

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
By Kathleen G. Kane, Attorney	:	
General; Pennsylvania Department	:	
of Insurance, By Michael Consedine,	:	
Insurance Commissioner and	:	
Pennsylvania Department of Health,	:	
By Michael Wolf, Secretary of Health,	:	
Petitioners	:	
	:	
v.	:	
	:	
UPMC, A Nonprofit Corp.;	:	
UPE, a/k/a Highmark Health,	:	
A Nonprofit Corp. and Highmark, Inc.,	:	
A Nonprofit Corp.,	:	No. 334 M.D. 2014
Respondents	:	Heard: October 22, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI

Filed: October 30, 2014

The Commonwealth of Pennsylvania, acting through its Attorney General, Kathleen G. Kane, its Insurance Commissioner, Michael F. Consedine, and its Secretary of Health, Michael Wolf (collectively, the Commonwealth) filed an application to hold UPE, also known as Highmark Health, and Highmark, Inc.,

both nonprofit corporations (collectively, Highmark),<sup>1</sup> in contempt of a consent decree previously entered by this Court and to issue a preliminary injunction ordering Highmark's compliance with the decree. For the reasons that follow, we deny the Commonwealth's application.

## I.

The following facts are undisputed. By order dated July 1, 2014, this Court approved and entered two separate but parallel consent decrees between the Commonwealth and Highmark and between the Commonwealth and UPMC, another nonprofit corporation. The two consent decrees contain mirror terms because apparently, due to the acrimony between the two parties, they would not negotiate with each other or, for that matter, sit in the same room together. The purpose of the consent decrees was to alleviate some of the harm UPMC and Highmark's ongoing acrimonious "dispute" involving the delivery and payment of healthcare caused the citizens of Western Pennsylvania.

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<sup>1</sup>Highmark Health serves as the sole controlling member and parent of Highmark, Inc. and is a party to the Highmark consent decree. While we recognize that Highmark, Inc. and Keystone Health Plan West, Inc., which design, sell, and market the product at issue, are distinct from Highmark Health, for purposes of adjudicating the current application, we will refer to them collectively.

The Highmark consent decree provides, in pertinent part:

## **I. INTERPRETATIVE PRINCIPLES**

A. The Consent Decree shall be construed in a manner that is consistent with the Insurance Department's April 29, 2013 Approving Determination and Order of the Highmark/West Penn Allegheny Health System Affiliation ("UPE Order") and the 2012 Mediated Agreement entered into by the UPMC and Highmark and to protect consumers and the charitable mission of the Parties. The outcome of the actions embodied in the Consent Decree shall be incorporated in the Transition Plan to be filed by Highmark by July 31, 2014 as provided under Condition 22 of the UPE Order. The Consent Decree is not a contract extension and shall not be characterized as such.

\* \* \*

## **IV. TERMS**

Highmark, Inc. and UPE (collectively Highmark) shall comply with the following terms:

### **A. Access**

1. **ER Services** – Highmark shall negotiate in good faith to reach an In-Network<sup>2</sup>

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<sup>2</sup> "In-Network" is defined as:

where a Health Care Provider has contracted with a Health Plan to provide specified services for reimbursement at a negotiated rate to treat the Health Plan's members. The member shall be charged no more than the co-pay, co-insurance or deductible charged by his or her Health Plan, the member shall not be refused treatment for the specified services in the contract based on his or her Health Plan and the negotiated rate paid under the

**(Footnote continued on next page...)**

agreement with UPMC on rates and patient transfer protocols for Emergency and Trauma Services for Hospital, physician and appropriate continuity of care services at all UPMC and Allegheny Health Network hospitals by July 15, 2014 or be subject to the Dispute Resolution Process set forth in paragraph C (1) below. This does not mean that Hospitals or physicians rendering emergency or trauma services to a patient are In-Network for purposes or services other than treating the emergency condition for which a patient is admitted or the treating physicians are otherwise In-Network under other terms of this Consent Decree including, but not limited to, the Continuity of Care, Unique/Exception Hospitals or Oncology. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. Highmark shall not Balance Bill consumers until the ER Services agreement is resolved.

2. **Vulnerable Populations** – Highmark and UPMC mutually agree that vulnerable populations include: (i) consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage, (ii) Medigap health plans, (iii) Medicaid and (iv) CHIP. With respect to Highmark covered vulnerable populations, UPMC shall continue to contract with Highmark at In-Network rates for all of its Hospital, physician and appropriate continuity

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**(continued...)**

contract by the Health Plan and the member shall be payment in full for the specified services.

(Highmark Consent Decree § II(J)).

of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as In-Network regardless of whether they have Medicare as their primary or secondary insurance. Highmark acknowledges that UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.

\* \* \*

4. **Oncology**– Highmark subscribers may access, as if In-Network, UPMC services, providers facilities and physicians involved in the treatment of cancer, if a patient’s treating physician determines that a patient who is diagnosed with cancer should be treated by a UPMC oncologist and the patient agrees to be so treated. In addition, UPMC and Highmark shall negotiate an agreement for treatment of illnesses which result from cancer treatment. These resulting illnesses may include, but not be limited to, mental health, endocrinology, orthopedics and cardiology. The need for a treatment of a resulting illness shall be determined, in the first instance, by the patient’s treating physician acting in consultation with and in accordance with the wishes of the patient or the patient’s representative. Moreover, all UPMC joint ventures, physician services provided at or on behalf of independent hospitals whether related to oncology or not shall be In-Network. If UPMC and Highmark do not reach an agreement on rates for cancer treatment and

resulting illnesses by July 15, 2014, the parties will be subject to the Dispute Resolution Process set forth in paragraph C (1) below. UPMC shall not Balance Bill consumers until this agreement is resolved. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order.

5. **Unique/Exception Hospitals/Physicians** – Highmark shall negotiate in good faith to reach an agreement with UPMC for Hospital, physician and follow-up care services at Western Psychiatric Institute and Clinic, UPMC Bedford, UPMC Venango (Northwest), UPMC/Hamot and UPMC/Altoona, UPMC Horizon and any facility, any physician, facility or other provider services located outside the Greater Pittsburgh Area currently owned or acquired in the future by UPMC, or with whom UPMC has an agreement to handle provider contracting such as, but not limited to, the Kane Hospital, or any other physician or facility outside the Greater Pittsburgh Area determined by DOH to be essential to meet local community needs, by July 15, 2014 or be subject to the Dispute Resolution Process set forth in paragraph C (1) below. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. The Greater Pittsburgh Area shall mean the Counties of Allegheny, Beaver, Butler, Washington and Westmoreland. The Children’s Final Order will continue in effect.

6. **Out-of-Network Services** – For all other Highmark subscribers whose care is not otherwise governed by other provisions in this Consent Decree, beginning January 1, 2015, UPMC will provide services to all such subscribers on an Out-of-Network basis.

UPMC's reimbursement rates for Out-of-Network services for Highmark subscribers shall be no more than 60% of charges if paid promptly and provided that UPMC informs consumers of such charge before rendering services.

\* \* \*

11. **Advertising** – Highmark shall not engage in any public advertising that is unclear or misleading in fact or by implication to consumers.

(Highmark Consent Decree §§ I, IV(A)(1)–(2), (4)–(6), (11)) (footnoted added). The UPMC consent decree contains identical language, but Section IV in its agreement states that “UPMC shall comply with the following terms: ...” (UPMC Consent Decree § IV).

Prior to execution of the consent decrees, in February 2014, Highmark invited UPMC to become a participating provider in Highmark's Community Blue Medicare HMO (Community Blue Program), a low-cost, limited-network Medicare Advantage program, but UPMC declined.<sup>3</sup> Prior to September 26, 2014, Highmark began marketing the Community Blue Program, which does not provide Medicare-eligible seniors with in-network access to UPMC physicians, facilities, and services. Subsequently, UPMC advised Highmark of its position that the product violates the consent decrees which “clearly require all UPMC hospitals

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<sup>3</sup>Highmark also offers two other Medicare Advantage products, Security Blue and Freedom Blue, both of which provide in-network access to UPMC services at higher monthly premiums.

and physicians to be in network for the ‘vulnerable populations’ served by Highmark, including Medicare Advantage subscribers.” (Commonwealth’s Appl., Ex. A, at 1.)

After receiving UPMC’s letter, the Commonwealth requested from Highmark an explanation as to how its Community Blue Program is consistent with the consent decree. In response, Highmark explained that its program complied with the consent decree for the following reasons:

- 1) This new product is reflective of the Consumer Choice Initiatives prescribed in the Approving Order and Determination, dated April 29, 2013, issued by the Pennsylvania Insurance Commissioner (PID Order). The Consent Order provides that it is to be interpreted consistently with that Order;
- 2) The Consent Decree does not prohibit the offering of such a product and Highmark Medicare Advantage members may still have full access to UPMC; and
- 3) Highmark’s intention to offer this product was communicated to UPMC prior to and to the Commonwealth during the negotiations on the Consent Decree and the Transition Plan.

(Commonwealth’s Appl., Ex. C, at 1.) The 2015 open-enrollment period for Medicare Advantage products, which includes enrollment in the Community Blue Program, runs from October 15, 2014 through December 7, 2014.



On October 10, 2014, the Commonwealth filed an Application to Hold Highmark in Contempt,<sup>4</sup> contending that Highmark's Community Blue Program violates: (1) Section IV(A)(2) regarding in-network access to UPMC for vulnerable populations; (2) Sections IV(A)(1), (4), and (5) regarding emergency-room services, oncology services, and exception hospitals; and (3) Section IV(A)(11) regarding unclear and misleading advertising. As such, the Commonwealth seeks an order: directing Highmark to expand its provider network for all Medicare Advantage Plans offered in Western Pennsylvania to include UPMC physicians, facilities, and services for the duration of the consent decree; prohibiting Highmark from restricting its Community Blue Program members from using UPMC; prohibiting Highmark from promoting any limited-network Medicare Advantage product which excludes UPMC physicians, facilities, and services; and ordering Highmark to reimburse any Community Blue Program member who is charged by UPMC on an out-of-network basis after January 1, 2015, through the duration of the consent decree.

## II.

In support of its contention that Highmark's advertising regarding its Community Blue Program is misleading and unclear, the Commonwealth submitted various promotional materials, including an advertisement that Highmark published in *The Erie Times*, which states

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<sup>4</sup>Section IV(C)(4)(a) of Highmark's consent decree authorizes the Commonwealth to seek enforcement of the consent decree in this Court after it has provided Highmark twenty days' notice to cure an alleged violation. Further, Section IV(C)(11) provides that this Court retains jurisdiction over the consent decree "to enable any party to apply to this Court for such further orders and directions as may be necessary and appropriate for the interpretation, modification and enforcement of this Consent Decree." (Highmark Consent Decree § IV(C)(11)).

**Access to the care you asked for. Delivered.**

Highmark has always put the health of our members first. That's why we've agreed to a road map that ensures Highmark members will have access to all the care they need.

**UPMC Hamot:** Highmark members will have in-network access at UPMC Hamot and its affiliate Kane Community Hospital, as well as UPMC Horizon.

**Cancer Coverage:** Highmark members will have in-network access to all UPMC services for oncology care, including the Hillman Cancer Center.

\* \* \*

**Physicians:** In-network access to all UPMC physicians practicing at any UPMC exception hospitals, any UPMC physicians located outside the five-county Greater Pittsburgh area, and all UPMC oncology, pediatricians and behavioral health providers.

(Commonwealth's Appl., Ex. F.)

The Commonwealth also submitted Highmark's "Personal Plan Overview," in which Highmark describes the Community Blue Program as including "a high value network of select providers" and notes in its hospital-provider list that the Community Blue Program does not include access to UPMC facilities. (Commonwealth's Appl., Ex. G, at 12, 14.)

In addition, the Commonwealth provided the declarations of Maryann E. Walsh and Elizabeth Blosser. Ms. Walsh serves as a senior investigator in the

Antitrust Section of the Pennsylvania Attorney General's Office and stated that when she employed the "Compare & Shop" function on Highmark's website to compare its Community Blue Program to its other Medicare Advantage Programs offered throughout Western Pennsylvania, only summary information concerning basic plan costs, medical services, facility services, prescription-drug coverage, and additional benefits was displayed, but that a complete set of plan documents was accessible under Highmark's "Important Plan Documents" link. (Commonwealth's Appl., Decl. of Maryann E. Walsh ¶ 6.) Ms. Walsh also located the Community Blue Program on Medicare's website and compared it with other Medicare Advantage Plans available, but those comparisons did not reveal the size of the networks or lists of participating hospitals and physicians. However, Ms. Walsh was able to find a list of facilities by zip code under the "Find a Provider" link on Medicare's website. (*Id.* ¶ 17.)

Ms. Blosser, the Director of the Issue Management Division of FLS Connect, a national marketing firm, stated that at the direction of UPMC's public-relations firm, which is one of FLS's clients, FLS conducted an automated telephone survey between October 10–17, 2014, to gauge whether Medicare-eligible seniors in counties where the Community Blue Program is offered understood that the program does not include in-network access to UPMC doctors and facilities. Based on the survey, approximately seventeen percent (or 1,211) of the respondents mistakenly believed that UPMC doctors and hospitals are included in the product while thirteen percent (or 905) correctly understand that those facilities are excluded. Just over seventy percent (or 5,069) responded that they

were “unsure.” The survey did not inquire as to the source of respondents’ knowledge regarding the program.<sup>5</sup>

Darlene Sampson testified that she is a Director of the Attorney General’s Community Outreach Program, which provides counseling services to Medicare beneficiaries to help them understand coverages. She stated that on October 15, 2014, the date on which open enrollment began, she received a call from the Regional Coordinator in Western Pennsylvania who was concerned about the volume of inquiries regarding the access Highmark members would have to UPMC facilities. Ms. Sampson testified that although information regarding this issue was drafted for dissemination to beneficiaries, it has not yet been released because it is still undergoing internal review. On cross-examination, Ms. Sampson conceded that she did not know the source of the inquirers’ confusion.

Adele Dean, the Regional Apprise Coordinator for Pennsylvania’s Southwest Area Agency on Aging, testified telephonically that she provides free counseling services to Medicare beneficiaries and more specifically, advises them regarding what types of coverages are available, the associated costs, and the accessible providers. She further stated that on the opening day of enrollment, she received excess calls in the western region regarding the UPMC/Highmark dispute and questions about the plans being offered.

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<sup>5</sup>Dean Walters, UPMC’s Chief Marketing Officer, also provided live testimony that this survey demonstrated that approximately eighty-seven percent of those polled were confused about the coverage provided under the product.

In support of the claim that Highmark engaged in misleading advertising, two clips were presented from public speaking engagements with Highmark's Chief Executive Officer (CEO) and President, David Holmberg. During an interview with *The Sunday Business Page*, CEO Holmberg was asked, "So, all seniors are taken care of? They can go to UPMC facilities with in-network costs?" He responded, "That's correct." (Commonwealth Elec. Ex. 17.) Further, in a press conference regarding Highmark and UPMC's agreement, CEO Holmberg stated that the consent decree "provides access to everybody in Western Pennsylvania to the Allegheny Health Network, to the UPMC facilities. It provides access to community assets...and it gives people choice and sets up a competitive environment potentially where we can all work together to create innovation with healthcare and to make a real difference." (Commonwealth Elec. Ex. 18, excerpt 1.)

In a post-hearing submission, UPMC also provided informational bulletins which are posted on Highmark's Provider Resource Center, a website accessible only to healthcare providers registered with Highmark. The printouts generally advise that the Highmark consent decree "provides in-network access to many UPMC facilities and physicians" and ensures that "Seniors 65+ will continue to have in-network access to all UPMC hospitals and physicians." (Letter from Stephen A. Cozen, Cozen O'Connor, to the Honorable Dan Pellegrini, President Judge, Re: "*Commonwealth of Pennsylvania, et al. v. UPMC and Highmark, Inc. et al.*, No. 334 M.D. 2014" (Oct. 23, 2014), at 4.) However, each time the documents discuss vulnerable populations/seniors, which facilities or physicians are in-network, oncology services, or access to emergency care, the following

disclaimer is stated: “Highmark’s Community Blue Medicare Advantage HMO is a \$0 premium product that does not include UPMC hospitals or physicians. This product, which will debut Jan. 1, 2015, has been approved by the Centers for Medicare and Medicaid Services.” (*Id.* at 4–6, 9, 11–13, 16–17.)

In opposition to the Commonwealth’s application, Highmark presented the declaration of Timothy Lightner, the Vice President of Highmark’s Product and Marketing Department, who stated that the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), which is charged with regulating Medicare Advantage Products, approved the Community Blue Program on August 18, 2014. He explained that CMS regulates and reviews marketing materials for Medicare Advantage plans, and in this capacity, required Highmark to include a disclaimer on its Community Blue Program materials “clearly indicating to subscribers that the product was a limited network product.” (Highmark Ex. 2 ¶ 28.) Mr. Lightner stated that Highmark complied with the requirement by including the following language in its Community Blue Program marketing materials:

**Not all providers will accept Community Blue Medicare HMO. Please verify that your providers are participating before enrolling. If a provider does not participate, neither Medicare nor Community Blue Medicare HMO will be responsible for the costs.**

(*Id.* ¶ 29.) CMS approved the disclaimer and subsequently approved Highmark’s marketing materials on a rolling basis.

Additionally, Highmark submitted various promotional materials displaying this language and reiterating that the Community Blue Program is a limited-network plan. Highmark also submitted a “Patients First” Summary, which specifies which UPMC facilities will remain in-network, the dates until which they will remain in-network, and the UPMC facilities which will be out-of-network effective January 1, 2015. (Highmark Ex. 11.)<sup>6</sup>

### III.

A consent decree is an agreement into which parties enter rather than a judicial determination of matters in controversy, and its terms bind the parties to the decree. *Dulles v. Dulles*, 85 A.2d 134, 137 (Pa. 1952). As a contract binding the parties thereto, a consent decree cannot be modified in the absence of fraud, accident, or mistake, and its terms “must be construed the same as any other contract.” *Lower Frederick Township v. Clemmer*, 543 A.2d 502, 510 (Pa. 1988) (internal quotation omitted).

It is axiomatic that “[t]he fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties.” *Id.* Where a dispute concerns a written contract, the intent of the parties “is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous the

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<sup>6</sup>The parties also submitted extrinsic evidence regarding how the terms of Highmark’s consent decree should be interpreted in the form of testimony from CEO Holmberg and Thomas McGough, UPMC’s Chief Legal Officer, as well as a declaration from Steven C. Nelson, the Senior Vice President for Highmark’s Strategy, Product, and Marketing Division. For the reasons discussed below, we need not consider such extrinsic evidence.

intent is to be discovered only from the express language of the agreement.”  
*Steuart v. McChesney*, 444 A.2d 659, 661 (Pa. 1982). Indeed,

When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed. Where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence.

*East Crossroads Center, Inc. v. Mellon-Stuart Co.*, 205 A.2d 865, 866 (Pa. 1965).

Further, a “consent decree forming the basis for [a] contempt finding must be definite, clear, and specific, leaving no doubt or uncertainty regarding the prohibited conduct.” *Commonwealth ex rel. Fisher v. Philip Morris, Inc.*, 4 A.3d 749, 755 n.5 (Pa. Cmwlth. 2010) (alteration in original) (internal quotation marks omitted), *appeal denied*, 20 A.3d 1213 (Pa. 2011). All inferences and ambiguities in a consent decree must be construed in favor of the alleged contemnor. *Id.* The complaining party bears the burden of proving noncompliance by a preponderance of the evidence. *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977).

As a preliminary matter, both parties argue, and this Court agrees, that the plain language of the consent-decree provisions at issue are clear and unambiguous such that the parties’ intent can be determined without considering extrinsic evidence.



## A.

First, the Commonwealth asserts that Highmark's creation of the Community Blue Program violates Section IV(A)(2)'s vulnerable-populations provision because it does not provide in-network access to UPMC services to the program's members, who are encompassed within the definition of "vulnerable populations." While Highmark acknowledges that the Community Blue members constitute a "vulnerable population" under the consent decree, Highmark counters that the provision does not require it to include UPMC in all Medicare-Advantage products. Highmark further emphasizes that the provision requires UPMC and Highmark to continue contracting for in-network rates with regard to certain specifically named products, none of which include Medicare-Advantage products or new products, generally.

The vulnerable-populations provision imposes a requirement that:

UPMC shall continue to contract with Highmark at In-Network rates for all of its Hospital, physician and appropriate continuity of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as In-Network regardless of whether they have Medicare as their primary or secondary insurance.

(Highmark Consent Decree § IV(A)(2)). Nowhere in the text of the provision is there a requirement that Highmark include UPMC in *all* of its Medicare-Advantage products. Further, while Section IV(A)(2) requires UPMC to continue contracting with Highmark at in-network rates for CHIP, Highmark Signature 65, Medigap,

and commercial retiree carve-out programs, it does not impose such requirements with regard to the Community Blue Program or future products. Although the provision requires UPMC to “treat” all participating Medicare beneficiaries as in-network, it does not impose any corresponding requirement on Highmark to provide for such in-network care, and we are unwilling to impose such a requirement where none exists.

### **B.**

Next, the Commonwealth contends that Highmark’s promotional and marketing materials violate Section IV(A)(11)’s prohibition against “unclear or misleading” advertising because they state that all Medicare-eligible seniors will “have access” to in-network UPMC services when the Community Blue Program provides for no such services. Highmark responds that these statements refer to Highmark products, in general, and do not specifically discuss the Community Blue Program, but that even in that context, they are not misleading, as determined by CMS, whose decision preempts the Commonwealth’s claim.

Insofar as the Commonwealth claims that the written materials CMS expressly approved are “misleading,” we find the Commonwealth’s claim preempted.<sup>7</sup> 42 U.S.C. §1395w-21(h)(2) specifically states that any marketing material which is “materially inaccurate or misleading or otherwise makes a material misrepresentation” shall be disapproved by CMS. Further, 42 U.S.C.

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<sup>7</sup>This is not to say that a CMS determination that marketing materials are not misleading always preempts the terms of a consent decree. Indeed, there may be circumstances under which a provider agrees to further regulation than that imposed by CMS. However, in the instant case, the inquiry resolved by CMS is the same inquiry the Commonwealth now asks us to adjudicate.

§1395w-26(b)(3), which applies to Medicare+ Choice Programs, makes clear, “The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.” We need not reach whether this law preempts laws enacted by the public that generally bar fraudulent advertising because Highmark subjected itself to determination under Section IV(A)(11) of the consent decree by agreeing that it “shall not engage in any public advertising that is unclear or misleading in fact or by implication to consumers.” (Highmark Consent Decree § IV(A)(11)).

Regardless, in reviewing the written materials, we find them not misleading because the promotional materials developed specifically for the Community Blue Program are clear about the coverage provided. Highmark’s “Personal Plan Overview” describes the Community Blue Program as including “a high value network of *select* providers” and notes in its hospital-provider list that the Community Blue Program does not include access to UPMC facilities. (Commonwealth’s Appl., Ex. G, at 12, 14) (emphasis added). The materials further disclaim that “**Not all providers will accept Community Blue Medicare HMO**” or that “Highmark’s Community Blue Medicare Advantage HMO is a \$0 premium product that does not include UPMC hospitals or physicians.” (Highmark Ex. 2 ¶ 29; Letter from Stephen A. Cozen, Cozen O’Connor, to the Honorable Dan Pellegrini, President Judge, Re: “*Commonwealth of Pennsylvania, et al. v. UPMC and Highmark, Inc. et al.*, No. 334 M.D. 2014” (Oct. 23, 2014), at 4–6, 9, 11–13, 16–17). A list of in-network facilities is provided on Medicare’s website, and a full description of the program is accessible on Highmark’s website.

While the testimony of Ms. Sampson, Ms. Dean, and Mr. Walters, and the declaration of Ms. Blosser credibly established that Medicare-eligible seniors are unclear as to whether in-network UPMC services are provided under the Community Blue Program, the Commonwealth failed to establish any causal connection between this confusion and Highmark's marketing materials. After all, none of the evidence discussed the source of confusion or even established that those with uncertainties had viewed the materials.

Finally, we find nothing unclear or misleading about Highmark's verbal statements that all Medicare-eligible seniors will "have access" to in-network UPMC services. Indeed, all such seniors have the option in enrolling in several Medicare Advantage plans, and only one excludes in-network UPMC services. Therefore, all seniors do have access to UPMC in-network but may not elect to subscribe to the services.

### C.

Additionally, the Commonwealth argues that Highmark breached the consent decree by failing to include the services specified in Sections IV(A)(1) (ER Services), IV(A)(4) (Oncology), and IV(A)(5) (Exception Hospitals) by offering its Community Blue Program which altogether excludes UPMC from in-network services and therefore constitutes Highmark's refusal to negotiate with UPMC regarding in-network rates for emergency and trauma services, oncology

services, and services for a specified list of unique/exception hospitals and physicians.

With respect to emergency-room services, Highmark counters that UPMC is required to treat all persons appearing at an emergency room regardless of their health insurance and that the Community Blue Program specifically includes coverage for emergency-room services at all hospitals, as revealed in its approved marketing materials.

Pursuant to 42 U.S.C. §1395dd(b)(1):

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

42 U.S.C. §1395dd(b)(1).

From this statute, it is clear that Highmark cannot prohibit its Community Blue members from reporting to UPMC facilities for emergency care, as such facilities are legally obligated to provide emergency services regardless of insurance coverage. Moreover, a review of Highmark's Community Blue Program description reveals that Highmark does not, in fact, exclude such coverage. For

example, the “Personal Plan Overview” expressly notes that the Community Blue Program members “must use plan providers *except in emergency or urgent care situations....*” (Commonwealth’s Appl., Ex. G, at 10) (emphasis added). Finally, Highmark has fulfilled its duty to negotiate in good faith with UPMC to reach an in-network agreement for emergency, trauma, and continuity of care services, all of which are available under Highmark’s other Medicare Advantage Programs but not under its Community Blue Program. However, Section IV(A)(1) imposes no requirement that each and every product developed by Highmark incorporate such an agreement.

With respect to oncology services, Highmark contends that the consent decree does not require it to include in-network services in each product it offers in Western Pennsylvania. We find informative the language of Section IV(A)(4) which states, “Highmark subscribers may access, *as if In-Network*, UPMC services, providers facilities and physicians involved in the treatment of cancer,” provided certain conditions are met. (Highmark Consent Decree § IV(A)(4)) (emphasis added). Notably, the consent decree does not state that Highmark shall provide in-network access to UPMC oncology services but distinctly states that Highmark subscribers will be treated *as if* they had in-network access for oncology purposes. Additionally, similar to Section IV(A)(1) discussed above, Section IV(A)(4) does not impose a requirement that each and every Highmark product include in-network oncology services.

Likewise, Section IV(A)(5) requires Highmark to reach “an agreement” with UPMC for hospital, physician, and follow-up care services with

regard to any facility, any physician, and any provider services located outside of Pittsburgh. (Highmark Consent Decree § IV(A)(5)). Such an agreement has been reached and incorporated into Highmark's other products, but nothing in this provision requires that the agreement be present in Highmark's Community Blue Program. Interestingly, while this provision specifically applies to facilities UPMC may acquire in the future, it does not reference products which Highmark may develop in the future.

Because we find that Highmark has not violated the specific terms of the consent decree, there can be no finding of contempt. *See In re Capuzzi's Estate*, 148 A. 48, 50 (Pa. 1929) (“[A] party is not to be so punished [by a finding of contempt] where the order is contradictory, or its specific terms have not been violated.”). Accordingly, we deny the Commonwealth's application to hold Highmark in contempt of the consent decree.

  
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DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :  
By Kathleen G. Kane, Attorney :  
General; Pennsylvania Department :  
of Insurance, By Michael Consedine, :  
Insurance Commissioner and :  
Pennsylvania Department of Health, :  
By Michael Wolf, 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 : No. 334 M.D. 2014

ORDER

AND NOW, this 30<sup>th</sup> day of October, 2014, upon consideration of the Commonwealth of Pennsylvania's application to hold UPE and Highmark, Inc. in contempt of the consent decree previously entered by this Court, said application is denied.



DAN PELLEGRINI, President Judge

**Certified from the Record**

**OCT 30 2014**

**and Order Exit**