No. 123025

In the

Supreme Court of Illinois

SARAHI VASQUEZ GONZALEZ, as Administrator of the Estate of RODOLFO CHAVEZ LOPES a/k/a JUAN AGUILAR, deceased,

Plaintiff-Appellee,

v.

UNION HEALTH SERVICES, INC.,

Defendant-Appellant,

AGNIESZKA BRUKASZ, M.D., FAKHRUDDIN ADAMJI, M.D., TERRENCE LERNER, M.D., MICHAEL ROSSI, M.D., YEN LI-HSIANG, M.D., BLAKE MOVITZ, M.D., JULITALEE CAMBA, R.N., ADVOCATE NORTHSIDE HEALTH NETWORK d/b/a ADVOCATE ILLINOIS MASONIC MEDICAL CENTER, ADVOCATE ILLINOIS MASONIC HEALTH PARTNERS d/b/a ADVOCATE ILLINOIS MASONIC PHYSICIAN PARTNERS, ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE MEDICAL GROUP,

Defendants.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 16 L 10661.
The Honorable **John H. Ehrlich**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This is a medical malpractice case where it is alleged that plaintiff's decedent Rodolfo Chavez Lopez, aka Juan Aguilar ("Mr. Aguilar") died as a result of a massive pulmonary embolism following a lymph node biopsy. (C25-79). The Defendant, Union Health Services, Inc., (Union Health) filed a motion to dismiss based upon Section 5/2-619(a)(9) ILCS and 215 ILCS 165/26, Voluntary Health Services Plans Act.

The trial court, in its Memorandum Opinion and Order, held that Section 26 of the 1988 amendment to the Voluntary Health Service Plans Act (VHSPA) is unconstitutional, as it constitutes special legislation in violation of the United States Constitution and Illinois Constitution. Thus, the trial court denied the Defendant's, Union Health, motion to dismiss.

ISSUES PRESENTED FOR REVIEW

1. Whether the 1988 amendment to the Voluntary Health Service Plans Act (VHSPA), which eliminates statutory immunity for all voluntary health service plans except for those incorporated prior to January 1, 1965, non-for-profit and not owned or controlled by a hospital, is unconstitutional under the prohibition against special legislation in the Illinois Constitution and the guarantees of due process and equal protection set forth in the Illinois Constitution and United States Constitution.

2. Whether the statutory immunity granted to Union Health Service, Inc. from the Voluntary Health Service Plans Act (VHSPA) is unconstitutional as applied to Union Health Service, Inc.

JURISDICTION

This Court may exercise jurisdiction pursuant to Illinois Supreme Court Rule 302(a). Illinois Supreme Court Rule 302(a) states "appeals from final judgments of circuit

courts shall be taken directly to the Supreme Court in cases in which a statute of the United States or of this state has been held invalid." While this trial court's order does not constitute a final judgment, the Illinois Supreme Court has stated "where the order appealed rests on a finding of a statute's unconstitutionality, this court has assumed jurisdiction under Rule 302(a), notwithstanding the finality requirement." *Desnick v. Dep't of Prof'l Regulation*, 171 Ill.2d. 510, 516 (1996); *Garcia v. Tully*, 72 Ill.2d 1, 17 (1978).

On November 2, 2017, the trial court entered an order denying Defendant, Union Health Services, Inc. ("Union Health"), motion to dismiss. In its Memorandum Opinion and Order, the trial court determined that the 1988 amendment to the VHSPA is unconstitutional special legislation and violates the United States and Illinois Constitutions. (C 1351-78 V3) U.S. Const. art IV, §1; U.S. Const. amend. XIV; Ill. Const. 1970, art. IV, §13. On December 1, 2017, Defendant, Union Health, filed its Notice of Direct Appeal. (C 1439-40).

STATEMENT OF FACTS

From April 4, 2014 through October 31, 2014, Mr. Aguilar was under the care and treatment of the physicians, nurses and technicians of Defendant, Union Health. (C25-79). The physicians of Union Health failed to recognize the signs and symptoms of deep vein thrombosis ("DVT") as well as pulmonary emboli. (C25-79). Specifically, Mr. Aguilar died because the defendant physicians of Union Health failed to recognize the signs and symptoms of DVT; cleared Mr. Aguilar for the laparoscopic biopsy when it was known or should have been known that the patient had an active DVT; prescribed lasix to treat a known DVT; and failed to appreciate Mr. Aguilar's risk factors for developing DVT. (C25-79). Plaintiff filed a 24 count Complaint under the Wrongful Death and Survival Act

against Union Health, Advocate North Side Health Network, d/b/a Advocate Illinois Masonic Medical Center, Advocate Illinois Masonic Health Partners d/b/a Advocate Illinois Masonic Physician Partners, Advocate Health and Hospital Corporation d/b/a Advocate Medical Group, along with several physicians and nurses arising out of the death of Mr. Aguilar. (C25-79).

Union Health is named as the principal under a respondeat superior theory for its actual or apparent agents who negligently treated Mr. Aguilar, resulting in his death. (C25-79). Defendant, Union Health, filed a 735 ILCS 5/2-619 motion to dismiss attempting to avoid liability for Mr. Aguilar's death by claiming immunity under the VHSPA, 215 ILCS 165/26. (C249-51).

Relying on written briefs, without hearing oral arguments, the trial court issued a Memorandum Opinion and Order denying Union Health's motion to dismiss and declaring Section 26 of the VHSPA unconstitutional. (C1357-77 V3). The trial court reasoned that in 1951, these unique types of health care and insurance delivery systems were "rationally related to the state's legitimate interests but not today." (C1351-78 V3). Moreover, the 1988 amendment enacted by the legislation "purposefully protected and continues to protect a class of only one—UHS [Union Health Services]." (C1351-78 V3). Therefore, the trial court held, "continuing to provide absolute immunity to a class of one is simply not rationally related to any legitimate state interest." (C1351-78 V3).

STANDARD OF REVIEW

In this case, the Plaintiff asserts, and the trial court held, that Section 26 of the VHSPA constitutes special legislation. Special legislation confers a "special benefit or privilege upon one person or group and excluding others that are similarly situated." *Allen*

v. Woodfield Chevrolet, Inc., 208 Ill.2d. 12, 21 (2003). *Best v. Taylor Machine Works et al.*, 179 Ill.2d 367, 291 (1997). Determining whether a piece of legislation constitutes special legislation involves a two-part inquiry. *Allen*, 208 Ill.2d. at 22. The court will first determine "whether the statutory amendments discriminate in favor of a select group, and if so, second, whether the classification created by the statutory amendment is arbitrary. *Id*. "A special legislation challenge is generally judged by the same standard that applies to review of an equal protection challenge." *Petition of Vill. of Vernon* Hills, Ill.2d 117, 123 (1995);

The appropriate standard for review for a statute challenged as special legislation and which "does not affect a fundamental right or involve a suspect or quasi-suspect classification," is the rational basis test. *N. Ill. Home Builders Ass'n, Inc v. Cnty of DuPage*, 165 Ill.2d. 25, 38 (1995). When applying the rational basis standard of review, the Court must determine whether "the classification at issue is rationally related to a legitimate state interest." *Cutinello v. Whitley*, 161 Ill.2d. 409, 417 (1994). "Classifications made by the legislature are presumed valid" and a "statute will be upheld if any set of facts can be reasonably conceived which justify distinguishing the class to which the law applies from the class to which the statute is inapplicable." *Id*. at 418. *Bilyk v. Chi Transit Auth.*, 125 Ill. 3d 230, 236 (1988). Whether there is a rational basis for a classification is a question of law which the Court reviews *de novo*. *Id*.

ARGUMENT

I. The Immunity Granted Exclusively to Union Health is Unconstitutional Special Legislation and Violates the Equal Protection Clause of the State and Federal Constitutions.

In 1951, the legislature enacted VHSPA to facilitate the creation of health service corporations to provide health benefits to union members "in lieu of a traditional health insurance system." *Am. Nat'l Bank & Trust Co. of Chi. v. Anchor Org. for Health Maint.*, 210 Ill. App. 3d 418, 425-26 (1st Dist. 1991). *McMichael v. Michael Reese Health Plan Found.*, 259 Ill. App. 3d 113, 116-17 (1st Dist. 1994). To encourage the purpose of the plans, the legislature included an immunity clause in the legislation insulating the corporations organized under the Act from liability:

> A health services plan corporation shall not be liable for injuries resulting from negligence, misfeasance, malfeasance, nonfeasance or malpractice on the part of any officer or employee of the corporation, or on the part of any person, organization, agency or corporation rendering health services to the health services plan corporation's subscribers and beneficiaries. (former Ill.Rev.Stat. ch. 32, §620.)

The statute did not grant immunity to doctors or any other medical person providing services through the health services plan, it only insulated the corporation. (former Ill.Rev.Stat. ch. 32, §620).

In 1982, the Illinois Health Maintenance Organization Act (HMO Act) was amended to provide that organizations, including non-profit corporations organized under VHSPA, such as Union Health, could be certified as HMOs. (Ill.Rev.Stat.1989, ch. 111 ½, pars. 1402(11), 1403(b)). *McMichael*, 259 Ill. App. 3d at 117. From 1982 to 1988, a series of amendments to the HMO Act eroded all differences between VHSP corporations and corporations certified as HMOs, with the exception of the statutory immunity clause. *Id*. By 1988 there were only three non-HMO certified VHSP remaining: 1) Anchor

Organization for Health Maintenance, 2) Michael Reese Health Plan, and 3) Union Health Services.

In 1988, in order to make all VHSP certified HMOs, VHSPA was amended requiring all VHSP, including Union Health, to become certified as HMOs. *Id*. at 117. 215 ILCS 165/8.[1] In 1989, Section 620 was further amended to prevent the creation of any new corporations under VHSPA, effectively ending the life of the legislation. *Id*. at 118. 215 ILCS 165/3.1. Lastly, the provision granting immunity under VHSPA was amended. 215 ILCS 165/26. The language of the amendment repealed immunity for all VHSP except those incorporated prior to 1965 and not owned or controlled by a hospital:

> A health services plan corporation *incorporated prior to January 1, 1965, operated on a not-for-profit basis, and neither owned or controlled by a hospital* shall not be liable for injuries resulting from negligence, misfeasance, malfeasance, nonfeasance or malpractice on the part of any officer or employee of the corporation, or on the part of any person, organization, agency or corporation rendering health services to the health services plan corporation's subscribers and beneficiaries. 215 ILCS 165/26.

At the time the amendment was enacted, there were only three VHSPA corporations in existence. *Moshe v. Anchor Org. for Health Maint.*, 199 Ill. App. 3d 585, 596-97 (1st Dist. 1990). After the amendment was enacted, only one VHSPA corporation remained immune from liability, Union Health. *Id*. 215 ILCS 165/26

[1] "no person shall offer to the public any voluntary health service plan or otherwise engage in the business of a health service plan corporation without having first received a charter from the Director. No charter under this Act shall be approved by the Director for any organization seeking to provide medical or hospital services unless the organization files a concomitant application for a certificate of authority, and is approved by the Director, as a health maintenance organization pursuant to the requirements of the Health Maintenance Organization Act." 215 ILCS 165/8.

A. The Immunity Provision of the Voluntary Health Services Plan Act Discriminates in Favor of a Select Group.

Through the various amendments, the VHSPA, constitutes special legislation and, therefore, is no longer rationally related to a legitimate state interests. The equal protection clause of the State and Federal constitutions "requires equality between groups that are similarly situated." *Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959, 960 (1st Dist. 1986). Yet, as it now stands, VHSPA treats Union Health differently than other voluntary health plans that were similarly situated.

The Illinois Supreme Court routinely strikes down special immunity legislation that arbitrarily limits the liability of injured victims by granting special protections to limited classes of potential defendants. For example, in *Grace v. Howlett,* 51 Ill.2d 478, 487 (1972), the Court struck down a statute that limited recovery for certain automobile accident victims depending on the fortuity of whether the tortfeasor driver was using the vehicle for commercial or personal purposes. The Court found that the statute's attempt to bar or limit recovery was arbitrary and unreasonable. *Id*. The Court held

> there are many purposes for which the obvious differences between private passenger automobiles, buses, taxicabs, trucks and other vehicles would justify different legislative treatment. But the determination of the amount to be recovered by persons injured by those vehicles […] is not one of those purposes. *Id*.

In *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 196, 199-201 (1952), the Court invalidated a provision of the Workers' Compensation Act that created arbitrary classifications of employers, employees, and third-party tortfeasors in workers' compensation provision again stating that the distinctions made "in no way promote any of the objective of the act."

Similar to *Grace* and *Grasse,* the VHSPA was amended in such a way as to create an arbitrary distinction between Union Health and the other voluntary health service plans. The legislative history and the appellate court's decision in *McMichael* suggests that the VHSPA, as amended, constitute unconstitutional special legislation granting an unjustified special immunity, based upon a cut-off date that arbitrarily limits the recovery of malpractice victims. *McMichael,* 259 Ill. App. 3d at 119.

As indicated by a dialogue during the June 30, 1988 Senate debate on the conference committee report, the legislators sought to repeal the immunity for the remaining two "hospital controlled" health service plans, but kept intact the immunity for the <u>*one*</u> "service organization," i.e., Union Health Service." *Moshe,* 199 Ill. App. 3d at 596-97. *See also* Ill. Gen. Assemb., Senate Report. (C 1101-09 V2). However, from the moment of its creation there was concern among legislators that the 1988 amendment was constitutionally invalid special legislation because of the exemption it created for *one* single entity, Union Health. Senator Barkhausen stated:

> My concern, Mr. President and members, is that we're...in attempts to reach some sort of a political compromise...there are three HMO's that are organized as voluntary health services plans that have been provided with statutory immunity ... and rather than changing the rules for all three of them...we're only changing the rules for two of them. My concern is that this aspect of the Conference Committee Report represents a form of…of special legislation and I suspect if .... if challenged the courts might find that…that conclusion is correct.
>
> lll. Gen. Assemb., Senate Report, at 160-161. (C 1101 -09 V2).

Since the 1988 enactment, the appellate court has not addressed the constitutionality of the amendment.[2] The closest the court came was in its decision in *McMichael v. Michael Reese Health Plan Found.*, 259 Ill. App. 3d 113 (1994), wherein the court declined to definitively answer whether the amendment constituted special legislation or whether Union Health continued to conform to the original concept of the VHSPA. The Court did not address these issues because Michael Reese Health Foundation did not have standing and Union Health was not a named defendant in the action.[3] *Id.* at 119. However, the *McMichael* Court sent clear signals to the bench when it suggested:

> it is clear to this court that the legislature intended that no HMO, regardless of its organization pursuant to other statutes, be granted immunity. A single exception was made for Union, a health service plan which the legislature felt still conformed to the original concept of the VHSP A and, thereby, was entitled to continued immunity...
>
> However, the problem lies in the reservation of immunity for the single entity known as Union. ***Hence, if the 1998 amendment is constitutionally invalid at all; it is because of the exemption it creates.*** *Id*. (emphasis added).

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[2] The Appellant mistakenly suggested that the Appellate Court has addressed the constitutionality of this statute, however, that is not the case. In *Moshe*, the Court held that (1) a provider's dual status as HMO and voluntary health service plan does not preclude immunity and (2) the 1988 amendment constituted a substantive change. 199 Ill. App. 3d 585 (1st Dist. 1990). In *American National*, the Court held that Anchor was no longer entitled to rely upon the VHSPA charter because it was acting in the same capacity as an HMO. 210 Ill. App. 3d 418 (1st Dist. 1991). In *Brown*, the Court held that the statute (prior to the amendment) did not violate the equal protection clause. 150 Ill. App. 959 (1st Dist. 1986).

[3] Michael Reese Health Plan Foundation requested, and the trial court certified, the following question for interlocutory appeal: "Whether the 1988 amended to section 26 of the VHSPA is violative of the equal protection and due process clauses of our State and Federal constitutions or whether it constitutes special legislation, which is constitutionally prohibited." *McMichael v. Michael Reese Health Plan Found.*, 259 Ill. App. 3d 113, 116 (1994). The appellate court dismissed the appeal because the "resolution of this question will not affect MRHP's interest in any way." *Id*. Therefore, the appellate court held that the Michael Reese Health Plan Foundation lacked standing to contest this claim. *Id*.

In short, the Court properly reserved holding that the amendment was special legislation until Union Health was actually before it. *Id*. Given the plain language of the decision, certainly, had it had the opportunity to decide the issue, there is no doubt that the *McMichael* Court would have declared Union Health's immunity to be unconstitutional special legislation. *Id*.

The immunity provision in the VHSPA limits liability to a class of one, Union Health. The arbitrary and capricious year of 1965 was chosen by the legislature to preserve immunity solely for Union Health, which is the only organization organized prior to 1965, and repealed immunity for Anchor and Michael Reese, which were organized thereafter. As Senator Barkhausen correctly suggested, the legislature only changed the rules for two, out of the three, similarly situated voluntary health service plans. (C 1101-09 V2).

Moreover, the amended legislation does not allow for any other health service plan to receive immunity. 215 ILCS 165(3). Given the current cut-off dates, there are no other corporations that can be granted this statutory immunity. 215 ILCS 165. The amendment constitutes special legislation because it confers a "special privilege of benefit upon a person or group of person while excluding others similarly situated." *Allen*, 208 Ill.2d at 21. Regardless of whether any other corporation fulfills the requirements of being a VHSP, no other corporation can enjoy the same benefits as Union Health, namely immunity from liability. 215 ILCS 165. This piece of legislation provides the special benefit of immunity to only one corporation, Union Health. To create a statute for the benefit of one, and only one possible, entity based on an arbitrary date or other numerical division is almost definitive of special legislation, and is presumptively unconstitutional.

B. The Immunity Provision of the Voluntary Health Services Plan Act No Longer Serves a Legitimate State Interest.

A piece of legislation serves a legitimate state interest if it "benefits the general welfare." *Bilyk*, 125 Ill.2d at 236. When enacted, the VHSPA served a legitimate State interest. The VHSPA was enacted "so that an employer or union could provide an improved health service program, in lieu of a traditional health insurance system." *American Nat'l*, 210 Ill. App. 3d at 425-26. The VHSPA allowed for a "medical care delivery system through which medical, hospital, nursing and related health services are rendered to a subscriber or beneficiary." *Brown*, 150 Ill. App. 3d at 961. The Appellate Court in *Brown* held that VHSPA served a legitimate State interest because "they serve the unique function of both insurer and health care provider." *Id*. at 961-62.

However, the Appellate Court in *McMichael* emphasized that a grant of immunity is dependent upon a finding that such benefit advances a legitimate State purpose. *McMichael*, 259 Ill. App. 3d at 118-19. The court notes that "a grant of immunity is not a fundamental right, it is a legislatively created and statutorily-conferred benefit bestowed upon a class, the constitutionality of which is dependent upon a finding that such a benefit advances a legitimate State purpose." *Id*. at 118-19. If the purpose ceases to exist, then the benefit conferred, in this case the statutory immunity, must also cease to exist. *Id*. at 119.

Union Health suggests that Union Health continues to adhere to the letter and spirit of VHSPA so to warrant continued immunity. However, any conceivable State interest allegedly justifying Union Health's immunization in 1988 no longer exist today. Even if Union Health complied with all of the requirements of the Act and fell under the legislature's original grant of immunity; if the state interest is no longer being served, then the constitutionality of the Act would be in jeopardy, as it is here. *Id*.

The Court in *American National* noted that the reason that Anchor "was not eligible to take advantage of the immunity that the status allowed" was because "Anchor began to deviate from their original function and purpose. *Am. Nat'l,* 210 Ill. App. 3d at 426. The Court noted "Anchor was acting in the same capacity as any other HMO." *Id*. The Court did not hold that Anchor was owned or controlled by a hospital, nor did it hold that it was no longer a not-for-profit organization. *Id*. It held that Anchor was no longer serving its purpose. *Id*.

In fact, in *American National*, the Appellate Court stated that by 1985 Anchor's "duties, obligations and requirements under VHSPA merged with its duties, obligations and requirements as a State certified and Federally qualified HMO." *Id*. Union Health, just like Anchor, is a certified HMO. While that, in it of itself is not a basis to preclude immunity, the merging and overlapping of duties between being a VHSP and HMO is a basis to preclude immunity. *Moshe*, 199 Ill. App. 3d at 594; *Am. Nat'l,* 210 Ill. App. 3d at 426. Union Health admits that while it functions as a VHSP, a percentage of its business is tailored toward functioning as an HMO. (C1290 V3). With Union Health functioning as both a VHSP and an HMO, at the same time, it is impossible to determine when Union Health is acting under its role of VHSP or when it is acting under its role of HMO. The distinction of between Union Health as a VHSP and a HMO is not apparent. Union Health original unique function gets lost within Union Health's several different categories of managed health care plans. *Am. Nat'l,* 210 Ill. App. 3d at 426. (C 1162-79 V2). If the "unique function" or 'persona' of the VHSP becomes diluted, then it can no longer serve the State's interest. *Id*.

Any interest the State had in encouraging the creation of VHSPA organizations was abrogated when the State amended the VHSPA and began to blur the lines between VHSPA and the HMO Act. *McMichael,* 259 Ill. App. 3d at 117. Since the immunity granted no longer serves a legitimate State purpose, offering a unique health service plan, this Court should eliminate the benefit conferred.

C. The Immunity Provision of the Voluntary Health Services Plan Act is Not Rationally Related to the Legitimate State Interest.

This statute, in order to pass constitutional muster, must be rationally related to a legitimate state interest. *N. Ill. Home Builders Ass'n, Inc v. Cnty. of DuPage*, 165 Ill.2d. 25, 38 (1995). Under Illinois law, rationality is the controlling principle for both an equal protection violation and determining whether the immunity is unconstitutional special legislation. *Jacobson v. Dep't of Public Aid,* 171 Ill.2d 314, 322 (1996). The guarantee of equal protection requires that similarly situated individuals be treated in a similar manner and precludes different treatment to different classes on the basis of criteria wholly unrelated to the purpose of the legislation. *Id*. Whether a rational basis exists for a classification presents a question of law. *Id* at 323. In examining a statute's constitutional validity, this Court must consider whether classification within the statute is based on a rational difference between members of a class similarly situated. *Bilyk,* 125 Ill.2d at 236 citing *Ill. Polygraph Society v. Pellicano,* 83 Ill. 2d 130 (1980). The Court must also consider whether the statute is rationally related to a legitimate state interest. *Id.*

A grant of immunity is not a fundamental right, it is a legislatively-created and statutorily-conferred benefit bestowed upon a class, the constitutionality of which is dependent upon a finding that such benefit advances a legitimate State purpose. *McMichael*, 259 Ill. App. 3d at 118. If a rational purpose for the statute and/or the special classification

ceases to exist, the legislature is not only free to eliminate the gratuitously conferred benefit, it may be constitutionally mandated to do so. *Id.* at 119.

In Illinois, when what is at issue is the ability to recover for civil wrongs, rationality must be examined from the perspective of the injured parties. *Harvey v. Clyde Park Dist.*, 32 Ill.2d 60 (1964). Is there a rational basis for barring an injured person from recovering from one entity as opposed to another? The Supreme Court discussed this rule thoroughly in *Harvey*. *Id.*

In *Harvey*, the Court struck down an immunity statute, § 12.1 of the Park District Code, which provided that any park district should not be liable to any injuries to person or property for any negligence caused by the operation of the property or the equipment of the park district. *Id.* In holding this statute unconstitutional, the Supreme Court determined that there was no rational basis for barring an injured party from recovering from a park district when the injured party can recover from a city or village. *Id.* The Supreme Court's reasoned

> Many of the activities that frequently give rise to liability are common to all governmental units. The operation of automobiles is an obvious example. From the perspective of the injured party ... there is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover…And the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of [then] section 22 of article IV. *Id* at 65.

Harvey is controlling here. *Id.* From the standpoint of the injured patient, there is *nothing* to distinguish Union Health from any other non-for-profit health care organization that is not owned by a hospital. From the standpoint of the injured party, Union Health is an insured healthcare organization that provides direct healthcare and healthcare referrals to contracted entities, hospitals and providers. The arbitrary inclusion of the 1965 cut-off date

is not rationally related to the state interest and is a clear violation of the equal protection clause.

As no clues to any rational basis for the condition of the amendment, incorporation prior to 1965, exist within the plain language of the amendment, the legislative history must be examined. The only basis given by the legislature for Union Health's special classification over Anchor Organization for Health Maintenance and Michael Reese Health Plan was the employment status of its physicians. In response to Senator Barkhausens' well-founded concerns about special legislation, Senator Jones responded as follows:

> the hospitals that this immunity is being taken away from, they .... the doctors that work for the hospitals are employees as such. There would be one that you're speaking of that we did not take away [UNION HEALTH] is just a service organization, but the provisions in this piece of legislation .... is good. It takes care of the problem that we have as it related to HMO's.
>
> lll. Gen. Assemb., Senate Report, at 160-161. (C 1101 -09 V2).

The reason given is that the doctors work for the hospital. *Id*. However, no rational is given for the arbitrary 1965 cut-off date, the effect of which eliminated any other organization from retaining immunity. Moreover, in the years since the amendment, Senator Jones' rationalization for granting special immunity to Union Health have further eroded. (C 1101-09 V2). Union Health directly employs many of its physicians, contracts with independent physicians and has itself become an independent contractor of Illinois' largest Physician Hospital Organization, Advocate. In this case, Union Health directly employs and insures Defendants, Dr. Agnieszka Brukasz and Dr. Fakhryddin Adamji. (C1110-20 V2). Further, it procures services from others through its affiliation with Advocate. (C1110-20 V2). As such, in 2016, Senator's Jones' rationalization as to why only Union Health should be left immune from liability no longer holds water as the Union

Health doctors work closely with hospital systems, such as Advocate. (C 1101-09 V2).

It is well established that there is no rational basis for limiting a plaintiff's right to recover where the classification is not based upon a real functional difference, but a nominal difference only. *Grasse v. Dealer's Transport Co.* (1952), 412 Ill. 179, 196-99, *People ex rel. East Side Levee and Sanitary Dist. v. Madison Cnty. Levee and Sanitary Dist.*, 54 Ill.2d 442, 447 (1973). As it stands today, there is no functional difference between Union Health and other health care organizations, they were similarly functioning voluntary health service plans. *McMichael*, 259 Ill. App. at 119. The only nominal difference is the year of incorporation. And the legislative record reflects no significance whatsoever to the January 1, 1965 cut-off date. The Illinois Supreme Court has expressly held such arbitrary cut-off dates are unconstitutional. *Wright v. Central DuPage Hospital Ass'n*, 62 Ill.2d 313 (1976). In *Wright*, the Court found a statutory provision which regulated malpractice insurance rates on policies prior to June 10, 1975 but not afterwards as arbitrary and not related to a legitimate state purpose. *Id*. at 331. The Court held that it was an unconstitutional special law and a denial of equal protection. *Id*. The Courts do not uphold artificial classifications that do not bear any connection to a legitimate state purpose. *Id*. *Bilyk v. Chi. Transit Auth.*, 125 Ill. 2d 230 (1988). Similarly, this arbitrary and artificial cut-off date does not bear any connection to a legitimate state purpose.

II. Alternatively, The Immunity Granted Exclusively to Union Health is Unconstitutional as Applied to Union Health.

In the alternative, the immunity granted by VHSPA to Union Health is constitutionally invalid because Union Health no longer continues to adhere to the original concept of the VHSPA.

A. Union Health Acts like any other Health Maintenance Organization Which Reflects a Deviation From its Original Purpose.

The purpose of creating the VHSPA was based on the "unique function" of the organization as both an insurer and a health care provider. *Brown,* 150 Ill. App. 3d at 961-62. While, the dual status of a corporation functioning as a HMO and VHSP does "not preclude the operation of the immunity provision;" however, with the certification of Union Health as a HMO, the distinction between Union Health as a VHSP and as a HMO has become blurred. *Moshe,* 199 Ill. App. 3d at 594.

HMOs and VHSPs share a common form and function. 215 ILCS 125; 215 ILCS 165. HMOs, like VHSPs, function as both an insurer and health care provider. 215 ILCS 125/1-2. 215 ILCS 165/2. Under the HMO Act, a "health care plan" means "any arraignment whereby any organization undertakes to **provide or arrange** for and pay for or reimburse the cost of basic health care services." 215 ILCS 125/1-2(7)(emphasis added). Under the VHSPA, a "voluntary health service plan" means "a plan or system under which medical, hospital, nursing and relating health services may be rendered to a subscriber or beneficiary at the expense of a health service plan corporation, or any contractual arrangement." 215 ILCS 165/2(b). *Moshe*, 199 Ill. App. 3d at 595 (functioning as both insurer and provider). Moreover, HMOs, like VHSPs, are governed by the specific legislative requirements of the Illinois Insurance Code. 215 ILCS 125/1-2. 215 ILCS 165/2.

At their essence, a HMO and a VHSP is an organization that provides or arranges for healthcare and acts as a liaison between the individual and the health care provider. Thus, the "unique function" of VHSP, such as Union Health, as articulated in *Brown*, has become nonexistent. *Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959 (1st Dist. 1986). These corporations are beginning to look like any other HMOs. *Am. Nat'l*

Bank & Trust Co. of Chicago v. Anchor Organization for Health Maintenance, 210 Ill. App. 3d 418 (1st Dist. 1991). The only real difference between VHSPA and HMO Act is the immunity clause. *McMichael*, 259 Ill. App. 3d at 118. A corporation falling within the category of VHSPA, only Union Health, is entitled to immunity from liability, but HMOs, also including Union Health, are not. *Id*. In fact, it seems as though the purpose for the enactment of the 1988 Amendment was to "take care of the problem that we have relating to HMO's." Ill. Gen. Assem., Senate Proceedings. (C 1101-09 V2). As the statute exists today, the distinction between VHSPA and HMO Act are convoluted at best and whatever "problem" the legislature wanted to "take care of" has not been addressed. (C 1101-09 V2).

The Appellate Court in *American National* commented on this merging of "duties, obligations and requirements" under VHSP and HMO. *Am. Nat'l*, 210 Ill. App. 3d at 426. In that case, the court noted "the Act [VHSPA] was originally devised so that an employer or union could provide an improved health services program." *Id*. at 425. The Court reasoned that it was "logical to provide voluntary health service plans with immunity" since the corporation "acted as insurers." *Id*. at 426. However, since becoming certified as an HMO, Anchor was "able to market its programs directly to employers in the Chicago area and present information to employees about the advantages of its health plan, particularly its affiliation with the medical center." *Id*. The Court held that "the 'persona' of the voluntary health service plans began to dissipate and the distinction between a health services plan and an HMO became less apparent." *Id*. Thus, the Court in *American National* stated "it would be fundamentally unfair and an unconstitutional unequal treatment to allow Anchor to rely upon its VHSPA charter to be insulated from liability" because "Anchor was acting in the same capacity as any other HMO." *Id.*

Just like Anchor, Union Health began to merge and dissipate the distinction between its "duties, obligations and requirements" as a VHSP and a HMO. *Id*. *McMichae*l, 259 Ill. App. 3d at 116. On its website, Union Health markets itself to employers and employees. (C 1162-79 V2). Of course, the goal of any health service plan organization is to advertise and present information so that employers and employees will take advantage of the plan. However, Union Health emphasizes that its organization fits into several categories of health care plan, such as "a Voluntary Health Services Plans Corporation; a multi-specialty medical group; a not-for-profit health plan, or a staff-model managed care plan." (C 1162-79 V2). Union Health also markets to itself as a Health Maintenance Organization (HMO). (C 1162-79 V2). Union Health holds many hats. Union Health's duties, obligations and requirements necessarily must merge and blur in order to fulfill all of its requirements as a VHSP and HMO. The difference between Union health as a VHSP and a HMO has eroded so that it no longer has a unique structure. *Id*.

B. Union Health is Effectively Controlled by Advocate Which Reflects a Deviation from Its Original Purpose.

One of the basic principles of Union Health's compliance with VHSPA include not being owned or controlled by any hospital. The VHSPA makes it clear that

> such a corporation shall impose no restrictions on the physicians […]who treat its subscribers as to methods of diagnosis or treatment. The private physician-patient relationship shall be maintained, and subscribers shall at all times have free choice of any physician […] 215 ILCS 165/7.

However, Union Health has deviated from this principle. Union Health directly employs many of its physicians, contracts with independent physicians and has itself become an independent contractor of Illinois' largest Physician Hospital Organization, Advocate. (C 1110-20 V2; C 1033 V2; C 1156-61 V2) In this case, Union Health directly

employs and insures Defendants Dr. Agnieszka Brukasz and Dr. Fakhruddin Adamji. (C1121-61 V2). Moreover, in the agreement between Union Health and its medical staff, Union Health retains controls over these doctors. (C1121-61 V2). Article XXI—Management Rights of the Agreement reads as follows:

> The management of Union Health Service and the direction of physicians, including the right to plan, direct and control operations, hire, suspend or discharge for proper cause […] the right to study or introduce new or improved health care delivery methods or facilities […] are vested in the Employer. (C 1110-20 V2).

Union Health has given itself the "right to plan, direct and control operations" in relation to its healthcare operations. (C 1156-61 V2). Neither the doctor nor the patient retains this right to free choice relating to health care; that right is left to Union Health. Not only does Union Health retain control of its employees, such as Dr. Brukasz and Dr. Adamji, but also these employee doctors procure services from other physicians through Union Health's affiliations, including its affiliation with Advocate. (C 1121-61 V2). Therefore, a patient must see Union Health employed doctor for all initial needs. These Union Health employed doctor can then refer patients to other "in network" doctors which Union Health referral and affiliation system dictates. This system is strikingly similar to that employed by all other HMOs.

Moreover, Union Health has executed service agreements with both Advocate Medical Group and Advocate Illinois Masonic. (C 1121-61 V2). As evidenced by the service provider agreements between Union Health and Advocate Illinois Masonic, the corporation is incentivized to send patients to Advocate for hospital care based on their agreed upon cost structure. (C 1121-61 V2). For example, the stop-loss outlined in the agreement reimburses Union Health 60.6% of total charges when the expenses

are $87,828 or more. (C 1121-61 V2). The higher the medical costs, the more likely it is that Union Health will send the patient to Advocate. This incentive program gives the hospital control over how Union Health operates because Union Health is rewarded for referring business to Advocate. (C 1121-61 V2). In this way, Union Health acts similarly to the other hundreds of Advocate contractors.

Union Health no longer exhibits the "unique" organization structure worthy of special protection. Instead, it is merely functions as another health organization with ties to the Advocate health network. *Am. Nat'l*, 210 Ill. App. at 426.

C. Union Health Purchase of Liability Insurance Reflects a Deviation from Its Original Purpose.

In September 2014, Union Health purchased a professionally liability policy issued by ISMIE Mutual Insurance Company. (C 1110-20 V2). The policy has a retroactive date of July 1, 1986, meaning it covers claims made against Union Health for incidents that occurred from that date forward, including the incident at issue. (C 1110-20 V2).

Courts have historically limited seemingly absolute common law immunities pursuant to the waiver of immunity doctrine, holding immunities are not absolute where insurance covers damages. There are three Illinois Supreme Court and Appellate Court cases that state very explicitly that tort immunity for a not-for-profit entity should be waived as a matter of public policy when that entity has purchased and is protected by liability insurance. *Moore v. Moyle,* 405 Ill. 555 (1950). *Wendt v. Servite Fathers,* 332 Ill. App. 618 (1st Dist. 1947). *Beach v. City of Springfield*, 32 Ill. App. 2d 256 (3d Dist. 1961). These cases establish that unless otherwise outlined in the statute there is a waiver of immunity to the extent that liability insurance exists.

The reasoning underlying the body of case law abrogating immunity to the extent that the immunized entity is covered by liability insurance is well-explained in *Beach v. City of Springfield,* 32 Ill. App. 2d 256 (3d Dist. 1961):

> The heart of each of these cases is not founded on a refinement of old decisions but upon the practical proposition that the loss will be sustained by an insurance carrier who accepted the burden of indemnifying the public body and who in return received good and valuable consideration for accepting the risk. It is ludicrous to contend that anyone can enter into an indemnifying contract and then refuse to fulfill the contract against the injured party, contending in substance that there is no basis for the suit for there was no risk to be insured. If a public body is immune for its negligent acts and it sees fit to purchase liability insurance using public funds and an insurance carrier sees fit to accept such public funds where under the law such insurance is not essential to prevent the misappropriation of public funds for such tortuous acts, it would then appear that the insurance carrier should not be able to hide behind the curtain of immunity.

The drafters of VHSPA failed to include any express clause or amendment to the Act ensuring Union Health's immunity regardless of the purchase of liability insurance. 215 ILCS 165. As such, it is unusual, at best, that Union Health purchased insurance yet still hides behind the curtain of immunity.

A basic principle of statutory construction holds that a court will not read into a statute exceptions, limitations, or conditions that the legislature did not express. *Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 184-85 (1999). Had the Illinois Legislature intended to include in the VHSPA or the 1988 amendment a statement about the right of Union Health to invoke immunity, it would surely have done so. It did not. Thus, Union Health should not be allowed to hide behind the curtain of immunity when it has taken active steps to acquire insurance.

Alternatively, if the purchase of insurance policy does not, in it of itself, constitute a waiver of its statutory immunity, it shows that Union Health is once again deviating from

its original function and acting more like a HMO than a VHSP. The purpose of the immunity provision of VHSPA is to provide the recipients benefits, such as reducing costs, based on the health care providers "unique function" as both "insurer and health care provider." *Brown*, 150 Ill. App. 3d at 962. If that is the case, the purchase of insurance, retroactive to 1986 frustrates the purpose of providing recipients with such unique benefits, such as reduced costs. Moreover, immunity is unique to VHSPs, not HMOs. In fact, the court has made it clear that HMOs do not enjoy the benefits of immunity. *Moshe*, 199 Ill. App. 3d 585 at 597-98. The purchase of liability insurance further shows that Union Health is acting more like an HMO than a VHSP; another further example of the blurring of the crucial distinction.

CONCLUSION

Wherefore, the Plaintiff-Appellee, Sarahi Vasquez Gonzalez, as Administrator to the Estate of Rodolfo Chavez Lopez, aka Juan Aguilar, requests that this Honorable Court enter a judgment declaring the 1988 amendment to 215 ILCS 165/26 unconstitutional and remand the case to the trial court with instructions to deny the Defendant's, Union Health Services, Inc., motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

/s/ Nicholas V. Loizzi
Nicholas V. Loizzi

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

SARAHI VASQUEZ GONAZALEZ, as Administrator of the Estate of RODOLFO CHAVEZ LOPEZ a/k/a JUAN AGUILAR, deceased,	)	
Plaintiff-Appellee,	)	
v.	)	No. 123025
UNION HEALTH SERVICES, INC.,	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on May 4, 2018, there was electronically filed and served upon the Clerk of the above court the Brief of Plaintiff-Appellee and that on the same day, a pdf of same was e-mailed to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the Brief of Plaintiff-Appellee bearing the court's file-stamp.

/s/ Nicholas V. Loizzi
Nicholas V. Loizzi

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

E-FILED
5/4/2018 11:59 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

/s/ Nicholas V. Loizzi
Nicholas V. Loizzi

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