

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 334 M.D. 2014

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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,

Petitioners,

v.

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

Respondents.

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**HIGHMARK'S RESPONSE IN OPPOSITION TO RESPONDENT UPMC'S MOTION IN LIMINE TO PRECLUDE HIGHMARK FROM TESTIFYING OR PRESENTING EVIDENCE AT THE EVIDENTIARY HEARING**

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## INTRODUCTION

The Pennsylvania Supreme Court has recognized that the Consent Decrees constitute a “comprehensive agreement” between the Commonwealth, Highmark and UPMC. Highmark played an active and central role in negotiating that comprehensive agreement. Highmark (and UPMC) each have fully participated in every proceeding initiated by the Office of Attorney General (“OAG”) regarding the Consent Decrees—no matter the issue at hand—and Highmark will be impacted and bound by this Court’s ruling at the upcoming hearing and any subsequent rulings related to the OAG’s Petition to Modify. There is no legal reason to cut off that participation now—indeed it would be error to do so. Moreover, Highmark—given its central role in negotiating the comprehensive agreement—has probative evidence regarding the parties’ intent in negotiating and agreeing to the Consent Decrees’ modification provision and would be unfairly prejudiced if it is barred from introducing that evidence.

Yet, UPMC seeks to bar entirely Highmark’s participation, and to preclude any Highmark testimony or evidence at the upcoming evidentiary hearing addressing the issue of the parties’ intent with regard to the scope of the Modification Provision. UPMC’s sole argument to bar Highmark’s participation at the hearing and all Highmark documentary and testimonial evidence (without even knowing what it

might be) is that the Consent Decrees are separate documents and were separately negotiated.

That is flat wrong. Contrary to what UPMC says: (1) the Consent Decrees were negotiated concurrently as part of a back-and-forth negotiation conducted by the OAG with both Highmark and UPMC; (2) the final versions of the Consent Decrees reflect comments, changes and input from both Highmark and UPMC; (3) the Modification Provisions (and the Consent Decrees generally) are virtually identical and are part of a comprehensive agreement; and (4) the Consent Decrees are designed to operate together—for instance, imposing obligations on UPMC to treat, and Highmark to pay for, treatment for certain patients, and also by providing Highmark and UPMC with the right to seek redress for the other’s suspected violations of the Consent Decrees. It, therefore, is not surprising that UPMC’s own website contradicts the position it takes in its Motion in Limine—conceding that the Consent Decrees are “between UPMC and Highmark.”<sup>1</sup>

To be sure, this Court has the discretion to assess the probative value of the specific evidence or testimony any of the parties (OAG, Highmark or UPMC) may present at the evidentiary hearing. But to bar one of those parties—Highmark—from participating in the proceedings altogether would leave this Court with an

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<sup>1</sup> <https://www.upmc.com/patients-families/choice-is-vital>, June 2, 2019.

incomplete record as to the intent of the three parties to this comprehensive agreement and unfairly prejudice Highmark by depriving it of an opportunity to be heard. UPMC's Motion should be denied.

## ARGUMENT

### **A. Highmark Is And Should Remain A Party To And Full Participant In This Proceeding.**

Highmark has been a party to this litigation since the OAG filed its Petition and moved for entry of the nearly identical Consent Decrees on June 27, 2014. Both UPMC and Highmark have been permitted to participate in each proceeding brought by the OAG pursuant to the Consent Decrees, even at times over the other party's objection. From the very beginning, both Highmark and UPMC have examined witnesses, presented or been prepared to present testimony and exhibits, given oral arguments and filed briefs both in this Court and the Pennsylvania Supreme Court. Consistent with the practice in this case, this Court overruled UPMC's objection to Highmark's participation in this case just a few months ago at the initial status conference.

Even more relevant to the current controversy, the Pennsylvania Supreme Court recognized in its May 28, 2019 Opinion that the OAG's proposed modifications will "bind both UPMC and Highmark." *Commonwealth by Shapiro*, 2019 WL 2275206, at \*12 n.6. Thus, any decision by this Court—including the issue now—will impact both Consent Decrees. Excluding Highmark from fully

participating as a party in proceedings that ultimately will impact it would be wrong as a matter of law and unfairly prejudicial.

UPMC's Motion says nothing that even comes close to justify this Court reversing course and prohibiting Highmark's participation. Highmark should be permitted to continue fully participating in the upcoming evidentiary hearing and any subsequent proceedings.

**B. Highmark's Evidence Is Relevant And Probative To The Issues Before This Court Regarding The Parties' Intent.**

Because Highmark was a central participant to the negotiation of the Consent Decrees, its evidence and testimony is directly relevant to the issue before this Court. The Consent Decrees were not negotiated by the OAG and UPMC alone. The negotiations were not separate—instead, UPMC and Highmark negotiated concurrently with the OAG in a process in which the OAG served as an intermediary between the parties and communicated each party's additions and revisions to various terms proposed for inclusion in the Consent Decrees. As our Supreme Court described the process and the agreement ultimately reached:

[T]he Commonwealth secured a *comprehensive agreement* in the form of a consent decree, but, because the parties refused to sign a common document, two final separate consent decrees were prepared ... Each party's decree has identical provisions except for the fact that Highmark's Consent Decree requires Highmark to comply with its terms, and UPMC's Consent Decree requires UPMC to comply with its terms.

*See Com. ex rel. Kane v. UPMC*, 129 A.3d 441, 448 (Pa. 2015) (emphasis added).

UPMC itself has acknowledged the reality of the Consent Decrees' negotiations, noting in its recent Supreme Court brief that it requested terms that were included in the Term Sheets that led to the Consent Decrees. UPMC Appellee Brief, No. 39 MAP 2019, at p. 8 (“At the request of UPMC, *these draft term sheets* included language that the proposed consent decree would terminate five years after entry.”); *id.* at p. 29 (UPMC noting that the “OAG circulated a revised draft term sheet to ‘reflect[] some of the changes that [*UPMC and Highmark*] have requested.”) (quoting Letter from the OAG dated June 24, 2014 (modification by UPMC)).

Under Pennsylvania Rule of Evidence 402: “All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.” Pa. R. Evid. 402; *Commonwealth v. Renninger*, 2019 WL 2151682 (Pa. Super. Ct. May 16, 2019). “Evidence is admissible if it is relevant — that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact — and its probative value outweighs the likelihood of unfair prejudice.” *Commonwealth v. Clemons*, 200 A.3d 441, 474 (Pa. 2019); *see also* Pa. R. Evid. 401.

Highmark was an integral and indispensable participant in the negotiations leading to the execution of these essentially identical Consent Decrees, and its evidence will assist this Court in interpreting the parties' intent as to the

Modification Provision. Accordingly, UPMC is flat wrong to assert that Highmark's evidence and testimony is not relevant or probative because Highmark "was not present and did not participate at all in the UPMC/Commonwealth contract negotiations." *See* Motion at ¶ 19. Indeed, the Consent Decrees would not have been entered by UPMC and/or the OAG if Highmark also did not assent to their terms. As a consequence, Highmark's evidence is directly relevant to this proceeding and it would be a legal error to rule prior to the hearing that it is barred.

**C. The Sole Case Cited By UPMC Supports Highmark's Participation At The Hearing.**

Nor is there any support in the law for UPMC's request to bar Highmark, a party to the Consent Decrees, from participating in these proceedings. The sole case UPMC relies upon actually supports Highmark's full participation at the upcoming hearing. As a threshold matter, *Cook* does not involve evidence relating to contract interpretation or intent. Rather, *Cook* addressed whether statements by a district attorney regarding racially-insensitive statements made by the attorney prosecuting the case were admissible to show that the attorney had discriminated during jury selection more than two years earlier. The Supreme Court held that the evidence was properly excluded because the district attorney had not participated in any way in the case potentially involving discriminatory jury selection. 952 A.2d 594, 602 (Pa. 2008).

As such, this case undercuts rather than supports UPMC’s Motion. In *Cook*, statements by a declarant who did not participate in the event that was the subject of the trial were excluded as irrelevant. Here, by contrast, Highmark was an integral participant in the negotiation of the Consent Decrees and is a party to the “comprehensive agreement” reached by the OAG through the Consent Decrees (as well as a party to this case). Highmark’s evidence and testimony is far different than the evidence excluded in *Cook*—because Highmark’s evidence is directly relevant to the interpretation of the Consent Decrees. Highmark should therefore be permitted to fully participate in the proceedings.

### CONCLUSION

This Court should deny UPMC’s Motion in Limine and permit Highmark to fully participate in the evidentiary hearing on the parties’ intent regarding the Modification Provision in the Consent Decrees.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I 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.

Submitted by:	UPE, a/k/a Highmark Health and Highmark Inc.
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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 3rd day of June, 2019, a true and correct copy of the foregoing document was served upon the following counsel by electronic PACFile:

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