IN THE SUPREME COURT OF PENNSYLVANIA

No. 45 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,
Appellees.

BRIEF OF AMICUS CURIAE THE PENNSYLVANIA COALITION OF MEDICAL ASSISTANCE MANAGED CARE ORGANIZATIONS

On Appeal from the Order of the Commonwealth Court in Case No. 1935 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098 (Eiseman I)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 46 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Appellants,

v.

AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., and KEYSTONE MERCY HEALTH PLAN,
Appellees.

BRIEF OF AMICUS CURIAE THE PENNSYLVANIA COALITION OF MEDICAL ASSISTANCE MANAGED CARE ORGANIZATIONS

On Appeal from the Order of the Commonwealth Court in Case No. 1949 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098 (Eiseman I)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 47 EAP 2014

JAMES EISEMAN, JR. and THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Appellants,

v.

UNITEDHEALTHCARE OF PENNSYLVANIA, INC. d/b/a UNITEDHEALTHCARE COMMUNITY PLAN, and HEALTHAMERICA PENNSYLVANIA INC. d/b/a COVENTRYCARES,
Appellees.

BRIEF OF AMICUS CURIAE THE PENNSYLVANIA COALITION OF MEDICAL ASSISTANCE MANAGED CARE ORGANIZATIONS

On Appeal from the Order of the Commonwealth Court in Case No. 1950 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098 (Eiseman I)

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I. STATEMENT OF INTEREST

The Pennsylvania Coalition of Medical Assistance Managed Care Organizations ("*Amicus*") is an organization of Medical Assistance Managed Care Organizations ("MCOs"), which provide health care coverage to more than one million, six hundred thousand Medicaid recipients across the Commonwealth. *Amicus'* members serve Medicaid patients in all 67 Pennsylvania counties and share a common goal of ensuring access to high-quality healthcare to their Medicaid patients, many of whom are among the Commonwealth's most vulnerable citizens.

Amicus has an obvious, significant and direct interest in this matter because a reversal of the Commonwealth Court's ruling will materially affect all of its members, as set forth below. Although we defer to Appellees for a detailed treatment of the legal issues implicated by this appeal, we seek to provide context regarding the serious, harmful and far-reaching policy implications of a reversal of the Commonwealth Court's rulings.

II. STATEMENT OF THE CASE

The Coalition incorporates by reference the Statement of the Case set forth in the Briefs of Appellees filed this date.[1]

[1] *Amicus* also incorporates by reference the Briefs of Amicus Curiae America's Health Insurance Plans, filed this date.

As set forth in detail therein, Appellants requested that Appellees produce copies of documents showing rates paid in connection with dental benefits provided under HealthChoices, a Medicaid managed care program, pursuant to Pennsylvania's Right to Know Law, 65 P.S. §§ 67.101 *et seq.* ("RTKL"). In particular, they sought documents showing: (1) the rates paid by the Commonwealth's Department of Public Welfare ("DPW")[2] to MCOs[3] (referred to by the Commonwealth Court as "Capitation Rates"); (2) the rates paid by MCOs to either subcontractors or directly to providers of dental services (referred to by the Commonwealth Court as "MCO Rates"); and (3) the rates paid by subcontractors to providers of dental services (referred to by the Commonwealth Court as "Provider Rates").

Following an appeal from rulings of the Office of Open Records, the Commonwealth Court ordered the production of documents reflecting the Capitation Rates, but concluded that the MCO Rates were not disbursements of funds by an agency and therefore are not "financial records" under the RTKL. *Dep't of Pub. Welfare v. Eiseman*, 85 A.3d 1117, 1127 (Pa. Commw. Ct. 2014) ("*Eiseman I*"). The Commonwealth Court further concluded that the documents

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[2] We recognize that during the pendency of this litigation, the General Assembly changed DPW's name to the Department of Human Services. For sake of simplicity and because DPW is named in the caption of certain of these consolidated appeals, we refer to the Department herein as DPW.

[3] HMOs and MCOs are referred to herein as MCOs.

showing the MCO Rates and Provider Rates were exempt from the RTKL's coverage because they contain both "confidential proprietary information" and "trade secrets." *Id.* at 1127-31. In a separate decision issued the same day, the Commonwealth Court concluded that documents showing the Provider Rates were outside the law's reach, as they were in the possession of non-parties and did not directly relate to performing the government function of administering the HealthChoices Program. *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 936-43 (Pa. Commw. Ct. 2014) ("*Eiseman II*"). At issue on this appeal are the Commonwealth Court's rulings regarding the documents reflecting the MCO Rates and Provider Rates.[4]

III. SUMMARY OF ARGUMENT

The Court should affirm. A reversal of the Commonwealth Court's decisions will cause substantial and widespread harm to Pennsylvania's current system of providing dental care for Medicaid beneficiaries, decreasing quality of care and access to care and increasing the total cost for the taxpayers of the Commonwealth. This is so for at least three reasons. First, treating the MCO Rates and the Provider Rates as though they are disbursements of government funds merely being passed through middlemen represents a fundamental misunderstanding of managed care and the true nature of the contractual

[4] *Amicus* is filing an identical copy of this brief in *Eiseman II.*

arrangement between DPW and the MCOs, and will mark a return to the dysfunctional, solely fee-for-service approach utilized prior to the entry of managed care into the administration of Medicaid benefits in Pennsylvania. Second, disclosure of the requested information will likely lead to two results, neither of which benefits patients: the rates will fall to the lowest rate or rise to the highest rate. Both scenarios reduce access to care and increase the aggregate spending of the DPW. Third, requiring disclosure may lead to anticompetitive harm in the form of coordination among competing providers or subcontractors, the risks that flow from sharing competitively sensitive, confidential and proprietary pricing information among competitors.

In addition, a reversal of the Commonwealth Court's decisions will also result in substantial and widespread competitive harm to Pennsylvania government contractors and subcontractors outside the healthcare industry, because a contractor's competitors will know its confidential and proprietary pricing information and trade secrets.

IV. ARGUMENT

A. The Court Should Affirm The Commonwealth Court's Decisions.

1. The MCO Rates And Provider Rates Are Not Disbursements Of Funds By An Agency.

Disclosure of the MCO Rates and Provider Rates will effectively return the system to the solely fee-for-service approach in place prior to the entry of managed

care for medical assistance in Pennsylvania. Prior to contracting with MCOs, DPW simply issued a rate schedule showing the rates for all providers.[5] This public disclosure led to massive inefficiencies, unnecessarily high spending by DPW, poor quality of care, and low access to care. In contrast, when DPW contracted with the MCOs, beginning in 1997, it ceased paying fees for services and began paying a fee per subscriber (*i.e.,* on a capitation basis). This fundamental change shifted the financial risk to the MCOs, incentivizing them to obtain high quality outcomes, rather than a high volume of services, which reduces their overall costs, maximizes their profits, and aligns their interests with those of the patients.[6] This fundamentally different model under DPW's HealthChoices program has led to increased quality of care and access to care, and massive reductions in DPW's aggregate spending for these services. *See generally Commonwealth of Pennsylvania Department of Public Welfare 2013 External Quality Review Report, Statewide Medicaid Managed Care Annual Report* (September 12, 2014), available at

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[5] That schedule remains in effect for approximately 600,000 Pennsylvania Medicaid beneficiaries who are eligible to receive benefits under both Medicaid and Medicare (known as "dual eligible") and long-term care patients. As noted, more than 1,600,000 Medicaid beneficiaries in Pennsylvania are in managed care. *See generally* Ari Gottlieb, PricewaterhouseCoopers, *The Expanded State of Medicaid in The United States: Private Medicaid Health Plans Crossing the Tipping Point* (Oct. 2014), available at http://www.mhpa.org/_upload/201412MHPADCBriefing.pdf (last visited January 19, 2015).

[6] To ensure high quality, DPW requires MCOs to meet objective quality metrics to obtain and retain their certification and to maintain national certification.

http://www.dpw.state.pa.us/cs/groups/webcontent/documents/report/c_102845.pdf (last visited January 19, 2015); *see also* The Lewin Group, *An Evaluation of Medicaid Savings from Pennsylvania's HealthChoices Program* (May 2011), available at http://www.lewin.com/~/media/Lewin/Site_Sections/Publications/MedicaidSavingsPAHealthChoices.pdf (reporting savings for the Commonwealth of $5.0-5.9 billion from 2000-2010) (last visited January 19, 2015).

This contractual arrangement necessarily affects the analysis of whether the requested records are "financial records" under the RTKL. The RTKL defines the term "financial records" to mean "any account, voucher or contract dealing with: (1) the receipt or disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property." 65 P.S. § 67.102. The Commonwealth Court sensibly reasoned that the MCO Rates are not "financial records" because they do not "involve disbursement of funds by a Commonwealth agency." *Eiseman I*, 85 A.3d at 1127. It accorded significant weight to the fact that the MCO rates "involve disbursement by a contractor of an agency." *Id.*

The Commonwealth Court's conclusion is correct, but the distinction is based on far more than who disburses the funds. The dissent in *Eiseman I* and the Brief of Amicus Curiae The Pennsylvania Newsmedia Association labor under the

misperception that the same dollar is simply moving through the supply chain,[7] or through "middlemen," but these payments are fundamentally different in nature – the payment from DPW to the MCOs is for *medically necessary services for a subscriber*, not *a specific dental service*. As a result, the amount ultimately paid to a dentist bears no resemblance to the amounts paid by DPW, because those payments buy fundamentally different things.

Stated simply, DPW is paying the MCOs to shift the risk of a high cost of care from DPW to the MCOs. This risk shifting is not merely theoretical: each MCO assumes all the risk that its Medicaid-related expenses (*i.e.*, the fees it agrees to pay its subcontractors and/or providers) exceed the Capitation Rates paid to it by DPW. Those expenses can and do exceed the Capitation Rate received from DPW. If, for example, the cost of providing medically necessary services exceeds the revenue from the Capitation Rates, the MCOs remain obligated to perform their contracts with DPW. In that event, they are plainly not disbursing the agency's money, and disclosure of the information sought by Appellants' RTKL request would blatantly overreach the boundaries of government expenditures and cross the line into the private affairs of MCOs. Simply put, the rates paid by an MCO to

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[7] *Eiseman I*, 85 A.3d at 1136-37 ("I believe that section 102 of the RTKL is broad enough to include public funds that trickle down through contractor and subcontractor contracts ('any contract') because these contracts nevertheless 'deal' with, or simply pass along down the line, the 'disbursement of funds by an agency.'") (internal citation omitted); Brief of Amicus Curiae The Pennsylvania Newsmedia Association, dated Dec. 2, 2014, at 4-5, 8-11.

third party administrators and/or providers are the trade secrets and competitively sensitive information that enable it to minimize the risk it has assumed. Because the onus of providing those medically necessary services (and the underlying methods and means of doing so) falls on the MCOs, the rates they (or their subcontractors) pay are a purely private matter, and the documents reflecting the MCO Rates and Provider Rates do not reflect "disbursement of funds by an agency." 65 P.S. § 67.102.

Moreover, contrary to Appellants' claims, the requested documents are not needed to assess the efficacy of HealthChoices, as they will only expose these private companies' confidential and proprietary trade secrets (which enabled the MCOs to achieve the success of the HealthChoices program). The public can assess the program's effectiveness by examining the Capitation Rates (paid by DPW to the MCOs) in view of the resultant quality of care and access to care statistics provided by DPW.

The Commonwealth Court's decisions struck the appropriate balance, requiring disclosure of the rates paid by DPW to the MCOs and nothing more. The public's interest in information must be balanced with its paramount competing interests in quality of care and access to care, and the MCOs' interest in confidentiality and the right to conduct business with their proprietary and competitively sensitive information and trade secrets protected.

2. Disclosure Of The Requested Information Will Likely Lead To A Decrease In Quality Of Care And Access To Care And An Increase In The Aggregate Spending Of The Commonwealth.

The Court should affirm for another reason. If the Court orders the requested disclosure, two likely results are apparent: the MCO Rate and Provider Rates rise to the highest rate or sink to the lowest rate. Neither scenario benefits patients.

In the first scenario, armed with the knowledge of the rates paid to their competitors, the subcontractors and providers will demand to be paid the highest rate being paid under Medicaid to any subcontractor or provider in the Commonwealth. If DPW's aggregate spending remains constant, the number of services provided will have to decline and, as a result, access to care will decline. If the General Assembly appropriates increased funds to DPW, other appropriations will decline or Pennsylvanians' taxes will rise.

To address this unintended consequence of the disclosure requested by Appellants, DPW may attempt to establish maximum provider rates, which will mark a return to the prior system and will ignore the important lessons learned from the introduction of managed care. This will lead to lower quality care, as the focus will return to maximizing volume of services, rather than patient outcomes, and some capable providers will refuse to accept the lower rates.

Similarly, in the second scenario, armed with the knowledge of the rates paid to their competitors, the MCOs will refuse to pay the subcontractors any more than the lowest rate paid to any subcontractor, and the subcontractors will refuse to pay the providers any more than the lowest rate paid to any provider. Even fewer providers will be willing to accept these patients, given that the MCOs' rates (while higher than those previously paid by DPW) are still substantially lower than commercial payors' rates. Some providers will likely refuse to accept Medicaid patients, and the quality of care and access to care will decline in the classic "race to the bottom" for both price and quality. Worse yet, the low rates may drive some providers to reduce or withhold medically appropriate care.

The system must promote competition at each level of the chain to achieve its goals of maximizing access and quality of care. Today, the current system promotes quality of care and access by fostering competition among MCOs. *See Eiseman I,* 85 A.3d at 1129 ("[T]he actual competition in the relevant market among the five MCOs is apparent. . . . As the MCOs compete for market share, gain for one means loss for another."). Because each MCO is paid a fee for each member, its revenues are determined directly by the number of members it enrolls. As a result, MCOs compete to attract and retain subscribers. Within each geographic region, a potential subscriber can choose among multiple MCOs. *See* http://www.enrollnow.net/PASelfService/en_US/bycounty.html. MCOs also

compete to attract providers to their networks and to maintain their contracts with DPW. If an MCO does not meet access requirements or provide quality care, DPW can cancel existing contracts or choose not to contract with that MCO in the future.

These multiple layers of competition incentivize high quality care and access at a low cost, which obviously benefits both patients and taxpayers. As Appellees' expert, Dr. Henry Miller, testified, rates "are valuable in the industry because of the investment required to maintain a competitive edge in gaining enrollees. These rates represent significant investments by each MCO, based on efficiencies, provider specialties and breadth of provider networks, quality of care, and presumably small margins of profitability." *Eiseman I*, 85 A.3d at 1130. In addition to the rates themselves, the documents Appellants seek may include incentive provisions designed to increase quality and reduce cost, a recent innovation in health insurance. Disclosure of those incentive provisions will discourage MCOs from investing in such innovation. And finally, the contracts Appellants seek are the result of substantial investments of negotiating time and talent, and in many instances, reflect careful judgments regarding the value one provider may add to an MCO's network, after considering the availability of comparable providers in a region. Viewing the rates out of

context will provide misleading or incomplete indicators of the value of a provider and oversimplify these nuanced decisions.

In the absence of competition, quality of care will decline (in either of the two scenarios outlined above) because providers will have no incentive to distinguish themselves. Access to care will sink for the reasons outlined above (in each scenario). And MCOs will have an obviously impaired ability to negotiate the best rate (or incentive to invest in such negotiations) and will be disincentivized to stay in (or enter) the market, reducing both patient choice and MCO competition. In short, ordering the requested disclosures will not permit the market to operate freely, and the substantial efficiencies gained by the introduction of managed care will quickly disappear, to the detriment of both patients and taxpayers. In sum, the disclosures requested by Appellants will lead the Commonwealth back to the parade of horribles that led to the introduction of managed care in the first place and harm both patients and taxpayers.

3. Disclosure Of The Requested Information May Lead To Anticompetitive Effects.

The Court should also affirm because the requested disclosure may lead to anticompetitive effects, including increased prices and decreased output, both because the market is not allowed to function properly, as described above, and

because Appellants' requested disclosures create a high risk that subcontractors and providers will coordinate pricing.

The exchange – among competitors – of competitively sensitive pricing information like that at issue here gives rise to patent risk of coordination. If, for example, all of the subcontractors know that one subcontractor is receiving a higher price for a given dental service, they have undue negotiating leverage and can all raise their prices, leaving the MCOs with no choice but to pay a higher price, renegotiating their rates with DPW, or exiting the market (and reducing patient choice and MCO competition) if the resultant margin is too small. Similarly, if all of the providers know that one provider is receiving a higher price for a given dental service, they, too, will have undue negotiating leverage. These results will harm patients and taxpayers alike.

The exchange of pricing information among competitors has long been the focus of both antitrust case law and reams of scholarly writings, both in the health care context and elsewhere. Indeed, with regard to providers, the United States Department of Justice and the Federal Trade Commission has issued a joint statement of enforcement policy on Provider Participation in Exchanges of Price and Cost Information. *See* Statements of Antitrust Enforcement Policy in Health Care, U.S. Dep't of Justice and FTC, at Statement 6, Provider Participation in Exchanges of Price and Cost Information (1996), available at

http://www.justice.gov/atr/public/guidelines/0000.htm (last visited January 19, 2015). While acknowledging that surveys may provide useful information that does not raise antitrust concerns, the federal antitrust enforcement agencies stated: "Without appropriate safeguards, however, ***information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services***." *Id.* (emphasis supplied).

The agencies established a safety zone for information exchanges but imposed material restrictions, including that the survey be managed by a third party and the information be "sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider." *Id.* Plainly, the disclosures sought by Appellants here would not satisfy those requirements and may instead facilitate oligopolistic coordination by subcontractors and providers with little or no procompetitive justification.

B. A Reversal Will Result In Substantial And Widespread Competitive Harm To Pennsylvania Government Contractors And Subcontractors Outside the Healthcare Industry.

The potential harm is not limited to the Medicaid context or even the healthcare industry but extends to all Commonwealth contractors. The relief Appellants seek will potentially require disclosure, in response to a RTKL request, of competitively sensitive pricing information of a Commonwealth contractor or

subcontractor, disregarding the sensitivity of the information simply because it is in a "financial record" and ignoring that it is not in the possession of the Commonwealth or any Commonwealth agency or governmental entity. The requested relief could plainly affect companies selling such products as asphalt, fuel, paper, or countless other supplies, in addition to those contractors offering any of a number of services to the Commonwealth. The precedential impact of Appellants' request is plainly far-reaching. Indeed, while MCOs can and do sell their managed care products to commercial (non-governmental) payors, non-health businesses can obviously sell their wares (such as asphalt, fuel, office supplies) to private customers without making any change to their product offerings, and the disclosure of their pricing in the governmental context may have a material and direct impact on their non-government pricing and sales.

Businesses that are concerned that they will be required to disclose their sensitive and confidential proprietary information and suffer competitive harm as a result may be deterred from doing business with the Commonwealth, resulting in reduced competition for the Commonwealth's business, which will lead to lower quality and higher prices. Increased prices, in turn, will likely lead to tax increases or diminished government services if resources are re-allocated to cover those higher costs.

It is, of course, essential that the Commonwealth encourage contractors and subcontractors to seek Commonwealth business, to ensure that the government provides basic services to Pennsylvanians at high quality and low cost. In today's global economy, the Commonwealth competes with other nations and other states for companies' business, and can ill afford to chill the entry or retention of business because of confidentiality concerns.

V. CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court affirm the decisions of the Commonwealth Court.

Respectfully submitted,

Dated: January 20, 2015

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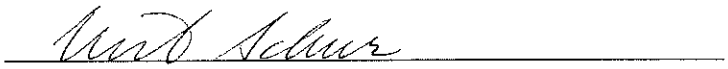

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