

IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

**COMMONWEALTH OF PENNSYLVANIA, by Josh Shapiro,
Attorney General; et al.,**
Petitioner,

v.

**UPMC, a nonprofit corp.; UPE, a/k/a HIGHMARK
HEALTH, a nonprofit corp.; and HIGHMARK,
INC., a nonprofit corp.,**
Respondents.

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

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

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DATE: April 8, 2019

The Commonwealth of Pennsylvania, by Josh Shapiro, Attorney General (the “Commonwealth”) respectfully files this Petition for Permission to Appeal, or in the Alternative, Application for Extraordinary Relief and, in support thereof, states as follows:

INTRODUCTION

This Petition concerns an emergent appeal on a discrete issue: Did this Court’s decision in *Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018) nullify the power of the Commonwealth Court to modify the duration of a negotiated consent decree that provided a broad modification provision allowing it to do so? If the outcome of this issue is not determined by June 30, 2019, then the health and welfare of millions of Pennsylvanians will be impacted, some of whom will be endangered.

Recognizing these time constraints and the importance of the issue presented, the Commonwealth Court *sua sponte* certified this issue for immediate appeal pursuant to 42 Pa. C.S. § 702(b) and Pa. R.A.P. 1311. The Commonwealth prays this Court will grant its Petition, order expedited briefing with argument the week of May 13, 2019, or in the alternative, order the maintenance of the Parties’ Consent Decrees, pending the ultimate resolution of this action in this Court.

In exchange for the Commonwealth granting them status as a charitable nonprofit, Pennsylvania’s nonprofit charitable healthcare systems must benefit the public by following their stated charitable purposes. According to its mission

statement, the University of Pittsburgh Medical Centers’ (“UPMC’s”) charitable purposes include developing a high quality, cost effective, and accessible health care system. UPMC may not pursue financial gain, commercial success, or market expansion to the exclusion of its charitable purposes.

The Commonwealth sought below to modify the terms of two 2014 Consent Decrees entered in the Commonwealth Court concerning a longstanding dispute between Highmark¹ and UPMC.² These Consent Decrees protect the public interest and enforce the Respondents’ charitable missions by requiring open and affordable access to their healthcare services through negotiated contracts.

The Consent Decrees contain a broad and unambiguous modification clause, a material term of that agreement, which states that “[i]f [any party] believes that modification of this Consent Decree would be in the public interest ... [and] [i]f the parties cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest” (the “Modification Clause”).

¹ “Highmark” actually comprises two separate entities – UPE a/k/a Highmark Health and Highmark, Inc. – to which we will refer collectively.

² Separate agreements were necessary because relations between UPMC and Highmark were so acrimonious.

Opinion at 27.³ There is no carve-out preventing the June 30, 2019 termination date of the Consent Decree from being modified.

The Commonwealth Court properly denied UPMC's Preliminary Objections below with respect to seventeen of the Commonwealth's eighteen requests for modification. But on the eighteenth request, that the termination date be extended, that Court held, as a matter of law, that it was unable to modify the termination date. It did so because of this Court's opinion in *Shapiro*, even though it also determined that *Shapiro* involved *enforcement* of the Consent Decree, not *modification*.

Respectfully, the Commonwealth believes that the Commonwealth Court erred as a matter of law because it gave undue protection to one term of the Consent Decree (its termination date) over another negotiated, material term (the modification clause) which distinctly allows modification of the entirety of the Consent Decree without restriction. The Commonwealth Court also erred because it applied blackletter contract law to its interpretation of the Consent Decree *incorrectly*. While broadly applicable to the interpretation of consent decrees, such common law is derived from general contract principles. But those contracts do not typically contain modification clauses at all, much less modification clauses –

³ A true and correct copy of the Commonwealth Court's April 3, 2019 Opinion and Order (cited as "Opinion") is attached as Appendix A.

like in this specific Consent Decree – that contain material terms addressing negotiating desired modifications by the parties, petitioning a court that expressly retains jurisdiction to decide such modification requests, and identifying the permissive standard by which the overseeing court shall judge such requests: whether “the requested modification is in the public interest.”

As a matter of law, the Commonwealth Court should have applied the modification provision to the Commonwealth’s request to modify the termination date of the Consent Decree as it did to the Commonwealth’s seventeen other requested modifications. Like it did on those seventeen requests, the Commonwealth Court should have *denied* UPMC’s motion to dismiss on preliminary objections. Opinion at 20-21. For these reasons, the Commonwealth prays that this Court will grant its Petition for Permission to Appeal and maintain the Consent Decrees pending resolution of this matter.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Permission to Appeal pursuant to Section 702(b) of the Judicial Code, 42 Pa. C.S. § 702(b) and Section 723 of the Judicial Code, 42 Pa. C.S. § 723. This Petition for Permission to Appeal is addressed to the Court's appellate jurisdiction, and is filed pursuant to Pa. R.A.P. 1311.

In the alternative, this Court has the discretion to exercise extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726. This Application is filed pursuant to Pa. R.A.P. 3309.

ORDER IN QUESTION

The text of the order from which the Commonwealth seeks to appeal, states in pertinent part:

AND NOW, this 3rd day of April, 2019, UPMC's Answer in the Nature of Motion to Dismiss or Preliminary Objections, to Commonwealth's Petition to Modify Consent Decree are **GRANTED/SUSTAINED in part and DENIED/OVERRULED in part** as to Count I. More particularly, the Motion/Preliminary Objections are granted/sustained only as to the prayer to extend modified Consent Decrees indefinitely; all other aspects of the Motion/Preliminary Objections to Count I are denied/overruled.

See Opinion at 44.

Recognizing the importance of the question at issue, the Commonwealth Court *sua sponte* certified this matter for appeal pursuant to 42 Pa. C.S. § 702(b) and 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.

See Opinion at 45.

STATEMENT OF THE CASE

This is a *parens patriae* action brought by the Commonwealth to modify identical Consent Decrees involving the two largest participants in the western Pennsylvania health care market—UPMC and Highmark—whose ongoing commercial dispute imminently impacts the welfare of millions of Pennsylvanians. The Commonwealth is a party to the Consent Decrees and seeks to modify UPMC’s Consent Decree pursuant to the plain terms of its Modification Provision. That provision states:

10. **Modification** – If the OAG, [the Insurance Department], [Department of Health] or UPMC believes that modification of this Consent Decree would be in the public interest, that party shall give notice to the other[s] and the parties shall attempt to agree on a modification. . . . If the parties cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.

Opinion at 27-28 (quoting Consent Decree, § IV(C)(10)) (emphasis by Commonwealth Court).

The parties to the Consent Decree agreed to a contractual term which permits modification by the Commonwealth Court and proscribes a procedure for seeking and obtaining it. That Modification Provision places no limitation on the type of modification that may be sought or granted. The modification need only be

“in the public interest.” Ergo, a party may seek to modify any provision of the Consent Decree, including, but not limited to its termination date.

The Commonwealth followed the procedure set forth in the Modification Provision. It attempted to secure an agreement with UPMC to modify the terms of the Consent Decree for the past two years, culminating in the Commonwealth providing both UPMC and Highmark a formal proposal to modify the existing Consent Decrees. Opinion at 7. Although Highmark agreed to these terms, provided UPMC would likewise be subject to them, UPMC refused to agree. *Id.*

In its Petition, the Commonwealth asserted, relevant to this appeal, that modification of the Consent Decree is necessary to foreclose UPMC from operating in violation of its stated charitable purposes as well as in violation of the Solicitation of Funds for Charitable Purposes Act, 10 P.S. §§ 162.1 *et seq.*, the Nonprofit Corporation Law of 1988, 15 Pa. C.S. §§ 5101 *et seq.*, and the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.*

The Commonwealth avers that UPMC does not ensure “everyone who comes through [its] doors has access to the very best, most advanced health care available.” Opinion at 14 (quoting Petition at ¶ 37). Rather, “only people who carry the right in-network insurance or are able to pay up front and in-full for non-emergency medical services obtain access to UPMC healthcare.” *Id.* Individuals with serious illnesses currently receiving medical treatment with UPMC will no

longer be able to receive treatment in-network once the Consent Decree terminates on June 30, 2019. *Id.* at 14-15 (citing Petition at ¶ 37).

The Commonwealth further alleges that UPMC “has made it clear that it has no intention of contracting with Highmark concerning any of Highmark’s Medicare Advantage plans after June 30, 2019” in conflict with prior representations it made to the public. Opinion at 12 (quoting allegations in petition). UPMC largely refuses to commit its newly acquired healthcare systems to contracting with all health insurers going forward unless they pay UPMC’s higher rates. Opinion at 12-13 (same). UPMC employs practices to increase its revenues, without apparent regard for the effect on the region’s healthcare, and tricked consumers, through its marketing, to unwittingly purchase coverage for UPMC’s community hospitals that does not include in-network access to UPMC’s premier hospitals, resulting in unexpected and costly out-of-network charges. Opinion at 12-14 (same).

Modification serves the public’s interest, as a lack of modification results in people being denied care or being forced to pay a much higher price for it. UPMC is a public charity whose harmful actions include closing its doors to out-of-network patients through prohibitive pricing and demands for upfront payment, and steering the public toward its insurance plan. UPMC has represented that it

intends to continue its conduct and keep enjoying its tax-exempt status as a nonprofit corporation subsidized by the very same people it chooses not to serve.

While the Commonwealth Court recognized the breath and scope of the Modification Provision, Opinion at 34 (“the Consent Decree sets forth no constraints on OAG’s ability to seek modification”), it nevertheless held that modification was constrained by this Court’s decision in *Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018), Opinion at 35. The Commonwealth Court came to this conclusion despite recognizing that *Shapiro* involved “*enforcement* of various aspects of the Consent Decree; . . . not [] *modification* as expressly permitted by Section IV(C)(10).” Opinion at 30 (emphasis in original).

In light of the import of its ruling and the time constraints its analysis places on the parties, as well as its impact on the healthcare of innumerable Pennsylvanians, the Commonwealth Court *sua sponte* included “permission to appeal pursuant to Pa. R.A.P. 1311” and the “statement prescribed by 42 Pa. C.S. §702(b).” Opinion at 42, 43-44 (Order).

This Petition for Permission to Appeal followed.

CONTROLLING QUESTION OF LAW

Did this Court's decision in *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018) nullify the power of the courts to modify the duration of a negotiated consent decree that expressly provided for that power?

REASONS TO GRANT THIS PETITION FOR PERMISSION TO APPEAL

This Court should accept the Commonwealth Court’s *sua sponte* certification for interlocutory appeal for three reasons. *First*, the Commonwealth Court acknowledged that its interlocutory order “involves a controlling question of law as to which there is substantial ground for difference of opinion” Opinion at 45. *Second*, the question presented goes to the ability of the Commonwealth to bring claims against UPMC arising out of its obligations pursuant to the Consent Decree. Therefore, interlocutory review will “materially advance the ultimate termination of the matter.” *Id.* *Third*, the outcome of this appeal is likely to have broad application on the healthcare of innumerable Pennsylvanians. Resolution of the question presented will define the scope of the protections afforded to those citizens.

I. The Difference of Opinion Here Arises Out of the Commonwealth Court’s Misreading of *Shapiro*. That Decision Does Not Prevent the Commonwealth Court from Implementing the Modification Provision in the Public’s Interest.

The Commonwealth Court misinterprets this Court’s decision in *Shapiro* as prohibiting it from modifying the termination date of the Consent Decree despite its plain authority to do so under the Modification Clause. *Shapiro* stands for no such holding.

The Commonwealth Court recognized that *Shapiro*'s ruling involved “*enforcement* of various aspects of the Consent Decree . . . [not] *modification* as expressly permitted by [the Modification Provision].” Opinion at 30 (emphasis in original). Nevertheless, the Commonwealth Court relied upon a general statement of contract law to hold that, because the termination date of the Consent Decree was unambiguous and material, the Court lacked the power to modify it. Opinion at 34-35. Respectfully, this is incorrect.

The Modification Clause is also an unambiguous, material term of the Consent Decree. The Commonwealth Court erred in granting undue protection to one term (the termination date) over another negotiated, material term (the Modification Clause), which distinctly allows modification of the entirety of the Consent Decree without restriction. *See* Opinion at 34 (“[T]he Consent Decree sets forth no other constraints on OAG’s ability to seek modification . . .”).

In *Shapiro*, this Court determined that the June end date was an unambiguous term of the Consent Decree. 188 A.3d at 1124. This Court did not, however, determine that the duration of the Consent Decree was beyond extension through the Modification Clause. Indeed, this Court specifically recognized that “[t]he Commonwealth Court, by the terms of the Consent Decree, retains jurisdiction for *any necessary and appropriate* interpretation, *modification*, or enforcement.” *Id.* at 1125 fn.7 (emphasis added).

Contracts do not typically contain modification clauses at all, much less modification clauses—as here—that contain material terms addressing: (1) negotiating desired modifications by the parties; (2) petitioning a court that expressly retains jurisdiction to decide such modification requests; and (3) identifying the permissive standard by which the overseeing court shall judge such requests: whether “the requested modification is in the public interest.” Consent Decree § IV(C)(10).

The Commonwealth Court should have applied the Modification Clause to the Commonwealth’s request to modify the termination date of the Consent Decree as it did to the Commonwealth’s seventeen other requested modifications and, like it did as to those seventeen requests, *denied* UPMC’s motion to dismiss on preliminary objections. Opinion at 20-21.

II. An Immediate Appeal will Materially Advance the Ultimate Termination of this Matter.

The Commonwealth Court, *sua sponte*, explicitly determined that “an immediate appeal may materially advance the ultimate termination of this matter.” Opinion at 45. If the Commonwealth Court’s analysis stands, the Consent Decrees terminate on June 30, 2019. Individuals with serious illnesses currently receiving medical treatment with UPMC will no longer be able to receive treatment in-network once the Consent Decrees terminate. Thus, the protections of the Consent Decrees will be irretrievably lost.

III. The Outcome of this Appeal will have Broad Application to the Healthcare of Pennsylvanians.

UPMC's refusal to contract with Highmark has the practical effect of denying cost-effective In-Network access to a substantial segment of the very public that is subsidizing and helping to sustain UPMC's charitable mission. Highmark has more than 100,000 Medicare Advantage participants in Pennsylvania. Petition at 18-19. Additionally, UPMC has largely refused to commit its newly acquired health care systems to contracting with all health insurers going forward, saying only that it will agree to contract if health plans are willing to pay UPMC's self-defined, often higher, market rates. *Id.* at 19.

These actions have real world consequences for our most vulnerable citizens:

- A UPMC cancer patient with a rare and aggressive form of Uterine Carcinosarcoma has been advised that there is an 85% chance of her disease recurring within two years of her recently completed initial treatments, but nevertheless, was advised in July 2018 that she will no longer be able to see her UPMC oncologists In-Network after June 30, 2019 unless she switches from her husband's employer provided Highmark health insurance to a non-Highmark In-Network insurance plan or prepays for the services she needs. Petition at 22.

- Similarly, a UPMC kidney transplant patient with a history of complications from the removal of her ovaries and fallopian tubes is under the care of three UPMC specialists, but will no longer be able to see her UPMC transplant, gynecological and pain specialists after June 30, 2019 unless she changes to a non-Highmark In-Network insurance plan with UPMC or prepays for the medical services she needs. *Id.*

These are merely representative samples of the broad negative impact of an abrupt ending to this action. The Commonwealth Court's ruling presupposes, as it must at the preliminary objection stage, that the public interest weighs in favor of modifying the duration of the Consent Decrees. That court's misinterpretation of *Shapiro* and misapplication of law require immediate correction.

IV. Proposed Briefing and Argument Schedule

As detailed above, this appeal raises critical issues concerning the healthcare of millions of Pennsylvania citizens. The Commonwealth believes the Commonwealth Court's determination is legally in error. If that error is not corrected, the Consent Decree will terminate on June 30, 2019 – before the Commonwealth's claims can be adjudicated.

Accordingly, the Commonwealth respectfully requests that this Court grant expedited briefing and argument pursuant to the following proposed schedule:

- **April 22, 2019**, for Commonwealth's opening brief and reproduced record;

- **May 6, 2019**, for any response briefs;
- **May 10, 2019**, for Commonwealth’s reply brief; and
- Argument during the Court’s **May 2019** sitting.

This expedited schedule is necessary to ensure that the question presented is addressed before the Consent Decree otherwise terminates on June 30, 2019. This Court previously granted expedited briefing in *Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018).

**IN THE ALTERNATIVE, THE COMMONWEALTH APPLIES
FOR EXTRAORDINARY RELIEF.**

The Commonwealth, in the alternative, applies for extraordinary relief in this matter, pursuant to Pa. R.A.P. 3309 and 42 Pa. C.S. § 726.

**REASONS TO GRANT THE APPLICATION
FOR EXTRAORDINARY RELIEF.**

This Court may assume, at its discretion, jurisdiction over any matter of immediate public importance that is pending before another court of this Commonwealth. In exercising that discretion, this Court considers the immediacy and the public importance of the issues raised. *Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010).

As to *public importance*, this Court’s intervention is necessary as this action raises critical issues concerning the healthcare of millions of Pennsylvania citizens. As to *immediacy*, the Commonwealth Court’s analysis is in error and, pursuant to that analysis, the Consent Decrees terminate on June 30, 2019. Without Court

intervention, as of June 30, individuals with serious illnesses currently receiving medical treatment with UPMC will no longer be able to receive treatment in-network and many unable to pay UPMC's full charges "up-front and in-full" will be completely denied access to their UPMC physicians and other providers.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Permission to Appeal, or, in the alternative, grant the Application for Extraordinary Relief and order the maintenance of the Consent Decrees, pending the ultimate resolution of this action in this Court.

Respectfully submitted,

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Date: April 8, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition contains 3,590 words. In making this certificate, I have relied on the word count of the word-processing system used to prepare the Petition.

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, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing PETITION FOR PERMISSION TO APPEAL, OR IN THE ALTERNATIVE, APPLICATION FOR EXTRAORDINARY RELIEF by electronic service via PACFile and via electronic mail.

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

Date: April 8, 2019