

# **[Case Watch] Commonwealth of Pennsylvania v. UPMC and Highmark: State AG Prevails with 10-Year Consent Decree After Long Bitter Court Battle**

Pennsylvania's efforts to restore competition to the provider and insurance markets in the long-standing battle between University of Pittsburgh Medical Center (UPMC) and Highmark Health overcame mounting challenges and finally concluded with an unprecedented 10-year consent decree. The Source closely tracked the case as it unfolded over the past several months. In this post, we take a look back at the case's long and winding road, which included three stops at the Pennsylvania Supreme Court, leading up to the new truce.

## **It's Déjà Vu All Over Again**

It all began in 2011, when health insurer Highmark Health entered the hospital market with its acquisition of Pittsburgh-area West Penn Allegheny Health System (now Allegheny Health Network). The merger put Highmark directly in competition with UPMC, which is also a provider that operates a health plan in the western Pennsylvania region. The two integrated health systems raced to establish their own exclusive plan-provider networks over the next few years. The spat continued to escalate and eventually drove both integrated systems to exclude one another's facilities from each other's networks. In 2014, the attorney general stepped in to intervene, and the parties reached a five-year consent decree to ensure coverage and affordable, in-network access for patients.[\[1\]](#)

Despite the consent decree, the health systems continued to battle for the next five years, violating parts of consent decree, culminating in the AG's interference once

again five years later. Facing imminent expiration of the original decree on June 30, 2019 as well as increased anticompetitive and network restrictive behavior, Attorney General Josh Shapiro proposed a modified decree to the parties, which would extend the original agreement and allow the parties to offer tiered health plans with preferred providers at lower cost. While Highmark agreed, UPMC rejected the proposal, prompting the AG to file a [court petition](#).<sup>[2]</sup>

The AG petition, filed on February 7, 2019, [alleges](#) that despite the consent decree, UPMC failed to limit amounts charged to Highmark subscribers, denied treatment to out-of-network patients, and refused to contract with Highmark and other health plans. Furthermore, the lawsuit alleges that UPMC's anticompetitive behavior has extended beyond the western Pennsylvania market to the eastern part of the state, where the health plan withheld access to its doctors for patients insured by competing health plans. Instead of basing his cause of action on antitrust grounds, which is generally more challenging to litigate, it is worth noting that the AG strategically used his authority to regulate nonprofit charities in the state to bring the action. He alleges that as a nonprofit charity, UPMC's anticompetitive behavior violated its charitable obligations to act in the public interest by charging patients insured by competitors high out-of-network rates for access to UPMC's hospitals and physicians. The petition requires UPMC to open its provider network and fairly negotiate with Highmark Health and other health plans.

## **Showdown at the Courts Reaches an Impasse**

While the nonprofit charity violation was deemed an easier road to take legally, the ensuing months in court proved anything but. Neither the AG's office nor UPMC gained the upper hand as they battled through a string of courts, from the Commonwealth Court, to the federal district court, and all the way to the Supreme Court of Pennsylvania.

### *UPMC's Motion to Dismiss Denied; Countersuit in Federal Court Tossed*

UPMC filed a [motion to dismiss](#) the state's lawsuit, arguing that the AG does not have the authority to seek modification to extend the original consent decree, as the

expiration date is “an unambiguous and material term of the consent decree” that could not be altered, and that Shapiro also failed to show how the proposed modifications would be in the public interest.

Additionally, UPMC brought a countersuit in federal court,[\[3\]](#) alleging that by imposing “mandatory contracting requirements” and forcing “ratemaking arbitrations” with Highmark Health and other willing insurers, the AG unlawfully meddled in federal healthcare programs, in violation of four federal laws. Specifically, UPMC argues in its [complaint](#) that 1) laws governing Medicare Advantage (MA) programs “explicitly favor competition [and] preserve healthcare entities’ freedom of contract;” 2) the Affordable Care Act (ACA) “precludes states from regulating nonprofits... differently from... for-profit insurers;” 3) the Sherman Act “prohibits regulatory schemes that delegate unsupervised ratemaking;” and 4) the Employee Retirement Income Security Act (ERISA) “supersedes state health care initiatives that substantially impact employer-sponsored health plans.” Additionally, UPMC puts forth arguments of administrative burden, alleging that “insurers who can force a provider into a contract can market to consumers that the provider is ‘in-network,’ but then tier and steer through the benefit design in ways that are confusing and impenetrable to consumers so that there will be significant economic burdens in selecting that provider.”[\[4\]](#)

Further complicating the dispute and broadening the stakes, the Hospital and Healthsystem Association of Pennsylvania (HAP) [filed a motion](#) to join UPMC’s countersuit in federal court. Given the state action proposes contracting requirements against UPMC based on the claim that UPMC violated its charitable obligations as a nonprofit charity, [HAP believes](#) the enforcement action could “potentially force all not-for-profit hospitals to do business with any insurer regardless of that insurer’s offered payment terms, procedures for assuring high-quality care, or the strength of its provider network.”[\[5\]](#)

In a win for the AG, the Commonwealth Court denied UPMC’s motion to dismiss, while the federal court tossed the countersuit along with HAP’s motion to join. In dismissing UPMC’s action, District Court Judge John Jones [held](#) that UPMC’s claim was not “ripe,” as it was too soon to tell how a modified agreement might be enforced. He reasoned that “even taking all of UPMC’s allegations as true that

General Shapiro's stated intentions may present a threat of harm—as is our duty at this juncture—UPMC has failed entirely to demonstrate that said threat is 'real' rather than 'uncertain' or 'contingent.'"[6]

### *AG's Request to Extend Agreement Denied After Revisit by Supreme Court*

While the courts ruled against UPMC, they also did not rule favorably for the AG's motion to extend the in-network access agreement. The Commonwealth Court held that the original 2014 consent decree will come to an end as agreed, on June 30. In denying the extension, Judge Simpson referred to the Supreme Court of Pennsylvania's ruling in two previous cases involving interpretation of the 2014 consent decree.[7] In particular, in Shapiro v. UPMC, the 2018 dispute between Highmark and UPMC over when Highmark's Medicare Advantage insurance members would lose access to UPMC doctors and hospitals, the state's highest court held that the June 30, 2019 termination date "is an unambiguous and material term" of the consent decree agreements.[8] As a result, Judge Simpson [opined](#) that "because the OAG does not plead fraud, accident or mistake, this Court lacks the power or authority to modify the termination date of the Consent Decree without the consent of the parties, even if it were in the public interest to do so." [9]

The AG then [appealed](#) the decision to the Supreme Court of Pennsylvania, arguing that Shapiro I only concerned the enforcement of the consent decree, whereas the current case seeks to alter the terms of the agreement through the modification provision, which was not at issue in the previous case. Shapiro further argued the public interest and the court's power to protect the original consent decree should allow the courts to change and extend the deal. In a split [4-3 opinion](#) this May, the high court declined to extend the termination date as Shapiro requested despite the looming deadline.[10] However, the majority reversed the lower court's decision that the termination date could not be modified, agreeing with the AG that Shapiro I should be distinguished as it petitioned to "*enforce* the Consent Decrees, not to *modify* them".[11] Citing Kane v. UPMC, the 2015 Supreme Court decision the lower court relied on, the majority found that "the Modification Provision is 'subject to more than one reasonable interpretation,'" [12] and remanded the case for an evidentiary hearing to re-examine the original decree's "ambiguous" modification provision, and for the lower court to make final decision on the extension request.

On June 14, following a hearing to determine the meaning of the modification clause with evidence of the parties' intent, the Commonwealth Court again denied the extension of the original decree, ruling that it will expire as scheduled on June 30, 2019. Judge Simpson [wrote](#) that "the modification provision was not intended to nullify the short, specific, unambiguous termination/expiration provision," as that element was "a core principle of the agreement [...that] was expressly negotiated[...]"[\[13\]](#)

### **AG Fought 'Til the End for New 10-year Consent Decree**

Just when all seems lost on the litigation front with the contractual relationships set to come undone, the parties [announced](#) that they reached a new agreement on June 24, just one week before the original decree was set to expire. Under the new decree, UPMC would extend network coverage for UPMC facilities to Highmark members for the next decade. Shapiro's office [said](#) the global deal will give Highmark health plan members access to all UPMC hospitals and is the longest deal UPMC has ever signed with an insurer. The new agreement is effective July 1, 2019, the day after the expiration of the original decree, to ensure that Pennsylvanians would not experience any disruption in their care.

As healthcare markets continue to consolidate with negative impact on competition and prices, policy experts [suggest](#) that state regulators and lawmakers should explore new policy levers to mitigate the effects on patients. As seen in this case, the Pennsylvania AG turned to creative enforcement ideas, namely invoking charitable entity laws, to counter anticompetitive market behavior in the state. Despite setbacks in court, the state is commendable for continuing to pursue a solution and is ultimately proven victorious, to the benefit of all Pennsylvania patients.

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[\[1\]](#) See [Litigation and Enforcement Highlights - February 2019](#), The Source Blog, February 15, 2019.

[2] *Pennsylvania v. UPMC*, Pa. Commw. Ct., No. 334 M.D. 2014, filed 2/7/19.

[3] *UPMC Pinnacle v. Shapiro*, M.D. Pa., No. 19-cv-298, filed 2/21/19.

[4] See [Litigation and Enforcement Highlights - March 2019](#), The Source Blog, March 15, 2019.

[5] See [States Are Taking the Helm on Antitrust Enforcement Efforts in Healthcare](#), The Source Blog, April 15, 2019.

[6] *Opinion* at 29.

[7] See *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018); *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441 (Pa. 2015).

[8] *Opinion* at 34.

[9] *Opinion* at 35.

[10] *Commonwealth v. UPMC*, 208 A.3d 898 (Pa. 2019)

[11] *Id.* at 909 (emphasis in original).

[12] *Id.* at 912.

[13] *Opinion* at 13.