IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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.	:	No. 334 M.D. 2014
UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc., A Nonprofit Corp., Respondents	:	

ADJUDICATION

AND NOW, this 14th day of June, 2019, in accordance with the Supreme Court's opinion and order of May 28, 2019, remanding the matter to this Court for an evidentiary hearing to receive evidence on and make findings of fact about the intended meaning and scope of the Modification Provision of the Consent Decrees, and after hearing on June 10 and 11, 2019, I make the following findings, based primarily on proposed findings submitted by the parties:

Findings of Fact

1. UPMC and Highmark are 501(c)(3) institutions. As charitable entities, their missions are to provide access to high quality affordable healthcare. Notes of Testimony, 6/10-11/19 (N.T.), at 161:4-9; 160:3-7; 271:2-18.

2. Highmark and UPMC had a longstanding contractual agreement that was to expire at the end of 2012. N.T. at 32:5-6; 164:4; 175:18-20; 233:16.

3. Following a mediation, that contract was extended through the end of 2014, after which UPMC planned to end its contractual relationship with Highmark. N.T. at 36:21-24; 165:5-7; 175:20-21; 232:17-19.

4. In April 2013, the Pennsylvania Insurance Department ("PID") approved Highmark's acquisition of West Penn Allegheny Health System ("WPAHS"). UPMC Ex. 134. The Approving Order, signed by Insurance Commissioner Michael Consedine, was "premised on a non-continuation" of the UPMC-Highmark contracts because "continuation of such contract[s] may ... delay WPAHS' financial recovery." Id. at 15.

5. After PID issued the Approving Order, UPMC's Board of Directors passed a June 12, 2013 resolution directing UPMC management not to extend commercial contracts with Highmark in Southwestern Pennsylvania. UPMC Ex. 142. The Board also directed UPMC management to "immediately attempt to engage Highmark in discussions regarding the transition that will take place between the date of this resolution and December 31, 2014." Id.

6. UPMC attempted to negotiate a transition plan, but Highmark continued to request "full network access for all Highmark members to all UPMC providers." UPMC Ex. 144.

7. With Highmark and UPMC "literally talking past each other," then-Governor Tom Corbett created the Patients First Leadership Team ("PFLT"). N.T. at 235:19-20. The PFLT—composed of Consedine; Michael Wolf, then-Secretary of the Department of Health; and former Attorney General Kathleen Kane—was asked to "develop a transition plan for the expiration of the UPMC-Highmark contracts at the end of 2014." UPMC Ex. 170 ¶ 16.

8. The PFLT met with UPMC on June 5, 2014, to begin discussing a transition plan. Consedine opened the meeting by stating that the PFLT understood there would not be an extension of the UPMC-Highmark contracts, and that the Commonwealth representatives were there to broker terms for a transition. N.T. at 254:17-255:23.

9. At that meeting, UPMC and the Commonwealth agreed that a key component of this transition was establishing a fixed end date, which would eliminate any public uncertainty about when system-wide in-network access to UPMC for Highmark members would end. Id.

10. Following the June 5 meeting, UPMC and the Commonwealth negotiated a term sheet. UPMC Chief Legal Officer W. Thomas McGough, Jr. was involved in those negotiations on behalf of UPMC. James Donahue, Esq., Executive Deputy Attorney General, Public Protection Division of the Office of Attorney General ("OAG") and Yen Lucas of PID negotiated on behalf of the Commonwealth. UPMC Ex. 101; N.T. at 258:6-23.

11. The parties first sought to negotiate term sheets, laying out the "core principles" that would "form the basis of an agreement." N.T. at 49:16-18, 21-23; 173:4-12; 268:4-8.

12. On June 11, 2014, the OAG circulated the first draft term sheets to UPMC and Highmark. N.T. at 54:18-20; Com. Ex. 1, Cmwlth.000001-000012.

13. The term sheets were intended to be "mirror images," reflecting the parties' respective obligations to one another. N.T. at 50:17-22.

14. In the June 11 term sheet, OAG also included a provision titled "Extension" that would allow any party to ask that the "binding arbitration provisions" be extended before the overall agreement contemplated by the term sheets expired. Id. UPMC understood this "Extension" provision to permit extension of all the mandatory in-network access provisions that were subject to arbitration. N.T. at 260:6-14.

15. On June 18, 2014, McGough sent a counter-proposal to Donahue. UPMC Ex. 107. UPMC's counter-proposal also provided for access to only certain services during what UPMC called a "Patients-First Transition" with a termination date of December 31, 2017. Id. at 1, 8 ¶ 12. UPMC intentionally did not include any provision that would permit either side to seek an extension or modification of the agreement's terms. N.T. at 262:8-17.

16. UPMC considered the "Extension" provision inconsistent with assurances that a transition plan would not include any contract extension. N.T. at 261:18-262:7.

17. On June 22, 2014, Lucas sent a revised term sheet from the Commonwealth that "incorporated a number of UPMC's suggestions." UPMC Ex. 110. The June 22 term sheet now proposed terms for "Key Transition Issue Agreements" and included a concrete end date, although the Commonwealth proposed a longer, five-year term. Id. ¶ 14. It did not contain a modification provision.

18. However, the June 22 term sheet still included the same "Extension" provision from the June 11 term sheet. UPMC Ex. 110 ¶¶ 4(d), (e), (g), 13.

19. Later on June 22, McGough circulated to the Commonwealth handwritten edits. Among other edits was a strike-out of the "Extension" provision in its entirety.

20. McGough's June 22 edits went further. He added language to emphasize that "the Consent Decree is not a contract extension and shall not be characterized as such." UPMC Ex. 111; N.T. at 266:8-15. McGough left in place the provision from the Commonwealth's June 22 term sheet that "[t]he Term of the Final Decree shall be for 5 years from the date of entry." UPMC Ex. 111. UPMC agreed to the longer term as a compromise. N.T. at 263:19-264:8.

21. The Commonwealth accepted many of these edits, including UPMC's deletion of the "Extension" provision. On June 24, the Commonwealth circulated its "last, best, and final terms" surrounding the "core principles" of the parties' agreement. UPMC Ex. 102. The June 24 term sheet included the proviso that "the Consent Decree is not a contract extension and shall [not] be characterized as such," as well as the express five-year term. Id. at 6.

22. The Commonwealth accepted UPMC's deletion of the "Extension" provision. Id.

23. UPMC signed the term sheet on June 24, 2014, Com. Ex. 1, Cmwlth.000059-000065, and Highmark signed on June 25. Com. Ex. 1, Cmwlth.000080a-000080g.

24. On June 25, 2014, the OAG executed term sheets memorializing agreements in principle and reserving items for future negotiation. Com. Ex. 1, Cmwlth.000088-000094.

25. Once the parties agreed on the core terms, they set to convert the term sheets to Consent Decrees that would be enforceable by the Court. N.T. at 62:5-8; 170:24-171:5; 274:18-25, 324:4-5.

26. On the evening of June 25, 2014, the OAG sent the initial draft Consent Decree to UPMC; among other changes, from the term sheets, the draft included the addition of "Definitions," "Binding Arbitration," "Binding on Successors and Assigns," "Legal Exposure," "Notices," "Averment of Truth," "Retention of Jurisdiction," "No Admission of Liability," and "Counterparts." The Consent Decrees included a "Modification" provision. Com. Ex. 2, Cmwlth.000107-000132.

27. The Modification Provision stated that if any party believes "modification of this Consent Decree" is in the public interest, notice should be given and the parties should attempt to agree; if an agreement cannot be reached, the party seeking

modification can petition the Commonwealth Court and bears the "burden of persuasion" that modification is in the public interest. Com. Ex. 2, Cmwlth.000128.

28. Donahue testified that the OAG included the Modification Provision to effectuate the Consent Decrees' core purpose to protect the public interest. The OAG needed to "have the ability to preserve UPMC's charitable mission and to protect consumers" in light of the uncertainty of the UPMC-Highmark relationship. N.T. at 86:8-23 (responding to inquiry why modification provision was important, Donahue stated, "We didn't know what the future was. We didn't know what things would be in 5 years .... So we still had to have the ability to preserve UPMC's charitable mission and to protect consumers.") Id.

29. UPMC's charitable mission would never have an end date, nor would the consumer interest in affordable access to quality healthcare ever end.

30. The OAG took much of the language for the Modification Provision from prior court-ordered consent decrees in other cases to which UPMC had previously agreed. N.T. at 65:15-17, 66:5-15, 67:2-16, 79:6-80:2; Com. Ex. 3, Cmwlth.000260, Com. Ex. 4, Cmwlth.000291; Com. Ex. 5, Cmwlth.000319-000320. The modification term in the other consent decrees was similar, but not identical to that proposed at this time.

31. UPMC and the Commonwealth never discussed the Modification Provision. N.T. at 280:16-18; see also N.T. at 54, 75-76, 99-100.

32. At the time he circulated the draft consent decree with the Modification Provision, Donahue was aware that UPMC had stricken the "Extension" provision from the term sheet, the Commonwealth agreed to delete the "Extension" provision, and Donahue himself signed the final term sheet omitting the "Extension" provision. N.T. at 140:15-141:5; UPMC Ex. 119 at 6.

33. The Commonwealth never expressed to UPMC any understanding or intent that the Modification Provision could be used to alter the termination date and "core principles" expressed in the parties' final term sheet. N.T. at 281:22-282:10.

34. Throughout the negotiation, neither UPMC nor any other party proposed any edits to the Modification Provision, which appeared with identical language in every draft circulated. N.T. at 87:11-14; 187:5-15; 280:13-15.

35. In the thirty-four years prior to this case, OAG never applied to extend a consent decree pursuant to a modification provision. N.T. at 114:2-15.

36. The Commonwealth did not tell UPMC that it had used the modification provision from prior consent decrees, and McGough did not review any prior consent decree in his consideration of the Modification Provision here. N.T. at 367:3-21.

37. Subsequent to execution of the Consent Decrees, all parties acted consistent with the agreement being for a transition of limited duration. Thus, immediately after the two Consent Decrees were executed, the Commonwealth issued a press release

describing the decree as a "comprehensive transition agreement" and stating that it was "not a contract extension" between UPMC and Highmark. UPMC Ex. 147. Thereafter, the Commonwealth never represented to the public that the Consent Decrees were anything but a transition with a definite end date. N.T. at 93:22-94:5, UPMC Ex. 147.

38. The parties signed the Consent Decree and filed them with this Court along with *Motions to Approve Consent Decrees* on June 27, 2014, Com. Exs. 6-7, Cmwlth.000335-000379.

39. On July 1, 2014, the Commonwealth Court granted the motions and entered the Consent Decrees as an order of the Court in one common Order. Com. Ex. 8, Cmwlth.000380.

40. Donahue, testified that the core purpose of the Consent Decrees was to ensure that certain segments of the population had access to healthcare at a reasonable cost, and this was made known to UPMC during the Consent Decree negotiations. N.T. at 48:21 – 49:12.

41. Thomas L. VanKirk, Esq., Executive Vice President, Chief Legal Officer and Secretary of Highmark Health, was a member of the Highmark team that negotiated and signed the Consent Decrees on Highmark's behalf. VanKirk testified that the Consent Decrees' purpose "was not ... to benefit Highmark, ... not ... to benefit UPMC. It was ... to benefit patients and Highmark members." N.T. at 163:17-21. VanKirk also testified that the Consent Decrees' underlying goals included ensuring

access to oncology care, access for vulnerable populations, access to hospitals in rural areas, access to emergency room services at in-network rates, and access to specialty hospitals. N.T. at 162:5 – 163:4.

42. McGough testified that the final term sheets signed by all parties, which contained no extension provision, a final term of the agreement of five years, and no modification agreement, represented the core principles around the deal. N.T. at 272:20-273:14. Regarding the public interest, McGough testified that uncertainty about the end date of the relationships between UPMC and Highmark "was really crippling, quite frankly, to the community and the people who needed to make decisions about what needed to be done when that date arrived." N.T. at 254:17-255:23.

Discussion

Generally, if contractual terms are ambiguous, parol or extrinsic evidence "is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances." Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004). This question is not to be resolved in a vacuum, but in reference to the entire contract as a whole, so as to effectuate its true purpose. Commonwealth ex rel. Kane v. UPMC, 129 A.3d 441 (Pa. 2015). The Court must interpret a contract "to give effect to all of its provisions . . . [and] will not interpret one provision of a contract in a manner which results in another portion being annulled." Id. at 464 (citations omitted). Moreover, "a party's performance under

the terms of a contract is evidence of the meaning of those terms." Id. (citing Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 (Pa. 1978)).

The Consent Decrees were negotiated with the intention of creating a transition to a time when there would be greatly reduced contacts between UPMC and Highmark. All the parties were aware of this transition approach. The parties treated a specific end date of the transition as a "core principle," and an end date was expressly negotiated throughout the early term sheet discussions. UPMC consistently rejected any proposals which it viewed as allowing an extension of the end date. Ultimately, a five-year termination/expiration provision was agreed upon by all parties. This occurred before there was any mention of the Modification Provision.

The OAG and Highmark insist that they had concerns that transcended the five-year termination/expiration provision. Those concerns included UPMC's and Highmark's ongoing charitable responsibilities, and the ongoing need of consumers for access to high quality affordable healthcare. However, these concerns are never-ending. Stated differently, there will never be an end date for them. These perpetual concerns were known before the parties agreed on a specific termination/expiration provision. Given the actions of the UPMC Board of Directors, there is no reason to belief that UPMC would knowingly agree to such a perpetual undertaking. Also, it is unclear whether a regulatory agency such as PID would approve a perpetual undertaking by UPMC.

The Modification Provision first appeared late in the negotiations, after the conclusion of term sheet negotiations on "core principles." It was not offered in exchange for a particular concession. The Modification Provision proposed here was similar to provisions in other consent decrees between the Commonwealth and UPMC. There was never any discussion regarding the Modification Provision, nor were there challenges to it. The general Provision does not include any express limitation; nevertheless, there is no believable evidence that any party intended the general Modification Provision to override the specific termination/expiration provision which had been the subject of negotiations almost from the beginning. Indeed, until the current litigation, the OAG has never tried to use a modification provision in such a way. This interpretation advances the public interest by reinforcing a predictable end date and allowing planning for the future.

The extent to which the Modification Provision could be applied to other "core principle" provisions of the Consent Decrees was not explored in the hearing. However, based on the record before me, the most reasonable, probable and natural interpretation of the Modification Provision was offered by McGough: given the complexity of the subject matter, the speed at which negotiations were proceeding, and the appearance of mistakes by the negotiators, it was helpful to have a provision which would allow moderate and modest adjustments to the Consent Decrees in the service of core principles either by agreement of all the parties or by order of court. N.T. at 280:20-281:15.

Conclusions of Law

1. The Consent Decrees are to be "interpreted … to protect consumers and UPMC's [or Highmark's] charitable mission." Consent Decrees, § (I)(A).

2. In ascertaining the intention of the parties to a contract, it is their outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter. Ingrassia Const. Co. v. Walsh, 486 A.2d 478, 483 (Pa. Super. 1984) (citing Gen. Warehousmen and Emps. Union Local No. 636 v. J.C. Penny, 484 F. Supp. 130, 135 (W.D. Pa. 1980)).

3. The Modification Provision is ambiguous, and therefore extrinsic evidence of the intent of the parties was considered. Shapiro v. UPMC, ___ A.3d ___, (Pa., 39 MAP 2019, filed May 28, 2019), slip op. at 20.

4. A court will adopt an interpretation which under all the circumstances ascribes the most reasonable, probable and natural conduct of the parties. Razumic.

5. The interpretation of the Modification Provision which under all the circumstances ascribes the most reasonable, probable and natural conduct of the parties is that the Modification Provision was not intended to nullify the short, specific, unambiguous termination/expiration provision in the preceding paragraph, as that provision was a core principle of the agreement first addressed in the term sheets, and was expressly negotiated by the parties.

6. This conclusion is consistent with the canon of contract interpretation that where there is an apparent inconsistency between general and specific provisions of a contract, specific provisions ordinarily qualify the meaning of general provisions. Clairton Slag, Inc. v. Dep't of Gen. Servs., 2 A.3d 765, 773-74 (Pa. Cmwlth. 2010) (citing Commonwealth v. Brozzetti, 684 A.2d 658 (Pa. Cmwlth. 1996)); see also Harrity v. Continental-Equitable Title & Trust Co., 124 A. 493 (Pa. 1924).

7. This conclusion is also consistent with the canon of contract interpretation that an interpretation will not be given to one part of a contract (such as the Modification Provision) which will annul another part of it (such as the termination/expiration provision) or produce absurd results (such as the indefinite extension of the Consent Decrees sought here). See Kane; Harrity, 124 A. at 494.

8. The parties' outward and objective manifestations of assent, including planning for a transition period and the negotiations over the expiration provision, support the interpretation that the Modification Provision was not intended to override the termination/expiration provision.

9. In light of the Findings of Fact and Conclusions of Law, Petitioners cannot state a cause of action for extension of the termination/expiration provision of the Consent Decrees.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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.	:	No. 334 M.D. 2014
UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc., A Nonprofit Corp., Respondents	:	

ORDER

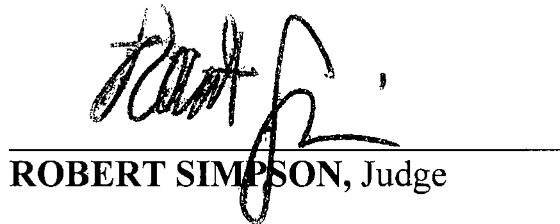
AND NOW, this 14th day of June, 2019, for the foregoing reasons, it is **ORDERED and DECREED** as follows:

The record from the June 10-11, 2019 hearing is **CLOSED**: and

The Court concludes that Petitioners cannot state a cause of action for modification of the Termination/Expiration Provision of the Consent Decrees, §IV (C)(8); accordingly, **JUDGMENT** is entered in favor of Respondent UPMC and against Petitioners only on the claim set forth in Count I, Paragraph 75(r) of the Petition to Modify Consent Decrees (extending the duration of the modified Consent Decrees indefinitely); and

As to the claim set forth in Count I, Paragraph 75(r) of the Petition to Modify, this Interlocutory Order is intended to be dispositive of that claim; accordingly, consistent with Scheduling Order II (filed March 13, 2019), this Order includes permission to appeal from this Court ("lower court") pursuant to Pa. R.A.P. 1311; further, pursuant to 42 Pa. C.S. 702(b), this Court is of the opinion that this Interlocutory Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the matter; and

The April 17, 2019 **STAY** of all other aspects of this litigation shall remain in full force and effect.



ROBERT SIMPSON, Judge

Certified from the Record

JUN 14 2019

And Order Exit