

IN THE SUPREME COURT OF PENNSYLVANIA

No. 46 MM 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.,

Petition of: Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General.

JOINDER TO PETITION FOR PERMISSION TO APPEAL, OR IN THE ALTERNATIVE, APPLICATION FOR EXTRAORDINARY RELIEF

On Appeal from the Order of the Commonwealth Court of Pennsylvania, Honorable Robert Simpson, Entered April 3, 2019, in No. 334 MDA 2014

Douglas E. Cameron
Pa. I.D. 41644
Kim M. Watterson
Pa. I.D. No. 63552
Daniel I. Booker
Pa. I.D. No. 10319
Jeffrey M. Weimer
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222-2716
Telephone: +1 412 288 3131
*Counsel for UPE, a/k/a Highmark
Health and Highmark Inc.*

INTRODUCTION

Highmark joins the Commonwealth’s Petition for Permission to Appeal, or in the Alternative, Application for Extraordinary Relief (the “Petition”)—specifically joining in the requests that this Court (1) agree to hear an immediate appeal of the interlocutory ruling certified by the Commonwealth Court, (2) expedite briefing and oral argument on that appeal, and (3) order that the Consent Decrees remain in place until this Court’s final rulings on this and any other appeals in this matter. In this joinder, Highmark (I) adds a few more words explaining why, as the Commonwealth Court (Judge Simpson) recognized, the Court’s April 3, 2019 order involves a “controlling question of law” on which there is a “substantial grounds for difference of opinion” and that resolution of this issue “will materially advance the termination of this matter,” and (II) provides additional reasons why the briefing schedule should be expedited and the Consent Decrees should be maintained pending the resolution of Count I of this litigation.

REASONS WHY THE REQUESTED RELIEF SHOULD BE GRANTED

I. THE COMMONWEALTH COURT’S RULING MEETS THE CRITERIA OF 42 PA. CONS. STAT. § 702(B)

An appellate court may hear an immediate appeal of an interlocutory order when the trial court’s ruling “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.” Pa. Cons.

Stat. § 702(b). Recognizing the significance of its ruling and its potential impact on the public, the Commonwealth Court *sua sponte* noted in its order that its ruling met all of Section 702(b)'s criteria and that an immediate appeal was warranted. As the Attorney General's Petition explains, this Court should reach the same conclusion and hear this appeal.

A. This Case Involves A Controlling Question Of Law

Section 702(b)'s first criterion—whether the ruling involves a controlling question of law—is easily met in this case. The Commonwealth Court's ruling on whether the Consent Decrees' termination date may be modified is based on its resolution of two questions of law.

First, in ruling on this issue, the Commonwealth Court construed the Consent Decrees—which are contracts—and contract interpretation is a legal question. The Commonwealth Court noted the settled legal principle that “[a] consent decree is a judicially sanctioned contract that is interpreted in accordance with the principles governing all contracts; thus, our primary objective is ascertaining the parties’ intent.” Thus, when the Commonwealth Court interpreted the Consent Decrees, it necessarily was engaged in contract interpretation—a purely legal inquiry that required no fact-finding.

Second, the Commonwealth Court's ruling was premised on its (incorrect) reading of this Court's decision in *Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018).

The Court reasoned that this Court previously “decided that the June 30, 2019 termination date is an unambiguous and material term of the Consent Decree.” Then—even though *Shapiro* did not involve a request to modify the Consent Decrees and this Court did not address whether there are any limitations on the modification provision’s scope—the Commonwealth Court concluded that the “inherent limitations on [the Commonwealth] Court’s power prevent relief inconsistent with the Supreme Court’s prior ruling in this case.” The Commonwealth Court’s interpretation of *Shapiro*—specifically, whether it precludes modification of the Consent Decrees’ termination date—too is a purely legal issue that does not involve fact-finding.

These questions of law also are controlling. This Court’s resolution of the issue the Commonwealth Court has certified for an immediate appeal plainly will impact the outcome of the Attorney General’s underlying petition—including, for instance, the scope of the relief the Commonwealth Court may order on the Attorney General’s request for modification of the Consent Decrees.

B. There Is Substantial Ground For Disagreement With The Commonwealth Court’s Decision

Section 702(b)’s second criterion also is met. To show that a substantial ground for difference of opinion exists, the petitioning party need not definitively establish that the lower court was wrong—that, instead, is left to the merits briefing. To secure immediate appeal of an interlocutory order, the petitioning party need

show only that there are ample reasons to see things differently than the lower court did. The Attorney General’s Petition sets forth those reasons—explaining why the Commonwealth Court committed legal error in interpreting the contracts (the Consent Decrees) and fundamentally misconstrued this Court’s decision in *Shapiro*. Indeed, the Commonwealth Court’s *sua sponte* recognition that its ruling meets this criterion is reason enough to conclude that there is a substantial ground for a difference of opinion.

C. An Immediate Appeal From The Order Will Materially Advance The Ultimate Termination Of The Matter

As the Attorney General explained and the Commonwealth Court recognized, an immediate appeal will materially advance the ultimate resolution of the litigation. The Commonwealth Court’s ruling that the Consent Decrees’ termination date may not be modified—notwithstanding the Consent Decrees’ express modification provision—is pivotal because the Consent Decrees are set to terminate on June 30, 2019 (*i.e.* in less than three months). As such, this appeal involves an issue that is central to the outcome of this litigation, and resolving that issue will meaningfully advance the termination of this case.

II. Maintenance of the Consent Decrees Pending The Ultimate Resolution Of This Litigation Is Urgently Needed To Protect The Public

As explained in the Attorney General’s Petition, and further detailed below, this case involves issues that affect the public in profound ways. As the Attorney

General’s underlying petition explains, UPMC’s conduct threatens adverse consequences for hundreds of thousands of Western Pennsylvanians. On top of that, UPMC’s failure to negotiate with the Attorney General regarding modifications to the Consent Decrees which protect the public necessitated this lawsuit and has caused further confusion and disruption in the healthcare marketplace—which is particularly acute given the Consent Decrees’ fast-approaching end-date.

Expedited briefing is therefore warranted (indeed, urgently needed) to avoid confusion and restore order to the healthcare market as quickly as possible. Indeed—likely for this same reason—this Court previously has agreed to expedite the disposition in other appeals arising from the Consent Decrees. *See Commonwealth v. UPMC, et al.*, No. 48 MAP 2015, Order dated June 17, 2015 (“UPMC’s request for an expedited briefing schedule is granted...”); *Commonwealth v. UPMC, et al.*, No. 4 MAP 2018, Order dated February 16, 2018 (granting Appellant’s Emergency Application for Expedited Briefing and Argument Schedule).

And more is required to protect the public (by minimizing the disruption in the delivery of healthcare services and avoiding confusion about coverage) and to ensure that this appeal, proceedings in the Commonwealth Court regarding Count I of the Attorney General’s underlying petition after the resolution of this appeal, and

any other subsequent appeals are not hollow exercises.¹ This Court should exercise its powers and order that the Consent Decrees must be kept in place until this litigation concerning Count I of the Attorney General's underlying petition is finally resolved.

The Attorney General's Petition describes, in stark terms, the significant impact the Consent Decrees' termination will have on countless Western Pennsylvanians. Highmark adds one further illustration—which, by no means, is the only one available. UPMC's own public statements indicate when the Consent Decrees terminate on June 30, 2019, UPMC will immediately begin to impose fees for emergency department services that are 100% of stated charges (*i.e.* full sticker price). If that happens, Highmark anticipates the annual increase in costs for individuals with Highmark insurance who receive UPMC emergency services will jump from approximately \$110 million in the aggregate to approximately \$535 million.² There can be no debate that this will impose an enormous burden on the community—both on individuals responsible for co-payments and deductibles and employers who subsidize a significant portion of their employees' healthcare costs.

¹ The Commonwealth Court entered an Order on March 13, 2019, severing Count I (seeking modification of the Consent Decrees) from the remaining Counts in the Attorney General's Petition to Modify.

² Highmark bases this estimate on 2018 emergency department usage and costs.

And this problem is particularly acute because individuals generally are not able to dictate where they will receive emergency care and because it is highly likely many will receive treatment at a UPMC emergency facility given the large number of UPMC facilities in Western Pennsylvania and, increasingly, other parts of the state. There are other examples, but this one is an immediate wrecking ball that UPMC's conduct will take to the provision of healthcare in Western Pennsylvania—and the costs associated with that healthcare—the minute the Consent Decrees expire.

The Attorney General has asked that the Consent Decrees be maintained “pending the ultimate resolution of this action in this Court” (Pet. 19)—and Highmark agrees. To be clear, the Consent Decrees should remain in place until the litigation on Count I of the Attorney General's underlying petition is *finally concluded*. The litigation already has created confusion in the marketplace. Allowing the Consent Decrees to terminate during the pendency of this litigation—and before a final judgment on the Attorney General's requested modification—risks chaos. It also would essentially render this litigation a hollow exercise.

More specifically, if the Consent Decrees' protections are allowed to lapse, public confusion will increase exponentially, as individuals will be faced with uncertainty regarding their healthcare options. As the Attorney General noted, UPMC already has instructed individuals that they are required to either change

doctors or prepay for services following the current expiration date of June 30, 2019. If the Consent Decrees' protections are not maintained during the pendency of this litigation, the public will suffer harm even if the Attorney General ultimately prevails.

CONCLUSION AND REQUESTED RELIEF

This Court should allow an immediate appeal from the Commonwealth's certified ruling (as stated in the Attorney General's Petition for Permission to Appeal), expedite briefing and oral argument (as outlined in the Attorney General's Petition), and order that the Consent Decrees remain in place until the resolution of this appeal, entry of final judgment on Count I of the Attorney General's underlying petition in the Commonwealth Court following remand after this Court's disposition of this appeal, and any further appeals in this Court from that final judgment.

Dated: April 10, 2019

Respectfully submitted,

REED SMITH LLP

By: /s/ Douglas E. Cameron

Douglas E. Cameron

Pa. I.D. No. 41644

dcameron@reedsmith.com

Kim M. Watterson

Pa. I.D. No. 63552

kwatterson@reedsmith.com

Daniel I. Booker

Pa. I.D. No. 10319

dbooker@reedsmith.com

Daniel I. Booker

Pa. I.D. No. 10319

dbooker@reedsmith.com

Jeffrey M. Weimer

Pa. I.D. No. 208409

jweimer@reedsmith.com

225 Fifth Avenue

Pittsburgh, PA 15222-2716

Telephone: +1 412 288 3131

Facsimile: +1 412 288 3063

*Counsel for UPE, a/k/a Highmark
Health and Highmark Inc.*

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.

Dated: April 10, 2019

/s/ Douglas E. Cameron
Douglas E. Cameron

CERTIFICATE OF COMPLIANCE WITH RULE 2135(D)

This Joinder complies with the length-of-brief limitation of Pa.R.A.P. 2135, because this Joinder contains 1695 words. This Certificate is based upon the word count of the word processing system used to prepare this Joinder.

Dated: April 10, 2019

/s/ Douglas E. Cameron
Douglas E. Cameron

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 10th day of April, 2019, a true and correct copy of the foregoing document was served upon the following counsel by electronic PACFile:

Joshua D. Shapiro
James A. Donahue, III
jdonahue@attorneygeneral.gov
Mark A. Pacella
mpacella@attorneygeneral.gov
Tracy W. Wertz
twertz@attorneygeneral.gov
Neil Mara
nmara@attorneygeneral.gov
Jonathan Scott Goldman
jgoldman@attorneygeneral.gov
Keli M. Neary
kneary@attorneygeneral.gov
Heather Jeanne Vance-Rittman
hvance_rittman@attorneygeneral.gov
Michael T. Foerster
mfoerster@attorneygeneral.gov
Joseph Stephen Betsko
jbetsko@attorneygeneral.gov
J. Bart DeLone

Pennsylvania Office of The Attorney General

14th Floor & 15th Floor, Strawberry Square
Harrisburg, PA 17120

Counsel for the Commonwealth of Pennsylvania, Office of Attorney General

Amy G. Daubert
adaubert@pa.gov

Pennsylvania Insurance Department

1341 Strawberry Square, 13th Floor
Harrisburg, PA 17120

Counsel for the Commonwealth of Pennsylvania

Kenneth L. Joel
kennjoel@pa.gov
Mary A. Giunta
mgiunta@pa.gov
Victoria S. Madden
vmadden@pa.gov

Pennsylvania Department of Health
PA Governor's Office, Office of General Counsel
333 Market Street, Floor 17
Harrisburg, PA 17101
Counsel for the Commonwealth of Pennsylvania

Yvette Kostelac
ykostelac@pa.gov
Chief Counsel
PA Department of Health

Amy J. Coles
BLANK ROME LLP
501 Grant Street, Suite 850
Pittsburgh, PA 15219
acoles@blankrome.com
*Counsel for non-parties Governor's Office, Pennsylvania Insurance Department,
and Pennsylvania Department of Health*

Amy J. Coles
BLANK ROME LLP
501 Grant Street, Suite 850
Pittsburgh, PA 15219
acoles@blankrome.com
Counsel for Pennsylvania Department of Aging

W. Thomas McGough, Jr.
mcgought@upmc.edu
UPMC
U.S. Steel Tower, Suite 6241
600 Grant Street
Pittsburgh, PA 15219
Counsel for UPMC

Stephen A. Cozen
scozen@cozen.com
Stephen A. Miller
samiller@cozen.com
Thomas Michael O'Rourke
tmorourke@cozen.com
Jared D. Bayer
jbayer@cozen.com
Andrew D. Linz
alinz@cozen.com
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
Counsel for UPMC

Paul M. Pohl
ppohl@jonesday.com
Leon F. DeJulius, Jr.
lfdejulius@jonesday.com
Rebekah B. Kcehowski
rbkcehowski@jonesday.com
Anderson T. Bailey
atbailey@jonesday.com
Kimberly A. Brown
kabrown@jonesday.com
Jones Day
500 Grant Street, Suite 4500
Pittsburgh, PA 15219

/s/ Douglas E. Cameron

Douglas E. Cameron