No. 123025

In the Supreme Court of Illinois

SARAHI VASQUEZ GONZALEZ, as Administrator of the Estate of RODOLFO CHAVEZ LOPEZ, aka JUAN AGUILAR, deceased,

Plaintiff-Appellee,

v.

UNION HEALTH SERVICE, INC.,

Defendant-Appellant,

and

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 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 HOSPITALS CORPORATION d/b/a ADVOCATE MEDICAL GROUP,

Defendants.

On 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 AND APPENDIX OF DEFENDANT-APPELLANT UNION HEALTH SERVICE, INC.

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

The appeal in this medical negligence case arises from the trial court's Memorandum Opinion and Order holding that the 1988 Amendment of the immunity provision of the Voluntary Health Services Plans Act ("the Act" or "the Voluntary Act"), 215 ILCS 165/26 (West 2014), constitutes special legislation in violation of the Illinois Constitution and violates the equal protection provisions of both the Illinois and the United States Constitutions. Based upon the trial court's constitutional analysis and finding of invalidity of the immunity provision, the court denied the Section 2-619(a)(9) motion to dismiss of this defendant, a health services plan corporation that is immune from civil liability for injuries resulting from claims of medical malpractice.

ISSUES PRESENTED FOR REVIEW

1. Whether the immunity provision in the Voluntary Act passes constitutional muster, where a rational basis exists for granting immunity to health services plan corporations such as this defendant and for enacting the classifications included in the amended provision.

2. Whether defendant is entitled to the protection of the immunity provision where it meets the requirements for immunity under the amended provision and adheres to the traditional voluntary health services plan model.

JURISDICTION

This Court may exercise jurisdiction over the trial court's Memorandum Opinion and Order (C 1351-77 V3) pursuant to Supreme Court Rule 302(a) and the Court's supervisory authority. The trial court filed its order on November 2, 2017 (C 1351-77 V3), and the defendant, Union Health Service, Inc. ("Union Health") filed its Notice of Direct Appeal on December 1, 2017. (C 1439-40 V3.) In its Memorandum Opinion and

Order, the trial court determined that the 1988 Amendment to the Voluntary Health Services Plans Act is unconstitutional special legislation and violates the United States and Illinois Constitutions. (U.S. Const. art. IV, § 1; U.S. Const. amend. XIV; Ill. Const. 1970, art. IV, § 13.) Solely on that basis, the trial court denied the defendant's motion to dismiss.

Notwithstanding the finality aspect of Rule 302(a), this Court has exercised its direct appeal jurisdiction in cases involving non-final orders where a trial court has determined that an Illinois statute is invalid. See, *e.g.*, *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005); *Desnick v. Department of Professional Regulation*, 171 Ill. 2d 510 (1996); *Garcia v. Tully*, 72 Ill. 2d 1 (1978). Union Health respectfully submits that this case presents an appropriate occasion for the exercise of the Court's supervisory authority to review the trial court's determination that the immunity provision of the Voluntary Act is unconstitutional. Prompt review will foster stability of the statutory framework under the Act.

STATUTES INVOLVED

215 ILCS 165/26 [No liability for negligence, malpractice, etc.]

> "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 (West 2014).

STATEMENT OF FACTS

Union Health appeals the trial court's Memorandum Opinion and Order declaring the amended immunity provision of the Voluntary Health Services Plans Act

unconstitutional. Union Health asserted the protection of the statute in a motion to dismiss plaintiff's complaint pursuant to 735 ILCS 5/2-619(a)(9) (West 2016). Plaintiff filed a 24-count complaint under the Wrongful Death and Survival Acts against Union Health, Advocate North Side Health Network d/b/a Advocate Illinois Masonic Medical Center and several physicians, physician groups and nurses, arising out of the death of plaintiff's decedent. In plaintiff's complaint for medical malpractice, she alleges that Union Health, through its agents and employees, negligently cleared plaintiff's decedent for a surgical biopsy subsequently performed at Illinois Masonic. (C 1234-38 V2.)

Union Health, a nonprofit corporation, received its charter to operate as a health services plan corporation on December 1, 1952. (C 319, 321.) Since that time, Union Health has served union members and their families, primarily the Service Employees International Union ("S.E.I.U."), by offering economically priced healthcare plans through the charter granted to it by the Illinois Department of Insurance. (C 319; C 1289-90 V3.) Pursuant to the Act, Union Health provides medical services to plan members and beneficiaries through Union Health's own employees and pursuant to contracts with hospitals to provide its members access to medical care and services not available directly from Union Health. (C 1291 V3.) Union Health provided healthcare services to the decedent, Juan Aguilar, through a voluntary health services plan. (C 319.)

Union Health moved to dismiss the two counts against it pursuant to the immunity conferred upon it by Section 26 of the Act.

Plaintiff did not contest the substantive applicability of the immunity provision. Rather, plaintiff responded to the motion to dismiss by claiming that Union Health waived its statutory immunity by purchasing liability insurance. (C 1023-24 V2.) Plaintiff

also claimed that the amended immunity provision constituted special legislation and violated the equal protection clause of the Illinois and Federal Constitutions. (C 1015-36 V2.)

In its reply, Union Health submitted unchallenged affidavits to support the application of the immunity provision and adherence to the letter and spirit of the Act. (C 317-20; C 1286-93 V3.) Union Health argued that plaintiff, who relied on a litany of factual errors, misstatements of the applicable case law and a vacated Cook County Circuit Court memorandum opinion, failed to carry its substantial burden in challenging the immunity provision's constitutionality. (C 1269-83 V3.)

Without hearing oral argument, the trial court issued a Memorandum Opinion and Order denying Union Health's motion to dismiss and declaring Section 26 of the Act unconstitutional, both facially and as applied to Union Health. (C 1357-77 V3.) The trial court also held that Union Health did not waive its statutorily-conferred immunity by purchasing liability insurance. (C 1355-57 V3.)

The trial court reasoned that the legislature, in its 1988 amendment of the immunity provision, arbitrarily defined a class to which only Union Health belonged in granting immunity; thus, the immunity provision constituted special legislation. (C 1372-74 V3.) As applied to Union Health, the trial court found that this defendant no longer functions in the capacity of a health services plan corporation envisioned by the General Assembly at the time of the statute's enactment in 1951; thus, according to the trial court, no rational basis exists for immunizing Union Health from medical malpractice actions. (C 1374-77 V3.)

ARGUMENT

Through the Voluntary Health Services Plans Act, the legislature created a unique healthcare delivery system that primarily serves union members and their beneficiaries. See *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill. App. 3d 113, 116-17 (1st Dist. 1994). As both insurer and healthcare provider, health services plan corporations are positioned to provide their subscribers with customized healthcare benefits at lower costs than other providers. As part of a legislative recognition of the need to improve healthcare options for union families struggling to afford good quality healthcare, the General Assembly provided immunity from civil liability to health services plan corporations. The appellate court has repeatedly upheld the immunity provision as constitutional. See, *e.g., Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959, 962 (1st Dist. 1986); *Moshe v. Anchor Organization for Health Maintenance*, 199 Ill. App. 3d 585, 595-96 (1st Dist. 1990).

Plaintiff challenged the 1988 amendment, which eliminated the immunity conferred upon two health services plan corporations that had deviated from the original concept envisioned by the legislature. Misconstruing even the fundamental question of the entities impacted by the amendment, plaintiff claimed it constituted special legislation and an equal protection violation.

In declaring the Act's amended immunity provision unconstitutional, the trial court improperly shifted the burden, which should have rested with the legislation's challenger to rebut the presumption of constitutionality. Instead, the trial court required the legislation's defender to prove the wisdom of the statute. The trial court also relied on the plaintiff's demonstrably erroneous representations about Union Health and other

health services plan corporations and misconstrued the unrebutted affidavits proffered by Union Health. As the appellate court has held, a rational basis exists for protecting health services plan corporations from liability. Union Health continues to conform to the unique organizational structure of the Act and, therefore, falls within the protection of the Act's immunity provision.

Because Union Health appeals an order declaring an Illinois statute unconstitutional, this Court's review is *de novo. Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 234 (2005). All statutes have "a strong presumption of constitutionality," and the party challenging the constitutionality of the legislative enactment bears a substantial burden of clearly rebutting the presumption. *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 148 (2006); see also *Big Sky*, 217 Ill. 2d at 234. A court must "uphold the constitutionality of a statute if it is reasonably possible to do so." *Big Sky*, 217 Ill. 2d at 234 (citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004)).

Plaintiff's special legislation and equal protection challenges both rely on the rational basis test; that is, whether the classification in the amended immunity provision bears a rational relationship to a legitimate state interest. See *Cutinello v. Whitley*, 161 Ill. 2d 409, 417-18 (1994). A reviewing court "must determine whether the statutory classification at issue discriminates in favor of a select group and, if so, whether the classification is arbitrary." *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 325 (2005). A court should not question—as the trial court did here—whether a statute adopted by the General Assembly is "wise," or whether the legislature has enacted a law constituting

good public policy. See *id*. at 332 (quoting *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003)). Those questions are for the legislature, not the judiciary.

I. The Appellate Court Has Held That a Rational Basis Existed for Granting Health Services Plan Corporations Immunity, a Basis That Remains Constitutionally Sound Today.

Recognizing the unique function voluntary health services plans play in the delivery of affordable healthcare services to Illinois citizens, the First District has upheld the constitutionality of the legislature's original grant of immunity under the Act. See *Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959, 961-62 (1st Dist. 1986). In *Brown*, the First District held that the "unique organizational structure and regulation of the voluntary health services plan corporation provides a rational basis" for reducing costs through the Act's immunity provision. *Id.* at 962.

Here, plaintiff did not challenge the constitutionality of the Act's original immunity provision, and the trial court did not address it.[1] Nothing has changed in the Act or in Union Health's organization or operations to eliminate the rational basis that the appellate court in *Brown* correctly determined existed for providing health services plan corporations immunity from negligence actions.

In its constitutional analysis, the appellate court in *Brown* considered significant the qualifications with which an entity must strictly comply to obtain statutory immunity. See *id*. at 961-62. A voluntary health services plan consists of a plan or system through

[1] As Union Health noted in its reply in support of its motion to dismiss, plaintiff did not address whether the original grant of immunity is unconstitutional as applied to Union Health. (C 1282 V3.) Union Health argued that the effect of a ruling declaring the amended version of Section 26 unconstitutional would be "to revert the statute as it existed before the amendment." See *Cookson v. Price*, 237 Ill. 2d 339, 341-42 (2010). The trial court did not directly address the original version of the immunity provision in its Memorandum Opinion and Order and concluded with the specific finding that the 1988 Amendment to Section 26 is unconstitutional. (C 1377 V3.)

which subscribers and their beneficiaries receive medical, hospital, nursing and other healthcare services at the expense of the health services plan corporation. 215 ILCS 165/1(b) (West 2014). To qualify as a health services plan corporation, among other requirements, the organization must operate as a not-for-profit business, *id*. § 27, and its statutorily-defined board of trustees must consist of at least thirty percent physicians licensed to practice in Illinois. *Id*. § 5. The Department of Insurance ("Department") regulates and oversees the operations and compliance of health services plan corporations. *Id*. § 4. The Act restricts the amount a corporation may spend for advertising and administrative expenses. *Id*. §§ 18-19. The Act also prohibits a health services plan corporation from controlling or restricting physicians' diagnosis and treatment of subscribers and preserves the private physician-patient relationship. *Id*. § 7.

Based on these statutory provisions, the appellate court in *Brown* concluded that, through the Act, the legislature had created a distinct type of healthcare provider. The court observed that health services plan corporations "serve the unique function of both insurer and health care provider." *Brown*, 150 Ill. App. 3d at 961-62. Thus, a health services plan corporation's particular function and organization, under the Department's regulation and oversight, justified the statutory grant of immunity. *Id.*

Since *Brown*, the appellate court repeatedly has upheld the constitutionality of granting immunity to health services plan corporations. See *Moshe v. Anchor Organization for Health Maintenance,* 199 Ill. App. 3d 585, 595-96 (1st Dist. 1990); *American National Bank & Trust Co. of Chicago v. Anchor Organization for Health Maintenance,* 210 Ill. App. 3d 418, 425-26 (1st Dist. 1991); *Jolly v. Michael Reese Health Plan Foundation*, 225 Ill. App. 3d 126, 130 (1st Dist. 1992); *McMichael v.*

Michael Reese Health Plan Foundation, 259 Ill. App. 3d 113, 116-17 (1st Dist. 1994). In its most recent published opinion addressing the constitutionality of the Act, the appellate court recognized the genesis of voluntary health services plan corporations: improving the health and welfare benefits of union members and their families. *McMichael*, 259 Ill. App. 3d at 116-17. To further this goal, health services plans furnish a framework for indemnifying their subscribers and providing quality healthcare services at more affordable rates than other medical insurance offerings. *Id.*

A. Union Health's conformity to the Act's original concept justifies its continued immunity under the 1988 amendment.

The organizational structure and regulation of voluntary health services plans created by the Act has not changed since the 1986 *Brown* decision; thus, Union Health's continued adherence to both the letter and spirit of the Act warrants continued immunity. Since receiving its Voluntary Act charter on December 1, 1952, Union Health has primarily served union members and their families through arrangements with the Service Employees International Union, Local 1 Health Fund, and Local 25 S.E.I.U. Welfare Fund. (C 1289-90 V3.) In this case, Union Health provided medical care and treatment to the decedent, who was a member of S.E.I.U. Local 1, in Union Health's capacity as a voluntary health services plan offered through the Local 25 S.E.I.U. Welfare Fund. (C 1290 V3.)

In its role as insurer, Union Health contracts with healthcare providers and hospitals to provide its subscribers access to medical care and services not available at Union Health at a reasonable cost. (C 1291-92 V3.) Union Health contracted with Advocate Illinois Masonic Medical Center to provide Mr. Aguilar hospital services such as the biopsy that is the subject of the care at issue. (C 1206-10 V2; C 1292 V3.) As a

direct provider of medical care, Union Health operates a medical facility in Chicago, Illinois where it provides various healthcare services. (C 925 V2.) Mr. Aguilar also received treatment at Union Health's Chicago facility pursuant to the voluntary health services plan offered through his union. (C 935-37 V2.)

Union Health has complied, and continues to comply, with all of the organizational and functional requirements of the Act. Union Health operates on a non-profit basis. (C 1290 V3.) The board of trustees that manages Union Health's business and affairs is comprised of the statutory minimum seven members, thirty percent of whom are licensed physicians. (C 1290 V3.) The Department of Insurance has never revoked Union Health's charter or issued a corrective order to Union Health. (C 1289 V3.) Union Health's compliance with the Act's organizational and regulatory requirements, which have remained largely unchanged since the Act's adoption, warrants the protection of the Act's immunity provision.

B. The legislature's intent behind the amendment comports with the rational basis for originally granting health services plan corporations immunity.

Although Union Health opted to concentrate on voluntary health services plan business, not all entities incorporated under the Act took the same approach with their business models. As both the General Assembly and the appellate court have observed, certain voluntary health services plans deviated from the original concept of the Act and functioned more like health maintenance organizations ("HMOs") concentrating on a different segment of the marketplace. See, *e.g.*, *American National*, 210 Ill. App. 3d at 426; see also 85th Gen. Assem., Senate Proceedings, June 30, 1988, at 159-61. As a result, the legislature determined that certain entities chartered under the Voluntary Act

no longer deserved immunity. See *Moshe*, 199 Ill. App. 3d at 596-98. Consequently, the legislature amended Section 26 of the Act to eliminate the immunity for hospital-controlled entitles that no longer conformed to the original concept of the Act:

> "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 (West 2014) (amended by Pub. Act 85-1246); see also 85th Gen. Assem., Senate Proceedings, June 30, 1988, at 159-61.

Through this amendment, the legislature sought to preserve the immunity Union Health had under the Act since receiving its charter, because Union Health is "just a service organization." 85th Gen. Assem., Senate Proceedings, June 30, 1988, at 161 (statements of Senator Jones). Relying on the Senate debates, in *Moshe*, the First District found that the 1988 amendments to the Act manifested "a clear legislative intent" to bring the HMOs originally chartered under the Act, but which subsequently operated in a manner that deviated from the Act's original concept, into conformity with the potential malpractice liability of other Illinois HMOs. *Moshe*, 199 Ill. App. 3d at 597-98. The 1988 amendments required corporations subsequently chartered under the Act to obtain an HMO certificate and eliminated the statutory immunity for HMOs already organized under the Act, "with the single exception of a union-based service plan which still conformed to the Act's original concept."[2] *Id.* Thus, the 1988 amendments repealed the immunity only for certain HMOs—Michael Reese Health Plan and Anchor Organization

[2] Both plaintiff and the trial court misread the statute. (C 1017 V2; C 1360 V3.) The legislature amended the Act to require any entity *applying* for a Voluntary Act charter to also hold a certificate of authority under the HMO Act. 215 ILCS 165/8 (West 2014) (amended by Pub. Act 85-1246).

for Health Maintenance ("Anchor"). *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill. App. 3d 113, 118 n. 1 (1st Dist. 1994). The 1988 amendments also preserved immunity for at least two other voluntary health services plans that did not hold an HMO certification—Sidney Hillman Health Centre and Union Medical Center. See *id.* at 117. (C 1289 V3.) The legislature's actions—eliminating immunity for hospital-controlled HMOs while preserving it for those entities continuing to provide medical care for union members through health services plans—are consistent with the rational basis for the original grant of immunity from malpractice liability.

C. Omissions and erroneous representations formed the basis of plaintiff's constitutional challenge.

Misconstruing the legislative history in the trial court, plaintiff repeatedly, and incorrectly, argued the 1988 amendment singled out Union Health for immunity. (C 1017, 1018, 1025, 1027, 1029 V2.) This statement is incorrect. Rather, the legislature removed the statutory benefit from those entities no longer conforming to the Act's original concept of a voluntary health services plan—Anchor and Michael Reese—and preserved immunity for those that did—Union Health, Sidney Hillman Health Centre and Union Medical Center. (C 1289 V3); see *McMichael*, 259 Ill. App. 3d at 117, 118 n.1. The General Assembly thus did not unconstitutionally confer a "special benefit" on Union Health to the detriment of anyone similarly situated. See *Big Sky*, 217 Ill. 2d at 236 (holding that a law may provide a special benefit or privilege to a group—even a class of one—as long as similarly situated entities are not denied the benefits of the legislation). Instead, the legislature preserved the immunity for those entities continuing to operate as health services plan corporations, in the manner envisioned by the General Assembly at the time of the statute's enactment. In so doing, the legislature satisfied the constitutional

mandate plaintiff claimed it failed to fulfill (C 1029-36 V2): the legislature recognized that the reason for granting Anchor and Michael Reese immunity ceased to exist and therefore eliminated the statutorily-conferred benefit. See *McMichael*, 259 Ill. App. 3d at 118-19.

As a result of plaintiff's erroneous representations that only Union Health benefited from the 1988 amendment, the trial court failed to consider the legislature's reasonable distinction between the two classes of entities. Unsupported by any evidence in the record, the trial court concluded that the legislative history could not reasonably be construed to suggest that Union Health was the only health services plan corporation operating as a "service organization," because both Sidney Hillman Health Centre and Union Medical had both Voluntary Act charters and HMO certificates. (C 1373 V3.) Nothing in the record suggests that Sidney Hillman Health Centre and Union Medical also hold HMO certificates; in fact, they do not. See *McMichael*, 259 Ill. App. 3d at 118 n.1 (observing that only three voluntary health services plans had HMO certificates at the time of the 1988 amendment: Anchor, Michael Reese and Union Health).

The Senate debate demonstrates that the legislature considered that only three voluntary health services plans, Union Health, Michael Reese, and Anchor, also held HMO certificates. The General Assembly concluded that Union Health properly belonged with the class that adhered to the original concept of the Act—Sidney Hillman Health Centre and Union Medical. See 85th Gen. Assem., Senate Proceedings, June 30, 1988, at 159-61; see also *McMichael*, 259 Ill. App. 3d at 117-18. The appellate court has reviewed the legislative history and found a rational basis for the legislation. See *McMichael*, 259 Ill. App. 3d at 116-18; *Moshe*, 199 Ill. App. 3d at 595-98.

In *McMichael*, the appellate court determined from the Senate debate that the General Assembly saw fit to repeal the immunity for two "hospital-controlled" HMOs, but keep intact immunity for Union Health, a "service organization." See *McMichael*, 259 Ill. App. 3d at 118, n.1; see also *Moshe*, 199 Ill. App. 3d at 596-98. Thus, the impetus for the legislature's actions was eliminating the immunity for the entities that no longer conformed to the basic tenets of the Act. See 85th Gen. Assem., Senate Proceedings, June 30, 1988, at 160 (statements of Senator Jones) (indicating that Union Health's status as a non-profit organization not owned by a hospital warranted continued immunity under the Act).

Plaintiff also erroneously represented to the trial court that the appellate court had never addressed the constitutionality of the 1988 amendment. (C 1018 V2.) To the contrary, when presented squarely with the issue of Union Health's immunity under the Act, the First District rejected the very equal protection and special legislation challenges plaintiff asserted below. See *Waddicar v. Union Health Service, Inc.*, No. 1-95-3715 (1st Dist. May 11, 1998).[3] Citing *Moshe*, the First District found that the Senate debate demonstrated the purpose of the amendment: to remove immunity from organizations with a voluntary health services plan charter operating as hospital-controlled HMOs. *Id.* at 6 (citing *Moshe*, 199 Ill. App. 3d at 596-98). The appellate court emphasized the distinction articulated by Senator Jones: that Union Health, as "just a service organization," would retain its immunity as a not-for-profit entity not controlled by a hospital. *Waddicar*, No. 1-95-3715, at 6. Accordingly, the appellate court held that Union

[3] In declaring the amended immunity provision unconstitutional, the trial court did not address the appellate court's decision in *Waddicar*. (C 1351-77 V3.)

Health adhered to the original concept of the Act and that a legitimate state purpose existed for endowing Union Health with immunity. *Id.* at 7-8. In the First District's view, Union Health's "continuing existence as both a service provider and an insurer provide[d] the set of facts which would render the amended law constitutional." *Id.* at 8. As in this case, the plaintiff in *Waddicar* failed to establish the unreasonableness of the General Assembly's amendment. See *id.* at 7-8.[4]

D. A health services plan corporation such as Union Health provides healthcare services customized for the benefit packages of the union health and welfare funds that are served, thereby justifying a legislative distinction from entities primarily operating as HMOs.

In its Memorandum Opinion and Order, the trial court did not recognize the distinction between the Voluntary Act and the HMO Act, which led the trial court to erroneously conclude that voluntary health services plans no longer are structurally unique. (C 1371 V3.) HMOs cannot do what voluntary health services plans do—that is, customize the services offered under a healthcare plan to provide the most economically feasible healthcare benefits to subscribers. The Voluntary Act provides that "[a] health services plan corporation may, in the discretion of its board of trustees, through its by-laws, limit or define the classes of persons who shall be eligible to become subscribers or beneficiaries, limit and define the benefits which it will furnish, and may divide such

[4] Union Health recognizes that, as an unpublished order, the *Waddicar* decision has limited precedential value. The appellate court, however, has considered the logic and reasoning of unpublished decisions. See *Nulle v. Krewer*, 374 Ill. App. 3d 802, 806, n.2 (2d Dist. 2007) (stating that unpublished decisions can be used by Illinois courts as persuasive authority); see also *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374 (4th Dist. 2005) (using the logic and reasoning set forth in the unpublished decision of another jurisdiction). This Court's consideration of the *Waddicar* order is particularly appropriate in this case, given plaintiff's erroneous representation to the trial court that the appellate court has not previously considered the issue before this Court. As *Waddicar* makes abundantly clear, the First District has considered the amendment and has rejected the very equal protection and special legislation challenges now at issue.

benefits as it undertakes to furnish into classes or kinds." 215 ILCS 165/6. By contrast, the HMO Act requires that HMO plans must "furnish[ ] basic health care services on a prepaid basis, through insurance or otherwise***." 215 ILCS 125/2-2(b)(4) (West 2014). The HMO Act defines "basic health care services" as "emergency care, and inpatient hospital and physician care, outpatient medical services, mental health services and care for alcohol and drug abuse, including any reasonable deductibles and co-payments***." 215 ILCS 125/1-2(3). Thus, unlike an HMO, a voluntary health services plan provides a union health and welfare fund with the option of selecting specific types of coverage to economically obtain quality healthcare benefits for specific medical services. (C 1287-88 V3.)

The metamorphosis of Anchor, as documented in the case law, illustrates the differences between HMOs and health services plan corporations and thus the rational basis for the amendment. In *Moshe*, plaintiff challenged Anchor's assertion of the Act's immunity for its HMO activities. 199 Ill. App. 3d at 594-95. Acknowledging that the amendment to the Voluntary Act reflected the legislature's intent to eliminate a statutory shield from liability for HMOs, the appellate court declined to remove Anchor's immunity prior to the effective date of the amendment of the immunity provision. *Id.* at 595-96. The First District observed that Anchor initially emerged in 1971 as a result of an agreement between the former Presbyterian-St. Luke's Medical Center and the union representing approximately one-third of the hospital's employees. *Id.* at 590. To optimize the health benefits for its employees, the hospital provided a healthcare plan through Anchor to participating union members. *Id.* After obtaining certification as an HMO under both Illinois and federal law, however, Anchor aggressively marketed its health

plan to outside employers and emphasized its affiliation with the medical center. *Id.* As a result, by 1982, Anchor derived 90% to 95% of its income from premiums paid by the public and private employers of its subscribers and, by 1985, the medical center's employees represented only a "relatively small fraction" of its subscribers. *Id.*

Thereafter, in *American National*, the First District ruled that the immunity provision, as applied to Anchor, was unconstitutional because "Anchor was acting in the same capacity as any other HMO." 210 Ill. App. 3d at 426. Anchor could not rely on its Voluntary Act charter to insulate itself from liability for its HMO activities. *Id.*

The First District's analysis in *American National* illustrates the functional difference—and thus, a rational basis for the amendment—between Union Health and Anchor HMO. The appellate court recognized that the Voluntary Act "was originally devised so that an employer or union could provide an improved health services program, in lieu of a traditional health insurance system. Thus, the voluntary health services plan corporations acted as insurers and it was logical to provide them with immunity." *Id*. at 425-26. Unlike Anchor, Union Health does not act like "any other HMO." Union Health continues to serve the vast majority of its subscribers through their union health and welfare funds, in the traditional voluntary health services plan model, not through an HMO offered by the subscribers' employers. (C 1289-90 V3.)

E. The amendment eliminated immunity for health services plan corporations that deviated from the original concept of the Act; thus, the amendment has a rational basis.

In holding that the amended immunity provision arbitrarily discriminates in favor of Union Health, the trial court failed to consider the practical effect of the amendatory language. In creating statutory classifications, the legislature need not "be accurate,

scientific or harmonious so long as [the classification] is not arbitrary and will accomplish the legislative design." *Illinois Housing Development Authority v. Van Meter*, 82 Ill. 2d 116, 123 (1980). The General Assembly may base legislation on "rational speculation unsupported by evidence or empirical data." *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 124 (1998). A court's role does not involve determining whether the legislature used "the best means to achieve the desired result." *Big Sky*, 217 Ill. 2d at 240.

By limiting immunity to those entities receiving health services plan corporation charters before 1965, the legislature removed immunity from Anchor and Michael Reese, entities that no longer adhered to the original concept of the Act. Both Anchor and Michael Reese received their Voluntary Act charters after 1965 (see *McMichael*, 259 Ill. App. 3d at 118, n.1), a fact making the temporal classification rationally related to the purpose of immunizing those entities who continued to function in the unique capacity envisioned by the Act. See *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill. 2d 499, 512 (1976) (holding application of law to licensees who derive more than five percent of their gross income from sale of alcohol not arbitrary despite no articulated basis for how the legislature chose that percentage).

With the amendment specifying that a voluntary health services entity must operate on a not-for-profit basis, independent from hospitals, the legislature sought to ameliorate the concern that had arisen from the influential roles hospitals played in Anchor and Michael Reese. As Senator Jones observed during the legislative debate, Union Health, although certified as an HMO, differed from Anchor and Michael Reese because it operated on a non-profit basis and was not controlled by a hospital. 85th Gen.

Assem., Senate Proceedings, June 30, 1988, at 160 (statements of Senator Jones). Further, conditioning immunity on an entity's not-for-profit status, free from hospital ownership or control, ensures that, if a health services plan corporation strays from its statutorily-required form, the entity cannot cite the immunity provision to avoid medical malpractice liability.

F. The trial court erred in its reading of the legislative history.

The trial court improperly restricted its analysis of the rational basis underlying the 1988 amendment to the legislative history. (C 1371-74 V3.) A statute's legislative history need not demonstrate a reasonable basis for legislation. See *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44, 54 (1st Dist. 2004), *aff'd*, 216 Ill. 2d 315 (2005). Rather, a statute constitutes unconstitutional special legislation "only if it was enacted for reasons totally unrelated to the pursuit of a legitimate state goal." *Big Sky*, 217 Ill. 2d at 240 (citing *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 236 (1988)). Regardless of the legislature's motivation or its articulation of the government's interest, the existence of any hypothetically conceivable set of facts that justifies distinguishing the class receiving immunity under the amended statute from the class excluded requires a court to reject a constitutional challenge. See *Crusius*, 216 Ill. 2d at 325.

In its Memorandum Opinion and Order, the trial court repeatedly contended that the legislative record did not supply sufficient factual support for the amendment. (C 1372-74 V3.) The trial court erred in finding dispositive an absence of evidence before the General Assembly. The legislative history need not reflect a rational basis for the amendment for this Court to sustain its constitutionality; any imaginable set of facts that justifies the classification created will suffice. See *Crusius*, 348 Ill. App. 3d at 54. Here,

plaintiff failed to negate, and the trial court did not consider, every conceivable set of facts. The court also failed to give due weight to the unrebutted factual averments in Mr. Garrett's affidavit. Moreover, the appellate court has reviewed the legislative history and found a rational basis for the legislation. See Argument Section I at pages 7-9, 13-15. In this fundamental way, the trial court's decision fails under this Court's precedent establishing the framework for constitutional analysis.

II. Union Health Satisfies the Requirements of the Amended Immunity Provision and Therefore Is Entitled to Its Protection.

A. Union Health has not deviated from its unique function as both insurer and healthcare provider.

Union Health adheres to the traditional voluntary health services plan model, not an HMO business model pursuing commercial employers, so as to remove it from the protections of the Act. The unrebutted affidavits of W. Joe Garrett, Executive Director of Union Health, establish that Union Health continues to serve its union member subscribers as the appellate court described in *Moshe*, *McMichael*, and *Waddicar*. (C 318-19; C 1289-90 V3.) Union Health's HMO certificate does not require it to devote any particular portion of its business to providing HMO coverage. Focusing primarily on voluntary plan business, Union Health provides a small fraction of its business, less than three percent, to exercising its HMO authority. (C 1290 V3.)

Plaintiff relied on speculation in urging the trial court to invalidate the immunity provision. She provided the trial court with no evidence supporting the conclusion that Union Health has morphed into a hospital-controlled HMO, and no evidence to support drawing comparisons to the Michael Reese and Anchor HMOs. See *Crusius*, 348 Ill. App. 3d at 54-55 (observing that the party challenging the constitutionality of a statutory

classification "bears the burden of negating every conceivable basis which supports it"). The court incorrectly relied on plaintiff's speculation and improperly shifted plaintiff's burden to Union Health. The court found that Mr. Garrett's affidavit lacked a comparison of the healthcare savings Union Health delivers to its subscribers with that offered by HMOs. The court also questioned why Union Health should continue to enjoy immunity when this Court eliminated charitable immunity for not-for-profit hospitals. (C 1375-76 V3.) As set forth in Argument I above, the legislature had a rational basis for granting health services plan corporations immunity. Plaintiff fell far short of answering the court's questions or providing a factual basis for the court's assumptions.

The trial court further misapprehended the significance of several facts in concluding that Union Health is no longer distinguishable from other HMOs. Dismissing the significance of the fact that Union Health devotes the vast majority of its business to providing voluntary plan products, the trial court found that Union Health "focuses its efforts only on certain types of healthcare and does not offer the broader type of care required of HMOs." (C 1376 V3.) In offering this observation, the trial court misapprehended a significant difference between Union Health and entities that largely function as HMOs. Later in its Memorandum Opinion and Order, however, the trial court seemed to recognize this distinction: "the type of services provided and how they are provided are distinguishing factors ***." (C 1376 V3.) The trial court further speculated that the "3% figure" likely resulted from subscribers having other insurance that precludes the limited options offered by Union Health. (C 1376 V3.) This speculation is unsubstantiated in the record. It also is irrelevant to the constitutional analysis.

Speculating that HMOs also serve union members and their families, the trial court concluded that Union Health's service of union members is inconsequential. (C 1376 V3.) The legislature and appellate court do not agree. The General Assembly and the appellate court have found the service of unions significant in the constitutional analysis. See *McMichael*, 259 Ill. App. 3d at 116-17 ("At the time the Act came into being health services plans organized pursuant to the Act were instituted by unions, which hoped to improve the health and welfare benefits of their union members."); see also *Moshe*, 199 Ill. App. 3d at 590 (observing that Anchor served the union members of Presbyterian-St. Luke's Medical Center).

Finally, departing from governing precedent, the trial court failed to appreciate the significance of the absence of hospital ownership and control over Union Health. (C 1376 V3.) The appellate court has repeatedly interpreted the 1988 amendment as evidencing the legislature's intent to bring entities with Voluntary Act charters that had deviated from the original concept of a voluntary health services plan—and thus acted more like full-fledged HMOs—into conformity with the legislative treatment given HMOs. See *Moshe*, 199 Ill. App. 3d at 595-98; see also *McMichael*, 259 Ill. App. 3d at 116-18. *Moshe* illustrates that, unlike the employers for the unions Union Health serves, Rush did not pay into the union's health and welfare fund; Rush believed it could provide a better health program than the union could. 199 Ill. App. 3d at 590. Then, once Rush's plan—Anchor—became HMO-certified, it marketed itself, including its affiliation with Rush, to non-union employers. *Id*. Considering these facts and the legislative debate, the First District concluded that the legislature, in narrowing the immunity provision of the

Act, was concerned about hospital control like the kind Rush exerted over Anchor. See *id*. at 595-98. The record presents no basis for raising that concern as to Union Health.

The trial court also misconstrued the holding in *McMichael*. The appellate court did not conclude that the legislature intended to remove immunity from all entities holding HMO licenses, "regardless of [their] organization pursuant to other statutes." (C 1372 V3 (quoting *McMichael*, 259 Ill. App. 3d at 118).) To the contrary, in addressing Michael Reese's challenge to the amendment, the appellate court observed that the legislature believed Union Health, despite its HMO certification, "still conformed to the original concept of the VHSPA and, thereby, was entitled to continued immunity." *McMichael*, 259 Ill. App. 3d at 118. Again, contrary to appellate precedent, the trial court substituted its policy judgments for the legislature's determinations.

B. Union Health contracts with hospitals as a conduit for patient care pursuant to its authority under the Act and in conformity with the Act.

Based on a "provider service agreement" between Advocate Illinois Masonic Medical Center and Union Health, the plaintiff erroneously advised the trial court that Union Health is an "Advocate controlled contractor." (C 1034 V2.) The agreement establishes that, in its role as an insurer under the Act, Union Health contracted with Advocate to provide certain medical services to Union Health's subscribers at the expense of Union Health. (C 1156-61 V2.) Contrary to plaintiff's contention that Union Health "merge[d]" with Advocate, Union Health merely has contracted with several Chicago-land hospitals, none of which have control over Union Health. (C 1033 V2; C 1292 V3.)

Both plaintiff and the trial court erroneously concluded that these contracts suggest that Union Health has deviated from its purpose as both an insurer and healthcare provider. (C 1032-35 V2; C 1374 V3.) Rather, these contracts illustrate Union Health is acting in its capacity as an insurer by providing its subscribers healthcare services that it does not offer directly, as authorized by the Act. See 215 ILCS 165/17. Mr. Garrett explains in his supplemental affidavit that, as the individual at Union Health who oversees the vital function of providing members with high quality healthcare at reasonable cost, he periodically reexamines contractual arrangements with the various hospitals providing medical care and services to the union members and their families served by Union Health. Like any entity in commerce, including in the healthcare arena, Union Health seeks "vendors" who will provide quality care at an advantageous price to control costs. (C 1291-92 V3.) Union Health is a not-for-profit organization; it controls costs for the benefit of the union members and their families served by Union Health. It has never entered into a contract providing a hospital with management control over Union Health or its operations. (C 1290, 1292 V3.) Thus, plaintiff's citation to a payment arrangement with Advocate says nothing about management control.[5] (C 1034 V2.)

Plaintiff likewise misapprehended the significance of the healthcare services that Union Health provides directly through its employed physicians at its Chicago facility. (C 1032 V2.) Provision of direct care to subscribers simply demonstrates Union Health's role as a healthcare provider. Thus, through both its contracts with various hospitals and

[5] Plaintiff failed to substantiate her claim about the payment arrangement between Union Health and Advocate in any contract in the record before this Court. (C 1034, 1121-61 V2.)

its own healthcare providers, Union Health continues to perform the unique function of both insurer and healthcare provider. See *Brown*, 150 Ill. App. 3d at 961-62.

C. Union Health's purchase of liability insurance does not remove it from the protection of the Act's immunity provision.

Plaintiff baselessly argued, and the trial court erroneously accepted, that the purchase of liability insurance somehow evidences Union Health's deviation from a voluntary health services plan. The rules of statutory construction impose on a court the task of ascertaining and giving effect to the legislature's intent. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 12. The plain and ordinary meaning of the statutory language selected by the General Assembly provides the best indication of legislative intent. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 16. Thus, a court should "not depart from the plain meaning of the statutory language by reading into it exceptions, limitations, or conditions not expressed by the legislature." *In re Estate of Shelton*, 2017 IL 121199, ¶ 36.

Comporting with this analysis, the trial court initially rejected plaintiff's argument that the purchase of insurance waived statutory immunity. (C 1355-57 V3.) The court correctly reasoned that the rules of statutory construction dictated the conclusion that the purchase of insurance did not limit the scope of statutory immunity. (C 1356 V3.) The court observed: "the only conclusion to be drawn from a reading of the statute's plain language is that section 26 of the VHSPA [Voluntary Act] provides a voluntary plan with absolute immunity regardless of whether it purchased insurance." (C 1356 V3.) Yet, toward the end of its Memorandum Opinion and Order, the trial court read into the immunity provision a *de facto* waiver based on the purchase of insurance. Contradicting

its initial statutory construction, which was fully supported by applicable case law,[6])the trial court made the speculative, irrelevant observation that "UHS believes it either no longer enjoys absolute immunity or could be held liable for its healthcare providers' acts and omissions." (C 1375 V3.) The trial court then cited a decision interpreting the common law charitable trust immunity doctrine, *Wendt v. Servite Fathers*, 332 Ill. App. 618, 634 (1st Dist. 1947), and concluded that a voluntary plan's insurance should be required to cover malpractice claims. (C 1375 V3.)

The trial court's analysis ventured far afield of its task—interpreting the immunity provision according to its plain language. Nothing in the Act prohibits a health services plan corporation from purchasing liability insurance or conditions a corporation's immunity on abstaining from such a purchase. Union Health's prudence in purchasing liability insurance should not operate to remove it from the protection offered by the Act's immunity provision because liability insurance does not affect the organizational structure or regulation of a health services corporation. See *Brown*, 150 Ill. App. 3d at 961-62. As the First District observed in *Brown*, a voluntary health services plan's function of operating as both insurer and healthcare provider, in addition to the specific statutory requirements governing voluntary health services plans, justifies granting a health services plan corporation immunity. See *id.* The absence of any mention of liability insurance in the Act demonstrates that the legislature did not consider it to have any impact on a voluntary health services plan corporation's unique organizational structure or regulation. Further, Illinois courts do not favor denying statutorily conferred

[6] Statutory immunity is "absolute" unless expressly limited by the legislature. See *Hudson v. YMCA of Metropolitan Chicago, LLC*, 377 Ill. App. 3d 631, 636 (1st Dist. 2007) (citing *Jost v. Bailey*, 286 Ill. App. 3d 872, 878-79 (2d Dist. 1997)).

immunity on an individual or entity. See *Eason v. Garfield Park Community Hospital*, 55 Ill. App. 3d 483, 487 (1st Dist. 1977) (finding physician entitled to immunity under the Local Governmental and Governmental Employees Tort Immunity Act even though he purchased malpractice insurance). Union Health should not be punished for responsibly acquiring insurance in the event a court determines the Voluntary Act's immunity inapplicable.

CONCLUSION

WHEREFORE, defendant-appellant, Union Health Service, Inc., requests that this Court vacate and reverse the trial court's order dated November 2, 2017, enter a judgment declaring the 1988 amendment to 215 ILCS 165/26 constitutional, and remand the case to the trial court with instructions to grant the motion to dismiss of defendant Union Health Service, Inc., based on statutory immunity. Union Health Service, Inc., requests such other and further relief as this Court deems just.

Dated: April 3, 2018

Respectfully submitted,

By: /s/Karen Kies DeGrand

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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 or words 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 27 pages.

/s/Karen Kies DeGrand
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APPENDIX

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DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

SARAHI VASQUEZ GONZALEZ, as Administrator of the Estate of RODOLFO CHAVEZ LOPEZ, aka JUAN AGUILAR, Deceased,

Plaintiff-Appellee,

v.

UNION HEALTH SERVICE, 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 NORTH SIDE HEALTH NETWORK, d/b/a ADVOCATE ILLINOIS MASONIC MEDICAL CENTER, ADVOCATE ILLINOIS MASONIC HEALTH PARTNERS d/b/a ADVOCATE ILLINIOS MASONIC PHYSICIAN PARTNERS, ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE MEDICAL GROUP,

Defendants.

No. 16 L 10661

The Honorable John H. Ehrlich, Judge Presiding.

NOTICE OF DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS PURSUANT TO SUPREME COURT RULE 302(a)

Defendant-Appellant, UNION HEALTH SERVICE, INC., pursuant to Supreme Court Rule 302(a) and pursuant to the Court's supervisory authority, hereby appeals to the Supreme

Court of Illinois the trial court's order entered on November 2, 2017 (Exhibit A). In the November 2, 2017 order, the trial court determined that the 1988 Amendment to the Voluntary Health Services Plans Act, 215 ILCS 165/26, is unconstitutional special legislation and violates the United States and Illinois Constitutions (U.S. Const. Art. IV, § 1 & Amd. XIV; Ill. Const. 1970, Art. IV, § 13).

Defendant-Appellant requests that the Supreme Court of Illinois reverse the November 2, 2017 order, enter a judgment declaring the 1988 Amendment to 215 ILCS 165/26 constitutional, and remand the case to the trial court with instructions to grant the motion to dismiss of defendant Union Health Service, Inc., based on statutory immunity. Union Health Service, Inc. requests such other and further relief as the Supreme Court deems just.

Respectfully submitted,

DONOHUE BROWN MATHEWSON & SMYTH LLC

By: _____

Karen Kies DeGrand, one of the attorneys for defendant-appellant Union Health Service, Inc.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Sarahi Vasquez Gonzalez, as administrator of the estate of Rodolfo Chavez Lopez, a/k/a Juan Aguilar, deceased,	)	
Plaintiff,	)	
v.	)	
Union Health Services, Inc., Agnieszka Brukasz, M.D., Fakhruddin Adamji, M.D., Terrence Lerner, M.D., Michael Rossi, M.D., Hen Li-Hsiang, M.D., Blake Movitz, M.D., Julitalee Camba, R.N., 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 Hospitals Corporation d/b/a Advocate Medical Group,	)	16 L 10661
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Illinois Constitution prohibits legislation conferring a special benefit or privilege on a person to the exclusion of others similarly situated. One of the Illinois Legislature's 1988 amendments to the Voluntary Health Services Plans Act rescinded absolute tort immunity for all but one voluntary plan operating at that time. The legislative history supporting the amendment and the evidentiary record provide no explicit or implied rational relationship between the amendment and the state's legitimate interest in the provision and management of healthcare either at the time of enactment or today. Without such a relationship supporting the amendment, the only conclusion is

that the amendment constitutes special legislation and is, therefore, unconstitutional.

Facts

From April 4 through October 29, 2014, Juan Aguilar received care from the medical staff at or associated with Union Health Service, Inc. (UHS). After an MRI revealed enlarged retroperitoneal lymph nodes, Aguilar underwent a CT-guided core biopsy at another healthcare facility. Several months later, Aguilar presented at UHS with a high fever and lower-left extremity swelling, redness, and pain. A physician recommended that Aguilar undergo a second biopsy the following week, again at a different facility. The day after the second biopsy, UHS physicians ordered that Aguilar be placed on heparin, given compression devices (although he was not walking), and discharged. Two days later, Aguilar died secondary to a deep-vein thrombosis (DVT) and pulmonary emboli.

On October 28, 2016, Sahari Vasquez Gonzalez, as administrator of Aguilar's estate, filed a 24-count complaint against various entities and individuals, including UHS and three of its physicians, Drs. Agnieszka Brukasz, Fakhruddin Adamji, and Terrence Lerner. Counts 15 and 16 are directed against UHS under the Survival and the Wrongful Death Acts for the alleged malpractice of its three physicians. Each count claims that the UHS physicians failed to recognize the signs and symptoms of DVT, permitted Aguilar to undergo a biopsy despite the DVT signs and symptoms, prescribed Lasix, and failed to appreciate the DVT risk factors.

On February 2, 2017, UHS filed a motion to dismiss counts 15 and 16 pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-619(a)(9). UHS argues that it is immune from liability pursuant to the Voluntary Health Services Plans Act (VHSPA). *See* 215 ILCS 165/1 – 30. The statute defines such a voluntary health services plan as an entity:

> under which medical, hospital, nursing and related health services may be rendered to a subscriber or beneficiary at the expense of a health services plan corporation, or any contractual arrangement to provide, either directly or through arrangements with others, dental care services to subscribers and beneficiaries.

215 ILCS 165/2(b). Especially important here is the statute's immunity provision for such plans. As originally enacted, the immunity provision stated that:

> 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 or beneficiaries.

Ill. Rev. Stat. 1983, ch. 32, ¶ 620, eff. July 1, 1951.

In affidavits attached to the motion and reply brief, W. Joe Garrett, the UHS executive director, avers that on December 1, 1952, UHS received its statutory charter as a not-for-profit voluntary health services plan and that it has operated as such since that date. UHS primarily serves union workers and their families through union health care funds paid to the Service Employees International Union's Local 1 health fund and Local 25 welfare fund. Garrett explains that UHS is not owned or controlled by a hospital and operates independently from hospitals and other healthcare providers, although it contracts with them to provide care and treatment not available at UHS facilities. Garrett also averred that two other voluntary plans received their charters before 1965 – the Sidney Hillman Health Centre of Chicago and Midwest Regional Joint Board (November 24, 1953) and Union Medical Center (April 21, 1960).

Garrett avers that voluntary plans must operate on a not-for-profit basis in contrast to HMOs that frequently operate on a for-profit basis. According to Garrett, the VHSPA permits a voluntary plan to obtain a certificate of authority under the HMO Act, 215 ILCS 125/1-1 – 6-19, but does not require a voluntary plan to offer the same scope of services as an HMO. On January 3, 1977, UHS obtained an HMO certificate, thereby permitting UHS to transact business under both statutes. Verified discovery responses provided by UHS further indicate that, at the time of Lopez's injury, UHS had a $1-million/$3-million liability insurance policy through ISMIE Mutual Insurance Company.

Gonzalez responds to the motion with two arguments. First, Gonzalez contends that UHS is not statutorily immune because it purchased liability insurance that, according to Gonzalez, extinguishes a voluntary plan's immunity. Second, Gonzalez argues that the Illinois legislature's 1988 amendment to section 26 of the VHSPA is unconstitutional because it constitutes special legislation and is, therefore, unenforceable.[1]

Analysis

As a procedural matter, this court recognizes that a section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). The motion must be directed against an entire claim or demand. *Id.* If the basis for the motion does not appear on the face of the complaint, the motion must be supported by an affidavit. *See* 735 ILCS 5/2-619(a). A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party, *see Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008), and all well-pleaded facts contained in the

[1] On October 3, 2017, Gonzalez filed and served on the Illinois Attorney General, this court, and the parties her notice of claim pursuant to Illinois Supreme Court Rule 19. As of the date of this memorandum opinion and order, the Attorney General has not responded to the Rule 19 notice.

complaint and all inferences reasonably drawn from them are to be considered true. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by affirmative matter that avoids the legal effect of or defeats a claim. *See* 735 ILCS 5/2-619(a)(9). For purposes of a section 2-619(a)(9) motion, "affirmative matter" is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86.

As to substantive matters, this court begins its analysis recognizing the admonition not to decide a legal question on constitutional grounds if it may be decided on other grounds. *See People v. E.H.*, 224 Ill. 2d 172, 178 (2006), *citing* cases. Although Gonzalez's challenge to the constitutionality of section 26 of the VHSPA is the weightier argument, she also argues that UHS is liable because it purchased insurance, effectively eliminating its statutory immunity. Since this argument is statutory and not constitutional in nature, it is the first one this court must address.

To determine whether the purchase of insurance waived the immunity UHS would otherwise enjoy under the VHSPA requires reading the text according to the rules of statutory construction. While there are many such rules, the basic ones will do in this instance. First and foremost, the purpose of statutory construction is to "ascertain and effectuate the legislature's intent . . . ." *McElwain v. Illinois Sec'y of State*, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995); *see also Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13. It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions, limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12.

This court acknowledges that the legislature has the inherent authority both to grant and limit a defendant's statutory immunity. *See Lacey v. Village of Palatine*, 232 Ill. 2d 349, 360 (2009). That principle is important for assessing legislative intent in general and the VHSPA's section 26 immunity in particular. First, the VHSPA does not explicitly prohibit a voluntary plan from purchasing insurance, and the statute contains no language from which such a prohibition could be inferred. Second, section 26 contains no language limiting the available immunity; for example, extending it only to simple negligence claims but not to willful and wanton claims. Had the legislature intended to limit the scope of section 26 immunity, the legislature certainly could have done so either with the original enactment in 1951 or the 1988 amendments. In short, the only conclusion to be drawn from a reading of the statute's plain language is that section 26 of the VHSPA provides a voluntary plan with absolute immunity regardless of whether it purchased insurance.

This conclusion is not altered by Gonzalez's reliance on extrinsic sources of statutory interpretation in the form of three cases allegedly supporting the opposite conclusion. Each of these cases is, however, inapplicable. In *Wendt v. Servite Fathers*, 332 Ill. App. 618 (1st Dist. 1947), for example, the court reached the unremarkable conclusion that the common law's charitable-trust-immunity doctrine does not extend to a charity's insurance proceeds.[2] Later, in *Moore v. Moyle*, 405 Ill. 555 (1950), the Supreme Court amplified the doctrine by permitting recovery against a charity's non-trust funds. Finally, in *Beach v. City of Springfield*, 32 Ill. App. 2d 256, 261 (3d Dist. 1961), the court held that an insurance company that accepted public money to insure a

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[2] The court's commonsense reasoning was that:

> if the [charitable] corporation wishes to waive immunity we know of no principle in law which would prevent it from doing so . . . . We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available.

Wendt, 332 Ill. App. at 634.

local public entity may not claim the benefit of the entity's immunity, but must bear the risk of paying an insured's claims.

Wendt and *Moore* are unhelpful because they address a common-law immunity, not a statutory one, and not the VHSPA in particular. Further, the Third District decided *Beach* in the interregnum between the Supreme Court's abolition of sovereign immunity in *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11 (1959), and the legislature's 1965 enactment of the Local Governmental and Governmental Employees Tort Immunity Act (TIA). *See* 745 ILCS 10/1-101 – 10-101. It is important to note that the original TIA adopted *Beach*'s holding by eliminating tort immunity upon the purchase of insurance. *See* Ill. Rev. Stat. ch. 85, ¶ 9-103(c). In a 1986 amendment, however, the legislature eliminated the purchase-of-insurance exception, permitting local public entities to purchase insurance and still assert statutory immunity. *See Zimmerman v. Skokie*, 183 Ill. 2d 30, 51-52 (1998). This reference to the legislature's rescission of the TIA's purchase-of-insurance limitation to immunity two years before the VHSPA amendments supports the inference that the legislature recognized the effect of such a limitation and chose not to include it in the VHSPA. In sum, the purchase of insurance does not waive statutory immunity under the VHSPA.

Turning to the parties' constitutional arguments, this court recognizes that the history of the VHSPA is, in many ways, a history of managed healthcare in Illinois. To understand that history, it is incumbent to explain various legislative enactments and amendments as well as judicial decisions concerning and related to the VHSPA. Such an explication will place in context the parties' challenges to and defenses of the 1988 amendment to section 26 – the statute's immunity provision. This court's discussion must begin, therefore, with the original text.

The legislature approved the VHSPA on June 27, 1951. *See* Ill. Rev. Stat. ch. 32, ¶¶ 595 – 624. As originally defined, a voluntary plan was "a plan or system under which medical, hospital, dental, nursing and relating health services may be

rendered to a subscriber or beneficiary, at the expense of a health services plan corporation." *Id.* at ¶ 596. Five or more persons could incorporate a voluntary plan, *see id.* at ¶ 598, that would be overseen by a board of trustees consisting of not less than seven persons, at least 30% of whom had to be licensed physicians, *see id.* at ¶ 599. The statute authorized the Department of Insurance to issue charters to voluntary plans and subjected them to Insurance Code regulation. *See id.* at ¶¶ 602 – 607. Only not-for-profit corporations could operate as voluntary plans. *See id.* at ¶ 621. The statute further provided absolute immunity to the corporate entity. As stated:

> 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.

Id. at ¶ 620.

The creation of voluntary plans via the VHSPA presaged by more than 20 years the legislature's creation of similar delivery systems for managed healthcare, the most important of which was the 1974 passage of the Health Maintenance Organization (HMO) Act. *See* 215 ILCS 125/1-1 – 6-19. That statute originally defined an HMO as "any person who or which undertakes to provide or arrange for one or more health care plans. . . ." *See* Ill. Rev. Stat. ch. 111 1/2, ¶ 1402(7). In 1982, the legislature amended the statute, in part, by redefining "HMO" to exclude "persons" and permit only organizations, including not-for-profit voluntary plans organized under the VHSPA, to be certified as HMOs. *See* Ill. Rev. Stat. ch. 111 1/2, ¶ 1402(9); *see also Moshe v. Anchor Org. for Health Maint.*, 199 Ill. App. 3d 585, 595 (1st Dist. 1990), *citing* Ill. Rev. Stat. 1987, ch. 111 1/2, ¶¶ 1402(11) & 1403(a).

The similarity between voluntary plans and HMOs after 1974 may have been a motivation for a facial challenge to the VHSPA's immunity provision under the equal protection clauses of the United States and Illinois constitutions. *See Brown v. Michael Reese Health Plan, Inc.*, 150 Ill. App. 3d 959 (1st Dist. 1986).[3] In *Brown*, the court began by noting that voluntary plans are:

> medical care delivery systems through which medical, hospital, nursing, and related health services are rendered to a subscriber or beneficiary. Generally, the plans ensure the availability of health services for a subscriber population by utilizing a prepayment method of financing and a group-practice mode for delivery of services.

Id. at 961, *citing* Note, *The Role of Prepaid Group Practice in Relieving the Medical Care Crisis*, 84 Harv. L. Rev. 887 (1971). The court concluded that by creating voluntary plans, the legislature had:

> clearly carved out a separate and distinct classification of health care providers. The voluntary health services plan is distinguishable from other health care providers because they serve the unique function of both insurer and health care provider. The health services plan is regulated by the Department of Insurance and governed by specific legislative requirements, unlike other, unregulated health care providers. In our opinion, this unique organizational structure and regulation of the voluntary health services plan corporation provides a rational basis for immunizing the defendant corporation in the instant case, and the trial court properly dismissed Michael Reese Health Plan, Inc., as a party defendant.

[3] It does not appear that Brown brought, and the court plainly did not consider, an as-applied constitutional challenge.

Id. at 961-62.

The expansion of HMO delivery systems eventually affected the existence of voluntary plans as originally organized under the VHSPA. In 1988, the legislature substantially altered the VHSPA in two ways. First, the legislature mandated that each voluntary plan organized under the statute also be certified as an HMO. *See* Ill. Rev. Stat. ch. 32, ¶ 602, amended by P.A. 85-1246, § 1, eff. Aug. 30, 1988, now 215 ILCS 165/8. Second, the legislature amended the VHSPA's immunity provision to read:

> 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 party 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. With the amendment to section 26, the legislature effectively placed three limitations on the continued application of absolute immunity for voluntary plans: (1) incorporation before January 1, 1965; (2) operation on a not-for-profit basis; and (3) no hospital ownership or control. *See id.* It is this amendment to section 26 that is the focal point of this court's analysis.[4]

To discern what the legislature sought to achieve by amending section 26, it is necessary to review the amendment's legislative history. It is noted at the outset that the available

[4] The legislature further amended the statute in 1989 to prohibit the issuance of any new charters to voluntary plans. *See* Ill. Rev. Stat. ch. 32, ¶ 597.1, amended by P.A. 86-600 (eff. Sept. 1, 1989), now 215 ILCS 165/3.1.

legislative history of the 1988 amendments in general and section 26 in particular is quite limited and provides little insight. Despite these shortcomings, it is known that the amendment to section 26 began as House Bill 3806, a bill introduced at first reading by Representative William Shaw as "a Bill for an Act to add Sections to the Health Maintenance Organizational [*sic*] Act." H.B. 3806, 85th Gen. Assembly, House Proceedings, Apr. 8, 1988, at 17. At the second reading, Shaw offered an amendment prohibiting HMOs from denying emergency treatment absent their prior approval, but soon withdrew the amendment. *Id.*, May 17, 1988, at 5-6 & 37. At the third reading, Shaw simply stated that the bill "provides [that] a person who solicit[s] the enrollment of Public Aid Recipients and Health Maintenance Organization[s] shall be licensed by the Department of Insurance." *Id.*, May 20, 1988, at 165. The House approved the measure. *Id.*

The bill then moved to the Senate, which had the first reading the following month. At that time, Senator Emil Jones offered Amendment No. 1, which he explained:

> prohibits the Department of Insurance from approving the charter of any organization seeking . . . to provide medical hospital services through health plans under this Act unless the organization also is approved for a certificate of authority under the HMO Act. It also require[s] HMO . . . representative[s] who solicit public aid recipients to obtain a . . . limited insurance representative license. . . .

H.B. 3806, 85 Gen. Assembly, Senate Proceedings, Jun. 15, 1988, at 34. The Senate approved the amendment. *Id.* At the second Reading of Amendment No. 1, Senator Jones explained further that:

> House Bill 3806 amend[s] the HMO Act and prohibit[s] the solicitation of public aid recipients for HMO plans unless that person . . . has a limited insurance license to sell HMO [*sic*]. Also the bill brings into conformity

> those not-for-profit health organization plans . . . with the HMO Act, and that's all the bill does. . . .

Id., Jun. 22, 1988, at 83. The Senate passed the amendment. *Id.*

The Senate sent Amendment No. 1 to the House, which voted not to concur with the amendment. H.B. 3806, 85th Gen. Assembly, House Proceedings, June 23, 1988, at 133. A few days later, it appears that the Senate refused to recede on Amendment No. 1. H.B. 3806, 85th Gen. Assembly, Senate Proceedings, June 28, 1988, at 93 (indicating "(Machine cutoff)").

After the Senate vote, the measure apparently went to a conference committee where legislators substantially altered the bill.[5] That conclusion is based on the next appearance of the bill in the House by which time the bill amended both the HMO Act as well as the VHSPA. At the bill's reappearance, Representative Shaw stated that:

> House Bill 3806, amends Section 26 of the Voluntary Health Service[s] Plan[s] Act . . . [w]hich currently renders voluntary health service plan[s] legally immune from any negligence or reckless conduct for their directors. . . . Also in this Bill it mandates that any person who solicits public aid recipients to enroll them in HMO's [*sic*] must be licensed. . . . I move for the adoption of the first Conference Report.

H.B. 3806, 85th Gen. Assembly, House Proceedings Jun. 30, 1988, at 188. The House then voted to approve the conference report. *Id.*

Finally, the Senate considered the conference report. At that time, the following colloquies occurred on the Senate floor:

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[5] This court attempted, but could not obtain, any audio recordings of the conference committee's hearings.

Senator Jones:
[The] First Conference Committee Report require[s] that medical service plan[s] organize[d] under the Voluntary Health Service[s] Plan[s] Act be approved for a certificate of authority under the HMO Act. It repeals the immunity for civil liability granted to the medical plans under the voluntary health service[s] plans. . . .

* * *

Senator Adeline Geo-Karis:
I understand that the exemption from liability that the Health Service Plan Corporation currently has for injuries resulting from negligence on the parts of officers or employees of the corporation is taken out. So they are . . . they do have liability, is that correct?

* * *

Senator Jones:
Right now, [there are] only three that fall[] under the particular Act and they are . . . immune from liability[;] this takes away that immunity.

* * *

Senator David Barkhausen:
[C]an you tell me how many HMO's [*sic*] there are that are now organized under the Statute providing for [ ] voluntarily health service plans and providing for some degree of immunity for those plans?

* * *

Senator Jones:
There are three.[6]

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[6] The Garrett affidavit confirms Senator Jones's apparent reference to the two other pre-1965 chartered voluntary plans – Sidney Hillman Health Centre (Nov. 24, 1953) and the Union Medical Center (Apr. 21, 1960). Other voluntary plans operated in 1988, but they had been chartered after 1965. References to that effect are made as to the Anchor Organization (Nov. 2, 1971) in *Moshe v. Anchor Org. for Health Maint.*, 199 Ill. App. 3d 585, 589 (1st Dist. 1990), and the Michael Reese Health Plan (Oct. 13, 1972) in *Jolly v. Michael Reese Health Plan Found.*, 225 Ill. App. 3d 126, 127 (1st Dist. 1992). The *McMichael* court was apparently uninformed when it wrote that as of

* * *

Senator Barkhausen:
Do you know the names of them?

* * *

My . . . question and concern is . . . is whether you can tell me whether this eliminates the immunity for all HMO's [*sic*] that previously were guaranteed statutory immunity from liability suits?

* * *

Senator Jones:
Yeah, the only group that . . . is exempt would be the Union Health Service but it does take away the immunity for all the others.

* * *

Senator Barkhausen:
Can you tell me why the provisions of this Conference Committee Report maintain the immunity for one HMO organized . . . as a voluntary health service plan and apparently not for the others?

* * *

Senator Jones:
Because it is a not-for-profit and it's not owned by a hospital.

* * *

Senator Barkhausen:
Well, . . . my concern, Mr. President and members, is that . . . in attempts to reach some sort of a political compromise, we've taken . . . two out of three. . . . [A]s I understand it, there are three HMO's [*sic*] that are organized as voluntary health service plans that have been provided with statutory immunity . . . for a very good reason under legislation dating back to 1951, and rather than changing the rules for all three of them

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1988 there were only three operating voluntary plans – UHS, Anchor, and Michael Reese. *See McMichael*, 259 Ill. App. 3d at 118, n.1.

> . . . 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 special legislation that I suspect . . . if challenged, the courts might find . . . that that conclusion is correct.
>
> * * *
>
> Senator Jones:
> In response to . . . the last speaker on this subject matter, the hospital that this immunity . . . is being taken away from, they . . . the doctors that work for the hospital are employees as such. There would be one that you're speaking of that we did not take it away is just a service organization but the provisions in this piece of legislation . . . [are] good. It takes care of the problem that we have as it relate[s] to HMO's [*sic*], and I ask for a favorable vote on this Conference Committee Report.

H.B. 3806, 85th Gen. Assembly, Senate Proceedings June 30, 1988, at 154-55, 159-61. The Senate then passed the conference committee report, *id.* at 161, and the bill became law and effective as of August 30, 1988. *See* 215 ILCS 165/26.

The legislature's effective blurring of the lines between voluntary plans and HMOs became a factor in four subsequent Illinois appellate court decisions. In the 1990 case, *Moshe*, the court considered whether Anchor could claim immunity because it was a voluntary plan, but despite the additional fact that after 1988 it was a chartered HMO. *See* 199 Ill. App. 3d at 589. The court did not reach the dual-capacity argument because the 1988 amendment to section 26 was substantive and, therefore, prospective only in application; consequently, Anchor could claim the pre-1988 immunity since the alleged malpractice had occurred in 1982. *See id.* at 588, 600-01. Additionally, the amendment's express language did not call for it to be applied retrospectively, and the legislature did not manifest any intent to that end. *See id.* at 602.

One year later, in *American Nat'l Bk. & Trust Co. v. Anchor Organ. for Health Maint.*, the court reversed a circuit court's dismissal of Anchor based on its claim of section 26 immunity. 210 Ill. App. 3d 418, 427 (1st Dist. 1991). Unlike *Brown* or *Moshe*, the focus in *American National* was an as-applied challenge to Anchor's claim of section 26 immunity based on its "dual capacity as a State-certified and federally qualified HMO as well as a voluntary health service plan." *Id.* at 424. In addressing this challenge, the court carefully distinguished the limits to its prior two decisions:

> In *Brown* . . . there was no indication of whether the defendant, Michael Reese [ ], was, at the time of the alleged malpractice, acting in a dual capacity as both an HMO and a voluntary health services plan. Thus, there was no discussion of whether a health services plan corporation having such dual status should be denied the immunity it would ordinarily enjoy under its VHSPA charter. This court in *Moshe* did, however, partially address this issue, finding that Anchor's dual status did not "preclude the operation of the immunity provision, as originally enacted, to bar all malpractice claims against it as a matter of law." (*Moshe*, 199 Ill. App. 3d at 594.) However, this court did not go on, in *Moshe*, to consider the constitutionality of applying the immunity provision to a dual status corporation such as Anchor, since this issue was not raised.

210 Ill. App. 3d at 425.

The court in *American National* reiterated its conclusion that section 26 immunity was rationally related to a legitimate state purpose. *Id.* at 425. Yet, the court also acknowledged that over time,

> corporations such as Anchor began to deviate from their original function and purpose, while at the same time, the HMO Act was amended substantially . . .

> placing some of the same restrictions that were once unique to VHSPA corporations, upon HMOs. The "persona" of the voluntary health services plans began to dissipate, and the distinction between a health services plan and an HMO became less apparent.

Id. at 426 (citations omitted). Then, after 1986,

> Anchor's duties, obligations and requirements under the VHSPA merged with its duties, obligations and requirements as a State-certified and federally qualified HMO. We find that, under these circumstances, it would be fundamentally unfair and an unconstitutional unequal treatment to allow Anchor to rely upon its VHSPA charter to be insulated from liability. Consequently, we find that, at the time that this cause of action accrued in 1986, Anchor was acting in the same capacity as any other HMO and that despite its charter under the VHSPA, it was not eligible to take advantage of the immunity that the status allowed.

Id. at 426.

The third case came the next year in *Jolly v. Michael Reese Health Plan Found.*, 225 Ill. App. 3d 126 (1st Dist. 1992). *Jolly* is factually similar to *Moshe* in that the plaintiff's claims of alleged malpractice occurred before the 1988 amendment to section 26. *See id.* at 128. The *Jolly* court relied on *Moshe* and held consistently that the 1988 amendment was strictly prospective in effect and, therefore, did not eliminate Michael Reese's section 26 immunity. *See id.* at 130. Jolly argued alternatively that Michael Reese could not claim immunity under the 1951 version of section 26 since it amounted to special legislation. The court rejected this argument by looking to *Moshe* and *Brown*, both of which recognized the constitutionality of the 1951 version of section 26 because the unique dual-capacity of voluntary

plans was rationally related to a legitimate state interest. *See id.* at 132.

The last judicial declaration concerning the VHSPA came three years later in *McMichael*. The matter arrived before the court on a permissive appeal pursuant to Illinois Supreme Court Rule 308(a). The question provided the court the opportunity to accept Michael Reese's argument and declare the 1988 amendment to section 26 to be unconstitutional and to reinstate immunity for all voluntary plans according to the 1951 statute. As explained by the court:

> When reviewing this legislation as a whole, in conjunction with the comments made by the legislature when passing the 1988 amendment to the VHSPA, 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 [Health Service], a health service plan which the legislature felt still conformed to the original concept of the VHSPA and, thereby, was entitled to continued immunity.
>
> * * *
>
> 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. If the purpose ceases to exist, the legislature is not only free to eliminate the gratuitously-conferred [*sic*] benefit, it may be constitutionally mandated to do so. Otherwise the statute may be invalid as "special legislation."
>
> With respect to the immunity provision of the VHSPA, it is clear that the legislature believed that there was no longer a need to confer the special benefit of immunity upon these health plans and, therefore, withdrew the benefit, which it is entirely entitled to do.

> However, the problem lies in the reservation of immunity for the single entity known as Union [Health Service]. Hence, if the 1998 amendment is constitutionally invalid at all, it is because of the exemption it creates. The question, then, is whether Union does, in fact, continue to adhere to the original concept of the VHSPA and whether there continues to be a legitimate State purpose for endowing Union [Health Service] with the benefit of immunity from liability.

McMichael, 259 Ill. App. 3d at 118-19.

The court's discussion certainly suggests that the 1988 amendment to section 26 is unconstitutional. Ultimately, however, the court chose not to reach that conclusion because:

> [w]hat MRHP fails to understand is that, whether Union and MRHP are identical in purpose and function will speak to the question of whether Union may continue to enjoy immunity, not to the question of whether MRHP's immunity should be reinstated. Therefore, the resolution of the certified question will not change MRHP's status or interest in the litigation and, for this reason, we do not feel it appropriate to answer the certified question at this time.

McMichael, 259 Ill. App. 3d at 119.

With this history of the VHSPA, it is plain that the problem Senator Barkhausen identified nearly 30 years ago and the *McMichael* court found unripe 20-plus years ago now forms Gonzalez's central argument for defeating UHS's motion to dismiss. Gonzalez argues that the 1988 amendment to VHSPA section 26 violates the equal protection clause of the United States and Illinois constitutions by authorizing disparate treatment to similarly situated groups. *See* U.S. Const., art. IV, § 1 & amd. XIV; Ill. Const., art. 1, § 2. Such disparate treatment, if true,

further violates the Illinois constitution's prohibition against "special legislation."

The term "special legislation" derives from another section of the Illinois constitution providing that:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

Ill. Const. art. IV, § 13. Special legislation has come to be defined as legislation that "confers a special benefit or privilege on a person or group of persons to the exclusion of others similarly situated." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 370 (1986), *citing Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 367 (1985) & *Fireside Chrysler-Plymouth, Mazda, Inc. v. Edgar*, 102 Ill. 2d 1, 4 (1984). Special legislation is unconstitutional because it is "arbitrarily, and without a sound, reasonable basis, discriminates *in favor of* a select group." *Illinois Polygraph Soc., v. Pellicano*, 83 Ill. 2d 130, 137-38 (1980) (emphasis in original) (contrasting equal protection challenges that are based on discrimination *against* a person or a class of persons).

Our Supreme Court has determined that the standards employed to judge whether a law constitutes special legislation are the same used to judge equal-protection challenges. *See Jenkins v. Wu*, 102 Ill. 2d 468, 477 (1984). If a classification does not affect a fundamental right or discriminate against a suspect class, the proper standard is the rational-basis test. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997); *People v. Richardson*, 2015 IL 118255, ¶ 9 (2015). In short, "[t]he distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald v. Board of Election Comm'rs*,

394 U.S. 802, 809 (1969) *see also Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (1994).

A presumption underlying any constitutional challenge is that "[c]lassifications drawn by the General Assembly are . . . constitutionally valid, and all doubts will be resolved in favor of upholding them." *In re Petition of the Village of Vernon Hills*, 168 Ill. 2d 117, 122-23 (1995). Equal protection within the ambit of the United States and Illinois constitutions requires equality between groups of persons similarly situated, yet neither constitution denies a state the power to treat different classes of persons differently. *See Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972); *People v. Eckhardt*, 127 Ill. 2d 146, 151 (1989). Further, unless a fundamental right or a suspect classification is at issue, Congress or the Legislature may differentiate between similarly situated persons if there exists a rational basis for the distinction. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976); *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 578 (1978).

In this case, it is plain that before 1988, the three voluntary plans chartered before 1965 – UHS, the Hillman Health Centre, and the Union Medical Center – were subject to the identical statutory requirements as to incorporation, regulation, management, provision of care, oversight by the Department of Insurance, and not-for-profit status. *See, e.g.*, 215 ILCS 165/4 to 7. As noted in *Brown*, section 26 immunity accorded to voluntary plans could be justified because of their unique dual structure as insurer and healthcare provider. *See* 150 Ill. App. 3d at 961-62. Quite apart from any constitutional discussion, it is undeniable that voluntary plans are no longer structurally unique given that, as a matter of law, HMOs function in the same dual capacity. *See* 215 ILCS 125/1-2(7) ("'Health care plan' means any arrangement whereby any organization undertakes to provide or arrange for and pay for or reimburse the cost of basic health care services") & 1-2(9) ("'Health Maintenance Organization' means any organization formed under the laws of this or another state to provide or arrange for one or more health care plans under a

system which causes any part of the risk of health care delivery to be borne by the organization or its providers"). Indeed, the *McMichael* court came to that conclusion as far back as 1994, finding that Anchor could not claim section 26 immunity because "the legislature intended that no HMO, regardless of its organization pursuant to other statutes, be granted immunity." 259 Ill. App. 3d at 118.

For a variety of reasons it is equally plain that the presumptive validity accorded to legislative enactments runs up against the 1988 amendment to the VHSPA section 26 both facially and as applied to UHS. First, the amendment includes an arbitrary cutoff date. It is undeniable that cutoff dates may or may not be constitutional depending on the circumstances giving rise to the legislation. *See, e.g., Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 643 (1973) (cutoff dates in mandatory-leave rules have no rational relationship to state's interest of preserving continuity of instruction while not violating teachers' exercise of constitutionally protected freedom); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 330-31 (1976) (Insurance Code amendment deregulating medical malpractice rates for policies written after June 10, 1975 constituted special legislation absent any justification based on the cutoff date). As the Illinois Supreme Court has explained:

> a law the legislature considers appropriately applied to a generic class presently existing, with attributes that are in no sense unique or unlikely of repetition in the future, cannot rationally, and hence constitutionally, be limited of application by a date restriction that closes the class as of the statute's effective date. Barring some viable rationale for doing so, it would, for example, violate the proscription of the constitution for the legislature to apply a law to a person or entity in existence on the effective date of enactment, but make it inapplicable to a person or entity who assumed those attributes or characteristics the day after the statute's

effective date.

Board of Ed. v. Peoria Fed'n of Support Staff, Security/ Policeman's Benevolent & Protective Ass'n Unit No. 114, 2013 IL 114853, ¶ 54, *citing Potwin v. Johnson*, 108 Ill. 70 (1883); *Pettibone v. West Chicago Pk. Comm'rs*, 215 Ill. 304, (1905); *Dawson Soap Co. v. City of Chicago*, 234 Ill. 314, (1908); *Mathews v. City of Chicago*, 342 Ill. 120 (1930), *People v. Madison Cty. Levee & San. Dist.*, 54 Ill. 2d 442 (1973), & *Wright*, 63 Ill. 2d 313. Here, the amendment's legislative history is devoid of any factual or legal reasoning justifying rescinding section 26 immunity to voluntary plans chartered after 1965. In contrast, no such temporal limitation applies to the requirement that all voluntary plans be HMOs.

Second, there is no rationale for limiting voluntary plans to those operated exclusively on a not-for-profit basis. Senator Jones states that the measure "takes care of *the problem* that we have as it relate[s] to HMO's [*sic*]" (emphasis added), but he does not identify "the problem." It may be that he was attempting to distinguish between not-for-profit voluntary plans and for-profit HMOs. This is a fair inference given that Senator Jones explains that the immunity remains intact for "*a* service organization" (emphasis added), *i.e.*, UHS. Drawing this inference is, however, problematic. It is not this court's place to infer from Senator Jones's cryptic statement "the problem" nearly 30 years after the fact. Additionally, there is no reasonable construction of the legislative history to support the inference that UHS was the only voluntary plan operating as a "service organization;" plainly, Sidney Hillman Health Centre and Union Medical Center also provided "services" in the form of healthcare and were "organizations" as chartered voluntary plans and HMOs. Those two organizations, in addition to UHS, had to be not-for-profit because, as Garrett avers in his affidavit, this is the means by which voluntary plans can offer services at lower costs than other healthcare providers.

Third, Senator Jones' apparent attempt to distinguish hospital-owned or -controlled voluntary plans from others is illusory. By operation of law, not-for-profit corporations are prohibited from issuing shares or dividends, *see* 805 ILCS 105/106.05, and, therefore, are not owned by anyone. *See, e.g., Better Gov't Ass'n v. Illinois High Sch. Ass'n*, 2016 IL App (1st) 151356, ¶ 30; *Smith v. Northeast Illinois Regional Commuter R.R.*, 210 Ill. App. 3d 223, 227 (1st Dist. 1991). In other words, UHS, Sidney Hillman Health Centre, and Union Medical Center may have operated in conjunction with medical providers employed by or associated with hospitals, but none was owned by a hospital. Senator Jones' distinction also fails because a voluntary plan must be controlled by a board of trustees. *See* 215 ILCS 165/5. Such a board must be comprised of "persons," defined as "a natural person, corporation, partnership or unincorporated association . . . ." 215 ILCS 165/2(j). While 30% of trustees must be licensed physicians, *see* 215 ILCS 165/5, it is possible that hospital representatives could comprise the other 70%. Such representation would, however, still meet the statutory requirements for the board of directors of a voluntary plan. Even with that possibility, the legislative record is devoid of any facts indicating that hospitals had taken over the boards of trustees of the Sidney Hillman Health Centre and Union Medical Center, leaving UHS as the only independently controlled voluntary plan.

Apart from the legal infirmities in the 1988 amendment to section 26, there are a variety of facts that lead to the inexorable conclusion that UHS today no longer functions as a voluntary plan as envisioned in 1951. First, UHS no longer fits the model of a voluntary plan that is jointly a healthcare provider and insurer. Discovery answers and Garrett's affidavit establish that UHS has for some time contracted with Advocate Illinois Masonic Medical Center, Mercy Hospital and Medical Center, Rush-Copley Medical Center, Rush-Oak Park Hospital, South Suburban Hospital, and University of Illinois Hospital and Health Sciences System for their professionals to provide healthcare services to UHS subscribers. Second, discovery answers also establish that UHS has purchased liability insurance. As noted above, this purchase

does not alter the application of section 26 immunity to UHS, yet, if UHS stills enjoys absolute immunity under section 26, there was no reason for UHS to have purchased insurance. It must be true, therefore, that UHS believes it either no longer enjoys absolute immunity or could be held liable for its healthcare providers' acts and omissions. To that end, if the goal of the charitable-fund doctrine was not to impair a trust but rely on purchased insurance, *Wendt*, 332 Ill. App. at 634, then it is only consistent to call on a voluntary plan's purchased insurance to cover potential claims against the plan based on its healthcare providers' acts and omissions.

In his affidavits, Garrett emphasizes the differences that remain between UHS and HMOs that could potentially justify the continued favorable treatment given only to UHS. These differences are, however, unremarkable. For example, this court assumes that Garrett is correct when he avers that a not-for-profit status permits UHS to offer healthcare through identical providers at lower costs than HMOs. Yet, the purpose of HMOs is also to provide healthcare at lower costs, *see, e.g., Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 28-29 (1999), so UHS is not destined to provide a result that other organizations cannot or do not achieve. Even if UHS does provide lower cost healthcare than HMOs, Garrett fails to substantiate the difference so that this court could better determine if the cost savings available to one union's members is rationally related to the state's interest in the provision and management of healthcare to Illinois residents. Additionally, it is important to distinguish that UHS is merely a not-for-profit organization; it is not a charity. The Illinois Supreme Court long ago abolished charitable immunity as a means to insulate not-for-profit hospitals from the consequences of their negligence. *See Darling v. Charleston Mem. Hosp.*, 33 Ill. 2d 326, 337 (1965), *cert. denied*, 383 U.S. 946 (1966). Garrett's affidavit fails to explain why, if common-law immunity no longer shields charitable not-for-profits, section 26 immunity should continue to apply to non-charitable not-for-profits such as UHS that have purchased insurance.

Relatedly, Garrett explains that less than 3% of UHS business involves the exercise of its HMO authority. That statistic is of limited utility because Garrett admits that UHS focuses its efforts only on certain types of healthcare and does not offer the broader type of care required of HMOs. It is also likely that the 3% figure is partly the result of UHS subscribers having other insurance coverage that excludes the more limited healthcare options provided by UHS. Apart from that lack of information, Garrett makes a key admission in his affidavits – UHS is both chartered and operates as an HMO. That fact alone puts UHS in the same category as all other voluntary plans since the HMO Act requires that they also be chartered as HMOs.

Garrett further attempts to distinguish UHS by averring that it serves union members and their families. That fact is, again, not unique to UHS. Non-contributing Service Employees International Union members and members of all other trade unions are served by various other HMOs and preferred provider organizations. The subscriber served is, therefore, not a distinguishing factor; rather, the type of services provided and how they are provided are distinguishing factors, and these do not differ between voluntary plans and HMOs.

Finally, Garrett avers that UHS is controlled by a board of directors and is not and has never been controlled by a hospital. That distinction, again, has little currency and appears to be simply a vestige of time. Under the 1951 or 1988 versions of the VHSPA, a hospital could effectively control a voluntary plan's board of directors, yet that would not alter the type of services provided or how they were provided. This is another distinction without a difference.

Conclusion

The changed landscape of providing and managing healthcare in Illinois has changed substantially since 1951 and has, essentially, left voluntary plans in general, and UHS in particular, behind. What was a progressive concept of a dual-

capacity healthcare and insurance delivery systems in 1951 has been substantially and more effectively replicated. Likewise, the immunity available in 1951 to a small, but uniquely different type of delivery system was then rationally related to the state's legitimate interests, but not today. The 1988 amendment to VHSPA section 26 changed all that and purposefully protected and continues to protect a class of only one – UHS. Continuing to provide absolute statutory immunity to a class of one is simply not rationally related to any legitimate state interest. The 1988 amendment to section 26 is, therefore, unconstitutional because it violates the Illinois constitution's prohibition against special legislation.

For these reasons,

THIS COURT FINDS THAT,

pursuant to Illinois Supreme Court Rule 18, the 1988 amendment to VHSPA section 26 is unconstitutional in violation of U.S. Const., art. IV, § 1 & amd. XIV; Ill. Const., art. 1, § 2; & Ill. Const. art. IV, § 13; and

THIS COURT ORDERS THAT,

UHS's motion to dismiss counts 15 and 16 is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

NOV 02 2017

Circuit Court 2075

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on December 1, 2017, at or before 5:00 p.m., I electronically filed the **Notice of Direct Appeal to the Supreme Court of Illinois Pursuant to Supreme Court Rule 302(a)** with the Circuit Court of Cook County, Illinois.

I certify that on December 1, 2017, at or before 5:00 p.m., I sent the above-mentioned pleading to the parties and attorneys of record by transmitting via email to the email addresses hereinafter indicated. Under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, I certify that the statements set forth in this Notice of Filing and Proof of Service are true and correct.

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NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on April 3, 2018, at or before 5:00 p.m., I electronically filed the Brief and Appendix of Defendant-Appellant Union Health Service, Inc. with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I certify that on April 3, 2018, at or before 5:00 p.m., I sent the above-mentioned pleading to the parties and attorneys of record by transmitting via email to the email addresses hereinafter indicated. Under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, I certify that the statements set forth in this Notice of Filing and Proof of Service are true and correct.

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