMC's neck—it is a

recognition of the responsibility UPMC owes the citizens of this Commonwealth in exchange for the benefits they have showered upon it.

UPMC, however, sees virtually everything in pure business terms; it does not seem to appreciate—or even recognize—the Attorney General's *parens patriae* responsibility to the people of this Commonwealth. UPMC elevates the *termination date* of the Consent Decree—as if the sole purpose of the Consent Decree is for it to end—while disparaging the *public interest* at its core. The Consent Decree is about protecting the interests of the public, the innocent bystanders to UPMC and Highmark's business disputes. For years the citizens of Pennsylvania have forgone significant tax revenues to subsidize UPMC; *their interests* must be read into the Consent Decree's every letter.

All the Commonwealth seeks is an opportunity to make its case that extending the Consent Decree is in the public interest. The Consent Decree is not a countdown clock and was never meant to be governed solely by the passage of time. The Consent Decrees were intended to provide a transition for the public to adapt to UPMC's refusal to contract with Highmark; but all parties—including UPMC—agreed to their modification in the public interest.

Contrary to UPMC's assertions, the underlying problem in this case is *not* the Commonwealth's alleged fundamental ignorance about how healthcare works. It is that UPMC has forgotten its core mission. As a charitable institution, UPMC

may not engage in unbridled competition, pursuing profits and market dominance at the expense of the public interest—its mission, of which it might be reminded, is to serve the citizens of Pennsylvania.

SUMMARY OF ARGUMENT

The opening paragraph of the Consent Decree dictates that the public interest is the guiding principle in construing that document. The words used in the document reflect that purpose. UPMC's constrained view of the courts' power to modify belies that purpose. Principles of contractual construction cannot be used contrary to the Consent Decrees' purpose—the public interest.

UPMC suggests that the Court's authority to modify the Consent Decree is inconsistent with separation of powers. While policy is generally a legislative prerogative, where a policy is universally understood as a foundational principle of law, courts must protect that policy. A charity's obligations to serve the public interest is such a policy.

UPMC suggests that the Consent Decree runs afoul of federal law. This suggestion is based upon an artful misstatement of that law. It is UPMC's actions that run afoul of its charitable mission—to serve the citizens of Pennsylvania.

Finally, this Court's King's Bench authority is fundamental and broad. This action involves a matter of public importance that requires immediate judicial intervention. King's Bench or extraordinary relief is necessary here so as to avoid UPMC prevailing, not on the merits, but through attrition.

ARGUMENT

I. The Modification Provision Reflects, Not Betrays, the Parties' Intent.

UPMC begins its argument suggesting that this Court's decision in *Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018), forecloses the Commonwealth Court's power to modify the duration of the Consent Decree. But the Commonwealth Court itself recognized that in *Shapiro*, the "OAG sought *enforcement* of certain aspects of the consent decree; it did not seek *modification* expressly permitted by §IV(c)(10)," Opinion at 30 (emphasis in original). That court, nevertheless, held that *Shapiro* prevented it from modifying the Consent Decree's end date. This was error.

In *Shapiro*, this Court was not asked to address, and did not determine, whether, the duration of the Consent Decree could be extended through the Modification Provision. To suggest that this Court in *Shapiro* addressed that issue—as UPMC repeatedly does[1]—is a canard.

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[1] UPMC's *res judicata* argument is flawed for the same reason. There must be an identity of claims that have been the subject of the first action. *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (1995). The Commonwealth Court correctly concluded that "there is a lack of identity between OAG's prior and current claims. As a result, *res judicata* does not bar OAG's current petition to modify the Consent Decree." Opinion at 30. Moreover, where the Consent Decree did not involve a judicial determination of the issue in controversy, it is not a final judgment. *Keystone Bldg. Corp. v. Lincoln Sav. and Loan Ass'n*, 360 A.2d 191, 195 (Pa. 1976); *Fed. Deposit Ins. Corp. v. Bd. of Finance and Revenue*, 84 A.2d 495, 500 (Pa. 1951). *Res judicata* is also not applicable when the subsequent action arises out of changed circumstances. *Callery v. Municipal Authority of Blythe Twp.*, 243 A.2d 385, 389 (Pa. 1968).

A. UPMCs view that a court cannot modify the termination date pursuant to the Consent Decree's Modification Provision is linguistically and legally wrong.

UPMC argues that the Modification Provision cannot permit any "significant" change to the Consent Decree because the definition of "modify" means only "to make minor changes." UPMC brief at 20-22. This definitional argument, particularly when applied to the courts, is simply wrong. It is also in conflict with the Modification Provision, itself.

1. UPMC cherry-picks its narrow definition of "modify."

As an initial matter, UPMC's argument does not even find support in its own dictionary. The dictionary UPMC primarily relies upon, Merriam Webster Online, defines "modify" as both "to make minor changes in" *and* "to make basic or fundamental changes in often to give a new orientation to or to serve a new end." *Merriam Webster Online*, https://www.merriam-webster.com/dictionary/modify (last visited May 2019); UPMC brief at 20 fn.9. Words require context to understand which of the multiple definitions was intended. UPMC's reliance upon cherry-picked definitions from non-legal dictionaries does little to elucidate the meaning of "modification" as used in the Consent Decrees here.

As the context of this dispute concerns a court's authority, the place to look is the seminal legal dictionary at the time of the Consent Decrees' signing—the 10th Edition of Black's Law Dictionary. It defines "modification," in relevant part,

as "[a] change to something; an alteration or amendment <a contract modification>." BLACK'S LAW DICTIONARY 1156 (10th ed. 2014). Using "a contract modification" as an example, Black's definition is not limited to only minor alterations. Quite the reverse, Black's Law defines "modification" as synonymous with "amendment." One would never say that the Fourteenth Amendment was merely a minor change to the Constitution. Likewise, a plaintiff's ability to amend his or her complaint under Pa.R.C.P. 1033 has never been limited to only incidental or subordinate changes.

2. The term "modify" refers to action by the Courts not the Office of Attorney General, and the Courts have broad authority to modify.

The term "modification" must be read in context of the entity making the modification—the Commonwealth Court. On this issue, throughout its brief, UPMC appears confused.[2]

The Judicial Code, for example, grants courts authority to "*modify* or rescind any order within 30 days after its entry . . . if no appeal from such order has been taken or allowed." 42 Pa.C.S.A. § 5505 (Modification of orders) (emphasis added). In prison condition litigation, a court may "void or *modify* the consent decree"

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[2] The two principal cases UPMC cites for its definition argument, *MCI Telecomms. Corp v. AT&T Co.*, 512 U.S. 218 (1994) and *Commonwealth v. DeFusco*, 549 A.2d 140 (Pa. Super, 1988), deal with the power of *agencies* to alter or ignore binding statutory language—not the authority of courts.

between a government party and a prisoner. 42 Pa.C.S.A. § 6607 (emphasis added). A court likewise has authority to *modify* a criminal sentence, 42 Pa.C.S.A. §§ 9721(b), 9773, an order of probation, *id.* § 9771, an arbitration award, *id.* § 7321.25, an order of prospective relief, *id.* § 6606, and a subpoena issued by a Prothonotary, *id.* § 5337(a).[3] Nothing restricts a court's broad authority to "modify." To the contrary, when used to describe a court's authority, the term "modify" encompasses the power to make both minor and major changes. *See e.g. Oak Tree Condo. Ass'n v. Greene*, 133 A.3d 113, 117 (Pa. Cmwlth. 2016) ("Prior to the 30–day appeal period, a trial court has broad authority to modify or rescind an order . . . .) (citing 42 Pa.C.S.A. § 5505).

3. UPMC's definition of "modify" is in conflict with the Modification Provision itself.

Finally on this point, UPMC's definition of "modification" is at war with the Modification Provision itself. The Commonwealth Court may only modify a term of the Consent Decree upon a showing that the modification "is in the public interest." RR.166a-167a (Consent Decree § IV(C)(10)). If the Modification

[3] Our Rules of Procedure mirror this broad definition. *See e.g.*, Pa.R.C.P. 248 ("Modification of Time"); Pa.R.A.P. 1926 ("Correction or Modification of the Record"); Pa.R.A.P. 105 ("Waiver and Modification of Rules").

Provision, as UPMC argues, only applies to "minor" or incidental changes, when could such a minor change ever implicate the public interest?

The Consent Decrees also do not delineate between significant and incidental. The only provision UPMC specifically describes as "boilerplate" in its brief—and thus presumably subject to modification—is the Modification Provision itself. UPMC brief at 25-26, 30. UPMC's restrictive definition of the courts' power to modify is contrary to how the term is traditionally used when empowering the courts, and is at war with the language of the Consent Decree itself.

4. The Modification Provision was negotiated and sits in harmony with the rest of the Consent Decree.

UPMC also seeks to interpret the Consent Decree to create conflict rather than avoid it. Specifically, UPMC argues that if modification of the end date was permitted, the reference to termination within the provision through which the Commonwealth Court retains jurisdiction over the Consent Decree (Retention Provision, § IV(C)(11)), would be meaningless. UPMC brief 22. This is incorrect.

The Modification Provision permits the Commonwealth Court to either shorten or lengthen the end date, so long as the modification is in the public interest. Therefore, modification merely creates a new end date. As these two provisions can be—and should be—read in harmony, they must be so.

Even UPMC recognizes that interpreting one provision of a contract, so as to nullify another, violates one of the fundamental principles of contract

interpretation. UPMC brief at 23. As detailed in our opening brief, to hold the end date immutable effectively nullifies the Modification Provision. UPMC asserts, however, that there is no nullification because the Commonwealth Court allowed 17 requests for modification to go forward. *Id*. But pursuant to the Commonwealth Court's flawed analysis, any effort to modify becomes meaningless after June 30, 2019. Without the ability to modify the end date, the modification process is nullified.

UPMC also asserts that the end date should be given greater weight than the Modification Provision because the former was negotiated and the latter was boilerplate. This is both legally and factually incorrect.

An argument that a party should not be bound by the plain language of a contract clause because the "unexpected clause . . . appears in the boilerplate of a printed form and, if read at all, is often not understood" is a claim of unconscionability. *See e.g. Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 146 (Pa. Super. 1985). In Pennsylvania, "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Witmer v. Exxon Corp*., 434 A.2d 1222, 1228 (Pa. 1981). UPMC's suggestion that any part of the Consent Decree is unconscionable or a contract of adhesion is pure fantasy.

First, UPMC is a well-represented multi-billion dollar organization. RR 101a (Petition). The Consent Decrees were *extensively* negotiated, through multiple iterations. *Compare e.g.*, RR.513a-517a (first June 11th proposed term sheet) *with* RR.519a-524a (second June 11th proposed term sheet) *and* RR.1767a-1780a (June 24th term sheet). If UPMC had wanted to preclude the end date from being modified by the Commonwealth Court, it could have raised this issue during negotiations. It did not.

Second, the Modification Provision itself was negotiated. Originally, the OAG proposed an "Extension Provision" providing that "[a]ny party to the Consent Decree can ask that binding arbitration provisions of the Final Decree be extended before initial agreements contemplated by this term sheet expire." RR.517a. This provision was ultimately replaced by the Modification Provision, language which UPMC had previously found acceptable in a 2007 consent decree involving its acquisition of The Mercy Hospital of Pittsburgh. *See Commonwealth v. Catholic Health East*, 2:01-cv-708 (W.D. Pa.), dkt. 1 ¶ 46 (May 25, 2007 Order).

The Modification Provision, like all parts of the Consent Decree, was the subject of negotiations between the parties.[4] UPMC cannot object to its plain language now.

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[4] UPMC focuses on correspondence dated June 11 and 24, 2014. These documents do not reflect the entirety of the negotiations. As UPMC notes: "Following two weeks of discussion, OAG circulated a revised draft term sheet to

B. UPMC ignores the "Interpretive Principles" of the Consent Decree and wrongly claims the proposed modifications would result in "perpetual" contracts.

UPMC cites to *Wyeth Pharmaceuticals, Inc., v. Borough of West Chester*, 126 A.3d 1055 (Pa. Cmwlth. 2015), for the proposition that "a contractual preamble can be a 'reliable indicator of intentions of the parties'" UPMC brief at 27 (quoting *Wyeth*). We agree. The opening paragraph of the Consent Decree dictates "Interpretive Principles" requiring that "[t]he Court's Consent Decree *shall* be interpreted . . . to protect *consumers* and UPMC'S *charitable mission*." Consent Decree §I(A) (RR.153a) (emphasis added). UPMC omits this critical text from its discussion. UPMC brief at 27-33. This interpretive principle must guide all construction of the Consent Decree. The Consent Decree is about protecting the interests of the public. That is the only prism through which this document can be properly interpreted and understood. UPMC now asks the Court to ignore this guiding principle in favor of its own self-interest. The Court should not.

UPMC claims that the Commonwealth's proposed modifications would convert the decrees into "perpetual" contracts. This is not true. The Commonwealth's proposed relief *retains* the Modification Provision in its entirety. Accordingly, as contemplated, any party may pursue additional or further

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'reflect[] some of the changes that [UPMC and Highmark] have requested.'" UPMC brief at 29.

modification (including termination of the Consent Decree entirely) by agreement or through petitioning the court and establishing that – pursuant to the interpretative principles of the Consent Decree – its desired modification promotes the public interest. *See* Proposed Modified Decree at ¶¶ 11, 12 and 13 (RR 222a).

As stated in our Petition, modification of the end date is necessary to protect Pennsylvania consumers and fulfill UPMC's charitable mission of providing high quality, cost-effective and accessible health care. *See e.g.* Petition at Intro. (RR.71a-72a); ¶ 59 (RR.102a). This issue should be heard on the merits.

C. The principle of the specific over the general has no application in the absence of conflict and cannot control a contract when that meaning defeats the agreement's overall purpose.

UPMC suggests that public policy never suffices to displace the plain language of a contract. UPMC brief at 30 n.14. In support of this, UPMC cites to *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1008 (Pa. 1998). There, this Court made clear that an unambiguous contract provision must be given its plain meaning unless doing so would be contrary to clearly expressed public policy. *Id.*

The language in this Consent Decree is in the service of public policy. UPMC seeks to escape that language by citing to the principle of contract construction that the specific prevails over the general. That principle, however, does not apply in the absence of conflict. And even if there was a conflict, that principle cannot be applied to defeat an agreement's overall scheme or purpose.

Pennsylvania Turnpike Commission, to use, v. U. S. Fidelity & Guaranty Co., 23 A.2d 416, 418 (Pa. 1942) ("[W]here a contract as a whole shows a given intention but certain words or phrases if taken literally will defeat such intention . . . the particular words or phrases will, if possible, be construed in such a way as to be consistent with the general intention.") "[T]he meaning which arises from a particular, even more specific clause cannot control the contract when that meaning defeats the agreement's overall scheme or purpose." 11 WILLISTON ON CONTRACTS § 32:10 (4th ed.) (Specific and general words; the *Ejusdem Generis* Doctrine).

It is axiomatic that a contract should be interpreted to favor the public interest. *See City of Philadelphia v. Philadelphia Transp. Co.*, 26 A.2d 909, 912 (Pa. 1942). The principle of the specific prevailing over the general, even where applicable, is at its weakest when its application is contrary to the public interest.

D. Where there is an express modification provision, case law has consistently recognized a court's ability to modify consent decrees to address changing circumstances.

UPMC persists in citing to case law that does not involve a modification provision. *See e.g. Penn Township v. Watts*, 618 A.2d 1244, 1248 (Pa. Cmwlth. 1992) ("The trial court did not have the authority to modify the consent decree . . ."); *Salazar by Salazar v. D.C.*, 896 F.3d 489 (D.C. Cir. 2018) (petitioner attempted to use Fed.R.Civ.P. 60(b) for the lack of a modification provision). But

here, the Commonwealth Court has express authority to modify the Consent Decree. Consent Decree § IV(C)(10) (RR.167a). Accordingly, principles concerning the ability to *interpret*, rather than *modify*, language have no application here.

Where UPMC does cite to case law concerning contracts with modification provisions, UPMC misstates it. In *Commonwealth v. U.S. Steel Corp.*, 325 A.2d 324 (Pa. Cmwlth. 1974), there was a modification provision. The court recognized that a decree could be changed in two different ways: first, by the parties through amendment; and second, by the court through modification. *U.S. Steel*, 325 A.2d at 329. There, however, the modification provision was not invoked. Instead, one party, without any supporting evidence, sought to escape the consent decree entirely by asserting impossibility. [5] Of course, this request was denied. Impossibility and cases like *Universal Builders Supply Inc. v. Shaler Highlands Corp.*, 175 A.2d 58 (Pa. 1961), only come into play because a modification

[5] UPMC also mischaracterizes our citation to *Dravosburg Housing Ass'n v. Borough of Dravosburg*, 454 A.2d 1158, 1162 (Pa. Cmwlth. 1983). We cited that decision to point out that the absence of a modification provision affects the parties' ability to seek alteration of terms outside of an agreed upon amendment. Therefore, the court outlined the process for amendment where the consent decree did "not expressly permit modification." *Id*. at 1161. Here, the authority of the court and the analysis are different.

provision was *not* invoked. Because the OAG invoked the Modification Provision here, this case is distinguishable.

Similarly, UPMC's reliance on the Third Circuit case of *Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267, 284 (3d Cir. 2001), is misguided. In *Holland*, the modification provision was limited to procedural matters. 246 F.3d at 279. Given that limitation, the Third Circuit held that modification of the decree to extend beyond its four year term was more than a narrow procedural modification would allow. *Id.* at 281. The opposite circumstance is presented here; the Modification Provision is *not* limited to procedural matters or otherwise.

Moreover, in *Holland*, the court's retention of jurisdiction was also specifically limited to the four-year term of the consent decree. *Id.* 279. Here, by contrast, the Retention of Jurisdiction provision has no temporal limitation. Prior to termination, jurisdiction is retained ". . . as may be necessary and appropriate for the interpretation, modification and enforcement of this Consent Decree." Consent Decree § IV(C)(11) (RR.167a). These substantive differences in the language establish that UPMC's reliance upon *Holland* is misplaced.

II. The Commonwealth's Requested Relief Does Not Interfere with Existing Law or Infringe on the Separation of Powers.

UPMC's contention that the Commonwealth's proposed modifications "violate basic separation of powers and lead to impermissible conflict with federal law" lacks merit.

A. UPMC agreed to the Court's authority to determine whether any party's proposed modifications are in the public interest.

UPMC's contention that the courts lack authority to determine whether the Commonwealth's proposed modifications are in the public interest flies in the face of its express agreement in the Consent Decree that the courts have precisely this authority. UPMC also confuses this Court's judicial authority with the General Assembly's authority to establish public policy through legislation. No one is arguing that the Court has legislative authority here.

UPMC cites *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941), as holding that judicial power does not extend to resolving controversial economic or social problems. UPMC brief at 39. But as this Court explained in *Mamlin*, a court's authority *does* extend to circumstances where "a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring." *Mamlin*, 17 A.2d at 409. *See also, Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009) (same).

The public interest in ensuring that charitable institutions, such as UPMC, are duly administered in faithfully pursuing their stated charitable purposes through the Commonwealth and its Courts is so obviously in the interest of public health, safety, morals, and welfare, that there is a centuries-old unanimity of opinion that the courts may speak on this issue, *even if* construed as an issue of

policy. *See*, 3 BLACKSTONE, COMMENTARIES 47 ("The king, as *parens patriae*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general . . . files ex officio an information in the Court of chancery to have the charity properly established"); *Fontain v. Ravenal*, 58 U.S. 369, 17 How. 369, 15 L.Ed 80 (Mem) (1854) (Recognizing broad powers of attorney general to protect public interest and insure charitable funds are properly applied); *Pruner Estate*, 136 A.2d 107 (Pa. 1957) (Beneficiary of charitable trusts is the general public but because the public is the object of the settlor's benefactions, private parties have insufficient financial interest in charitable trusts to oversee enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised). And, here, these issues are not ones of policy – they are issues of *law*. *See* 71 P.S. § 732-204(c) (The Attorney General shall represent the Commonwealth and "may intervene in any other action, including those involving charitable bequests and trusts").

A court's plain legal authority to protect such policies does not run afoul of legislative prerogative or the separation of powers. Here, the Office of Attorney General is not second guessing policy choices immortalized in statutes—it is asking this Court to protect them. UPMC's assertion that the Attorney General lacks authority to bring stand-alone public interest claims ignores the

Commonwealth's oversight responsibilities over UPMC as a Pennsylvania charitable entity.

To be clear, the Commonwealth seeks its proposed modifications in response to UPMC's unprecedented behavior. These modifications will not materially change how healthcare is generally delivered. But they will change how UPMC delivers healthcare and return UPMC to its charitable mission—hardly a dramatic overhaul of healthcare.[6] Indeed, UPMC has already agreed to essentially the same contractual terms in earlier cases that are being proposed as modifications here, most notably a period of negotiation followed by Last Best Offer Arbitration should negotiations fail. *See Commonwealth v. Catholic Health East*, 2:01-cv-708 (W.D. Pa.), dkt. 1 at 1, 25-26 (May 25, 2007 order); *In re Children's Hospital of Pittsburgh and Children's Hospital of Pittsburgh Foundation,* No. 6425 of 2001 (Allegh. Cty. O.Ct., 2001).

UPMC cites 42 U.S.C. § 1395w-24(a)(6)(B)(iii) as authority for its argument that federal law prohibits forced contracting in Medicare Advantage. However, as set forth *infra* at 22, UPMC fails to note that the statute only applies to the

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[6] UPMC incorrectly equates "any willing provider" and "any willing insurer" legislation with the Commonwealth's proposed "Duty to Negotiate" provisions. See *infra* at 23-24 (discussion of material differences). According to the National Conference of State Legislatures, as of November 5, 2014, twenty-seven (27) states had some form of "Any Willing Provider" laws. The Report is available at http://www.ncsl.org/research/health/any-willing-or-authorized-providers.aspx.

Secretary of HHS, not to the Commonwealth. UPMC's reference to the Pennsylvania Insurance Department (PID)'s website as support for its argument that the Commonwealth cannot force contracts between insurance companies and providers is also inapplicable. Such statements may provide the public with general guidance regarding PID and its responsibilities, but as a general matter, the PID has no regulatory role over hospitals. Because PID only regulates insurance companies, the agency's reach extends to just one of the contracting parties. Additionally, most insurers are for-profit business corporations, not charities committed to benefitting the public; this further limits PID's regulatory reach even within the context of insurance. In this case, both UPMC and Highmark are charitable institutions continuously subject to the oversight of the Commonwealth and authority of this Court to ensure they are fulfilling their charitable commitments.

UPMC places great weight on statements the Commonwealth made years before the Consent Decrees were negotiated that explained the Commonwealth's preference for pursuing negotiation. While that preference remains, circumstances have changed far beyond UPMC's contention that, "the only difference now is a different Attorney General."

UPMC has triggered a number of material changes, most having occurred during Attorney General Shapiro's tenure:

1. When UPMC terminated many of Highmark's Medicare Advantage contracts last summer, it reneged on its promise that senior citizens and Medicare subscribers would not be impacted by its contractual disputes with Highmark (RR.195a-196a);

2. When UPMC announced in October 2018 that after June 30, 2019, it will be requiring payments "Up-Front and In-Full" before any Out-of-Network non-emergency services will be provided, it expanded this policy to all Out-of-Network insurers, not just Highmark;

3. UPMC's Out-of-Network payment demands for any non-Medicare Out-of-Network services, including emergencies, will be based upon UPMC's charges, not its costs, resulting in payments in excess of the fair value of UPMC's services and its unjust enrichment at the public's expense;

4. UPMC's expansion across Pennsylvania promises to subject many more patients and payers to UPMC's policies and practices (RR.104a–106a); and

5. UPMC's closed the Susquehanna Health Medical Group physician practice in August of 2017 to the employees of a local employer (RR.200a).[7]

All parties to the Consent Decrees, including the Commonwealth, are afforded the opportunity to seek modification when changing circumstances warrant. The Commonwealth believes its proposed modifications are necessary given the impact on the public of UPMC's latest actions. All the Commonwealth seeks here is the opportunity to present its position to the Commonwealth Court.

[7] The employer restored access through another insurer, but at a higher cost.

B. Federal Medicare laws do not preempt modification of the end date.

UPMC erroneously contends that Congress has prohibited forced contracting for Medicare Advantage purposes by substituting the word "regulators" for the words "the Secretary" in its citation of 42 U.S.C. § 1395w-24(a)(6)(B)(iii) on page 42 of its brief. The relevant text, in pertinent part, reads:

> In order to promote competition under this part and part D and in carrying out such parts, ***the Secretary*** may not require any [Medicare Advantage] organization to contract with a particular hospital, physician, or other entity or individual to furnish items and services under this subchapter or require a particular price structure for payment under such a contract to the extent consistent with the Secretary's authority under this part.

42 U.S.C. § 1395w-24(a)(6)(B)(iii) (emphasis added). This section prohibits federal interference and is not directed against the Commonwealth or other state regulators as UPMC suggests.

Notwithstanding the above, the goal of the Proposed Modified Consent Decree is to require nonprofit charitable health care organizations to make their assets and services, created through public donations, taxpayer supported funding and taxpayer paid tax breaks, available to the very public who created them. This goal is accomplished by allowing Medicare Advantage Plans to assemble the provider networks they choose. If they choose to have UPMC's hospitals and doctors or Highmark's Allegheny Health Network hospitals and doctors in their

networks, the Proposed Modified Consent Decrees provide a method for building such a network.

UPMC's opposition to modification of the Consent Decree is not based on the Commonwealth controlling the design of Medicare Advantage or any other health plan serving Pennsylvania consumers. UPMC's opposition is based on losing its control over how other insurers design their networks.

UPMC objects, *inter alia*, to the duty to negotiate, the anti-tiering and anti-steering provisions, and the prohibition against exclusive contracting. All of these provisions prevent UPMC from telling other insurers how to do business.

First, UPMC improperly describes the Duty to Negotiate with credentialed providers as an "any willing provider" requirement similar to the types of "any willing provider" laws that have been rejected by the Pennsylvania legislature.[8]

As a preliminary matter, an "any willing provider" law is not similar to the Commonwealth's Duty to Negotiate provisions. Any willing provider laws have certain key provisions, most notably that: any provider can opt into a network; and if the provider is willing to accept the rates agreed upon by other providers.[9]

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[8] UPMC argues the failure of the legislature to pass a law with a provision similar to a provision in the Consent Decree bars this Court from imposing a similar provision. That contention has no basis in law. "[U]nsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 381, n11 (1969).

[9] UPMC cites HB345, Regular Session 2017-2018 which states: "A health care payer shall be required to contract with and to accept as a health care benefit

In contrast, the duty to negotiate provision only applies to credentialed providers, thus any provider cannot opt into the process. If a health plan has a credentialed provider there is a duty to negotiate with arbitration if the negotiations fail. The arbitration panel cannot order that a provider be placed in a narrow network plan or be placed on any particular tier in a plan. ¶ 4.3.4.4-4.5 (RR.215a-217a). Ultimately, since the health plan controls the credentialing process, the health plan, not the Commonwealth, controls how its network is designed.

Second, the proposed anti-tiering provision will prevent UPMC from imposing contract terms on an insurer's health plan. For example, a health plan may allow consumers pay a low co-pay to visit doctors in a high-quality/low-cost tier and a high co-pay if they visit a doctor in a low-quality/high-cost tier. If UPMC can continue to impose a contract term on an insurer that prohibits such tiering, it is UPMC, not the Commonwealth, that is dictating how plans are designed.

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plan participant any willing provider of health care services. A health care payer may not discriminate against a provider of health care services who:

(1) agrees to accept the health care payer's standard payment levels; and

(2) meets and agrees to adhere to quality standards established by the health care payer.

Third, an exclusivity provision, under which a hospital will only contract with a health plan if that plan excludes certain other hospitals from its network, is again a hospital designing how its network would look. This control by providers over health plans is addressed by the Proposed Modified Consent Decree and will let health plans design their networks and plans as they choose, not as UPMC would design the plans for them.

Since the Commonwealth is encouraging health plans to design networks as they please, there is no preemption. In general, preemption is express or implied, *New York City Health and Hosp. Corp. v. Wellcare of New York, Inc.*, 801 F. Supp. 2d. 126, 135 (S.D. N.Y. 2011), and the portion of the Medicare Law that deals with Medicare Advantage plans contains the following express preemption:

> The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.

42 U.S.C.A. § 1395w-26(b)(3).

The "standards established under this part," in turn, are found in 42 C.F.R. § 422.200-224, Centers for Medicare & Medicaid Services (CMS) regulations. Those regulations specifically address the conduct that Medicare Advantage plans must undertake. In contrast, the Commonwealth's Proposed Modified Consent Decree generally deals with providers and their responsibilities as nonprofit charitable corporations, actions not covered by these CMS regulations. Because the

Medicare law and regulations do not regulate the conduct at issue here, there is no preemption.

C. As a public charity, UPMC must fulfill its charitable mission for the public as a whole.

UPMC's "ad hominem" characterization of the Commonwealth's arguments demonstrates the organization's failure to understand its own purpose and role in society as a charitable institution. Rather than repeating its arguments and supporting authorities, the Court's attention is respectfully directed to the Commonwealth's opening brief at 27-31. *See also*, pages 14-28 of the Commonwealth's brief filed in the Commonwealth Court at RR.686a-701.

III. The Court, in the Interest of Justice and Pursuant to Its Inherent Authority under the Constitution, Should Order That the Consent Decree Be Extended until the Courts have Reached a Final, Unappealable Decision on our Petition for Modification.

The Commonwealth asked the Court to exercise its authority, either pursuant to 42 Pa.C.S.A. § 726 (extraordinary jurisdiction) or its King's Bench powers, to issue an interim order extending the protections of the Consent Decree until the courts have reached a final, unappealable decision on our Petition for Modification. The thrust of UPMC's response is that this Court is powerless to exercise its King's Bench authority. King's Bench, however, is not so limited. "By its 'supreme' nature, the inherent adjudicatory, supervisory, and administrative authority of this Court at King's Bench 'is very high and transcendent.'" *In re*

Bruno, 101 A.3d 635, 669 (Pa. 2014) (explaining history and authority of King's Bench) (quoting *Commonwealth v. Chimenti*, 507 A.2d 79, 81 (Pa. 1986)).

UPMC begins by misstating the procedural history of this appeal. UPMC announces that this matter has already been decided by this Court, which "denied only a few days ago" the request for special relief. Nowhere in this Court's April 16, 2019 order *granting* the Commonwealth's Petition for Permission to Appeal, or, in the Alternative, Application for Extraordinary Relief does this Court indicate that it would not hear the Commonwealth's request for an interim order, much less that its request has been denied. The Commonwealth filed its petition for permission to appeal pursuant to 42 Pa.C.S.A. § 702(b) (interlocutory orders), asking that should this Court reject that request, it take the appeal "in the alternative" under § 726. Granting the first request does not indicate a denial of the alternative.

Relying on this Court's decision in *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015), UPMC then notes that "King's Bench authority 'is exercised with extreme caution.'" UPMC brief at 52. While it is true that the Court does not exercise this prerogative routinely, the facts here are far from routine, as the wellbeing of Pennsylvania's most vulnerable citizens hangs in the balance.

UPMC omits the Court's further explanation in *Williams* regarding the appropriateness of exercising its King's Bench powers:

> King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law. While such authority is exercised with extreme caution, the availability of the power is essential to a well-functioning judicial system. . . . In exercising King's Bench authority, our "principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth."

Williams, 129 A.3d at 1207 (quoting from *In re Bruno*, 101 A.3d 635, 675 (Pa. 2014)).

The present case involves both a matter of public importance and the risk that the rights of hundreds of thousands of citizens will be adversely affected if interim relief is not granted. Accordingly, it is not only appropriate, but necessary for the Court to grant relief. While the Commonwealth recognizes that the Court is not required to grant the relief requested, UPMC's suggestion that the Court lacks the authority to do so simply misstates this Court's inherent powers. *In re Bruno*, 101 A.3d at 671 ("We have often undertaken flexible measures deriving from our broad power at King's Bench.").

UPMC argues that the Commonwealth waived its request to ask for King's Bench relief by not raising this argument in the Commonwealth Court. The Commonwealth Court, however, lacks King's Bench authority; that authority lies exclusively with this Court. *In re Bruno,* 101 A.3d at 665-66. Moreover, "[t]he

exercise of King's Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature; rather, the Court may employ any type of process necessary for the circumstances." *Williams*, 129 A.3d at 1206. This Court may "even exercise King's Bench powers over a matter where no dispute is pending in a lower court." *Id.* This is because King's Bench is most appropriate when "the Court cannot suffer the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary processes of law making those avenues inadequate for the exigencies of the moment." *In re Bruno*, 101 A.3d at 671. This is the situation here.

UPMC also claims that the Commonwealth should have raised its claim "more than four years" ago, UPMC brief at 53, essentially arguing that the Commonwealth should have sought modification right after the ink dried on the Consent Decrees. But the Commonwealth brings this action because of UPMC's deteriorating behavior as the end date approaches.

As explained in our opening brief, after this Court's ruling in *Shapiro*, UPMC began a tit-for-tat with Highmark, ultimately announcing that all Out-of-Network patients must pay UPMC's expected charges for their non-emergency health care services *up-front and in-full* before receiving any services from UPMC providers. RR.100a (Petition). Opening brief at 15. After learning about this policy, the Commonwealth had to first negotiate with UPMC in good faith before

seeking redress with the Commonwealth Court. Consent Decree § IV(C)(10) (RR.167a). It was only after that negotiation with UPMC failed that the present case was and could have been initiated. RR.107a, 112a (Petition).

UPMC then argues that the Commonwealth cannot demonstrate a clear right to modification based on mere allegations, and that in any event this Court is ill-equipped to review those allegations. This again misstates the relief the Commonwealth requests in this Court. Here, we seek only the opportunity to obtain modification from the Commonwealth Court. This Court need not delve into the intricacies of the healthcare market or address competing allegations to determine what is in the public interest; that is for the Commonwealth Court.

The Commonwealth is asking for nothing more than the right to have its day in court. UPMC will not be prevented from presenting evidence to the Commonwealth Court to show that modification of the consent decree is not in the public interest. However, if interim relief is not granted, there is a serious risk that UPMC will prevail, not on the merits, but through attrition.

CONCLUSION

The Court should reverse the decision of the Commonwealth Court as to the modification of the end dates of the Consent Decrees, remand for further action, and order the maintenance of the Consent Decrees until the courts have reached a final, unappealable decision on the Petition for Modification.

Respectfully submitted,

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Date: May 6, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,839 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ J. Bart DeLone
J. BART DeLONE
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Appellant by electronic service on all of the parties.

/s/ J. Bart DeLone
J. BART DeLONE
Chief Deputy Attorney General

Date: May 6, 2019