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.

REPLY BRIEF OF DEFENDANT-APPELLANT UNION HEALTH SERVICE, INC.

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ORAL ARGUMENT REQUESTED

ARGUMENT IN REPLY

Plaintiff relies exclusively on generalizations and inaccuracies to misclassify Union Health. The record does not support plaintiff's speculation that Union Health shares operational characteristics of the voluntary health services plan corporations that deviated from the Act's original concept and lost their immunity—Michael Reese Health Plan Foundation ("Michael Reese") and Anchor Organization for Health Maintenance ("Anchor"). In amending the Voluntary Act's immunity provision in 1988, the General Assembly scrutinized Union Health and distinguished it from entities no longer functioning as contemplated by the drafters of the legislation.

After the amendment, Union Health did not stand alone, as plaintiff repeatedly claims. Rather, the legislature accurately left immunity intact for Union Health and two other conforming voluntary health services plan corporations. Only by ignoring the practical effect of the amendatory language can plaintiff disregard the rational basis of the amendment.

Plaintiff also misconstrues case law and the record to avoid confronting the legislature's determination—upheld by the appellate court—that Union Health deserves immunity because it has adhered to the form and function of a voluntary health services plan. Plaintiff ignores the important purpose Union Health and other existing voluntary plans serve: providing affordable healthcare to union members and their families.

I. The Practical Effect of the 1988 Amendment Defeats Plaintiff's Constitutional Challenge to the Voluntary Act's Immunity Provision.

Two years after the appellate court upheld the constitutionality of the immunity afforded to corporations chartered under the Voluntary Act, the legislature took a critical second look at the practical implications of the immunity provision. Consistent with the

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rational basis for the original grant of immunity articulated by the First District in *Brown v. Michael Reese Health Plan*, 150 Ill. App. 3d 959, 961-62 (1st Dist. 1986), the legislature amended the Act to remove the statutory benefit from those corporations no longer conforming to the Act's original concept. Recognizing the influential roles hospitals played in the non-conforming entities' business plans, the legislature removed their statutory privilege, but preserved immunity for those entities that adhered to the letter and spirit of the Voluntary Act. See *Moshe v. Anchor Organization for Health Maintenance*, 199 Ill. App. 3d 585, 597-98 (1st Dist. 1990). Plaintiff, however, mischaracterizes both the purpose and effect of the amendment.

A. The amendment did not grant Union Health immunity; it eliminated immunity for corporations that deviated from the voluntary health services plan model.

Union Health is not a class of one. Plaintiff in her response—not the legislature by the amendment—creates an arbitrary classification by misconstruing the factual record. Plaintiff repeatedly claims that the amendment singled out Union Health for immunity. (Response at 5, 6, 8, 10, 18.) Plaintiff persists with this misrepresentation despite Union Health's having clarified in the trial court as well as in this Court that Union Health was *not* the only voluntary health services plan corporation with statutory immunity after 1988. (C1275, C1289 V3; Opening brief at 12-14.) The amendment effectively created two groups: those that complied with the original concept of the Act and those that strayed from the concept. In the legislature's view, the latter group, two hospital-controlled HMOs, no longer deserved immunity. See *Moshe*, 199 Ill. App. 3d at 597-98. The former class, consisting of Union Health, Sidney Hillman Health Centre and

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Union Medical Center, continued to serve the purposes envisioned by the General Assembly and thus retained immunity. Union Health does not stand alone.

But even if Union Health remained the only entity entitled to immunity under the Act, the amendment is not *per se* unconstitutional. This Court has often upheld against constitutional challenges legislation that effectively confers a benefit upon one entity. See *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130 (2006) (upholding statute that conferred benefit on one property owner); see also *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315 (2005) (rejecting constitutional challenge to law that favored one riverboat gambling licensee); *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221 (2005) (holding constitutional statute affecting only Illinois Bell). In all three cases, the constitutional challengers failed to identify any entity similarly situated to the subject of the legislation who were arbitrarily excluded.

Here, plaintiff fails to distinguish Sidney Hillman Health Centre and Union Medical Center from Union Health. Plaintiff refuses even to acknowledge them. The legislature considered Union Health's HMO certification in amending the Act and rightly determined that, in the absence of hospital influence, Union Health was similarly situated to Sidney Hillman Health Centre and Union Medical Center. These voluntary health services corporations continued to receive immunity based on their compliance with the original concept of the Act.

B. Restricting immunity to corporations that received Voluntary Act charters after 1965 properly removed immunity from corporations where a rational basis for immunity no longer existed.

Plaintiff's erroneous assumption that the legislature singled out Union Health for special treatment is the bedrock of plaintiff's flawed conclusion that limiting immunity to

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those entities incorporated before 1965 constitutes special legislation. (Response at 10, 15-16.) Sidney Hillman Health Centre and Union Medical Center, along with Union Health, received their Voluntary Act charters before 1965. See *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill. App. 3d 113, 116-17 (1st Dist. 1994); (C1289 V3.) The entities with Voluntary Act charters that lost immunity obtained their charters *after* 1965. See *Moshe*, 199 Ill. App. 3d at 594; see also *Jolly v. Michael Reese Health Plan Foundation*, 225 Ill. App. 3d 126, 128 (1st Dist. 1992). The temporal classification thus achieved the desired result: eliminating immunity for those corporations that only nominally operated as voluntary health services plans. See *Moshe*, 199 Ill. App. 3d at 596-98.

In enacting statutory classifications, "[t]he legislature has broad latitude and discretion." *Big Sky*, 217 Ill. 2d at 240. Courts do not question the means by which the General Assembly achieves the goal of legislation as long as the classification created by the statute is rationally related to a legitimate state interest. See *id*. Eliminating immunity for health services plans incorporated after 1965 ensured that only those that continued to conform to the Voluntary Act's original concept received protection from malpractice liability to facilitate their ability to provide affordable healthcare to union members and their families. Removing immunity from the entities that deviated from the Voluntary Act indicated that a rational basis remained for the immunity provision applicable to the conforming corporations.

This Court has upheld legislation using a temporal classification to confer a benefit on a limited class. See *Crusius*, 216 Ill. 2d at 333. In *Crusius*, plaintiff taxpayer challenged a statute that allowed "[a] licensee that was not conducting riverboat gambling

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on January 1, 1998" to apply to the Illinois Gaming Board for renewal and relocation to a new dock. *Id*. at 320 (citing 230 ILCS 10/11.2(a) (West 2000)). The taxpayer claimed the statute, which effectively allowed only one of ten licensees to apply for relocation, constituted special legislation and an equal protection violation. *Crusius*, 216 Ill. 2d at 325-26. Upholding the constitutionality of the statute, this Court reasoned that, although the statute could never apply to more than one licensee, it nevertheless bore a rational relationship to the state's interest in promoting the economic goals of the Riverboat Gambling Act. *Id.* at 327. The statute permitted the only non-operational riverboat gambling licensee to relocate to an economically viable location and thus promote tourism and generate state revenue. *Id*. at 327-28. In response to the argument that the provision did not further the goal of strict regulation, this Court observed that a statutory provision need not "promote all of the law's *** potentially conflicting objectives." *Id*. at 329.

The year 1965, along with the conditions that a voluntary plan corporation operate as a non-profit free from hospital ownership and control, achieved the purpose of the amendment. A court will not invalidate a statute, even if it restricts the beneficiary class to one, "if there are attributes or needs which warrant particularized treatment." *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44, 59 (1st Dist. 2004), *aff'd*, 216 Ill. 2d 315 (2005); see also *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 243 (1988) (upholding law applicable to the CTA against special legislation challenge because statute was "rationally related to the unique function and purpose of the CTA"). Here, too, the immunity conferred upon Union Health is rationally related to its unique function and purpose; therefore, the fact that, under a 1989 amendment to the Voluntary Act, no

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other entity may obtain a Voluntary Act charter is irrelevant. 215 ILCS 165/3.1. Tellingly, when making that subsequent amendment to the Act, the legislature did not readdress the immunity provision.

Plaintiff points to inapposite authority in citing *Wright v. Central DuPage Hospital Association*, 63 Ill. 2d 313 (1976). In *Wright*, two insurance companies challenged a provision of the Illinois Insurance Code that prohibited insurance companies covering medical malpractice from "refus[ing] to renew any existing policy providing such coverage at the rates existing on June 10, 1975" unless the insurance company fulfilled certain conditions. *Wright*, 63 Ill. 2d at 330 (quoting 215 ILCS 5/401(a) (West 1975)). Section 401(a) regulated the rates only for existing policies, not new policies. *Wright*, 63 Ill. 2d at 330. This Court reasoned that regulating the rates of both initial and existing medical malpractice policies is equally important; therefore, the classification created by the June 10, 1975 date was arbitrary and thus constituted special legislation. *Id*. at 330-31.

Unlike the two classes of insurance policies in *Wright*, the record here establishes a distinction between the two types of healthcare entities. The appellate court repeatedly has upheld the constitutionality of granting immunity to voluntary health services plans because they "serve the unique function of both insurer and health care provider." *Brown*, 150 Ill. App. 3d at 961-62; *Moshe*, 199 Ill. App. 3d at 595-96; *American National Bank & Trust Co. of Chicago v. Anchor Organization for Health Maintenance*, 210 Ill. App. 3d 418, 425-26 (1st Dist. 1991); *Jolly*, 225 Ill. App. 3d at 130. When certain entities with Voluntary Act charters began to deviate from this concept, the legislature sought to

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further the goal of the Act by narrowing the grant of statutory immunity. No such rational basis existed for the distinction drawn in *Wright*.

Plaintiff knowingly errs in claiming that the appellate court never addressed the constitutionality of the Voluntary Act or the amendment. (Response at 9, n.2.) As set forth in Union Health's opening brief, the appellate court has considered the constitutionality of the Act and, specifically, the amended immunity provision. (Opening brief at 7-9, 14-15.) In *Waddicar v. Union Health Service, Inc.*, the First District upheld the constitutionality of the amended immunity provision. No. 1-95-3715, at 7-8 (1st Dist. May 11, 1998); (C1313 V3). Plaintiff ignores the First District's conclusion that 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.

The *Waddicar* decision disproves plaintiff's speculation that, given the *dicta* in *McMichael*, "there is no doubt that the *McMichael* Court would have declared Union Health's immunity to be unconstitutional legislation." (Response at 10.) Reaching the opposite conclusion, the First District rejected the same special legislation and equal protection challenges plaintiff asserts here. *Waddicar*, No. 1-95-3715.

C. Plaintiff cites no case law supporting her claim that the 1988 amendment arbitrarily discriminates in favor of Union Health.

Plaintiff relies on inapplicable case law in challenging the 1988 amendment. (Response at 7-10, 14.) This Court's prior decisions in cases involving unrelated statutes are not dispositive of whether the classification effected by the 1988 amendment is rationally related to a legitimate state interest. See *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 194-95 (1952) (declining to address unrelated statutes cited by constitutional

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challenger and instead focusing on the classification created by the legislative provision at issue). Plaintiff's brief illustrates the reasoning for this rule. Plaintiff cites authorities that conceivably could apply only if the legislature had singled out Union Health based on its date of incorporation. (Response at 8.)

None of the cases cited by plaintiff provide analogous support for her position. Citing *Grace v. Howlett*, *Grasse v. Dealer's Transport Co.*, and *Harvey v. Clyde Park District*, plaintiff argues that legislation arbitrarily limiting an injured person's ability to recover in tort cannot withstand constitutional scrutiny. (Response at 7-8, 14.) Plaintiff mischaracterizes this Court's rulings in these cases as "involving special immunity legislation that arbitrarily limits the liability of injured victims [*sic*]" by granting certain potential defendants special protections. (Response at 7.) Contrary to plaintiff's argument, in each of the cases, this Court determined that no substantial difference existed among similarly situated entities that justified treating them differently, a situation not presented in this case.

In *Grasse*, this Court invalidated a provision in the Workers' Compensation Act, the operation of which arbitrarily classified employees, employers and third-party tortfeasors. 412 Ill. at 195-96, 199. Section 29 of the Act transferred an employee's common-law cause of action for injuries sustained on the job to his employer if the third-party who caused the injuries was subject to the Act. This Court reasoned that section 29's distinction between the two classes of tortfeasors did not promote the Act's objectives: to compensate employees in the course of their employment and afford a remedy to employers that paid for an employee's injuries caused by third-parties. 412 Ill. 179 at 195-96. Limiting an employer's ability to recover in a third-party action and

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restricting an employee's recovery on the basis of whether the tortfeasor fell within the purview of the Act had no rational basis. Likewise, this Court in *Grace* declared unconstitutional a statute that conditioned recovery for injuries caused by motor vehicles on the type of automobile because the distinctions had no rational connection to the purpose of the legislation—efficiently and equitably compensating victims of automobile crashes. 51 Ill. 2d 478, 487 (1972).

Plaintiff stretches this Court's holding in *Harvey* to suggest that, when a statute addresses a party's ability to recover for "civil wrongs," a Court must review the rational basis of the statute from the perspective of the injured party. (Response at 14.) Legislation that may affect a person's ability to recover in tort is not subject to an analysis different than the analysis applied to statutes that do not affect a fundamental right or involve a suspect classification. See *Big Sky*, 217 Ill. 2d at 237-38. Contrary to plaintiff's suggestion, no heightened standard of review exists. Rather, under a special legislation analysis, a court focuses on the statutory classification and those similarly situated. See *Id*. at 237 (finding irrelevant consumers' harm that resulted from legislation addressing a telecommunication carrier because consumers were not similarly situated to the entity subject to the law). This Court ultimately reasoned in *Harvey* that an immunity provision in the Park District Code amounted to special legislation, where the provision resulted in different treatment of similarly situated governmental units performing the same activities out of which tort liability commonly arises. 32 Ill. 2d 60, 65-66 (1964).

Plaintiff's faulty analysis depends on ignoring the existence of health services plan corporations situated similarly to Union Health. In addition, plaintiff cites the 1965 incorporation date in the amended provision as though it is the only feature distinguishing

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Union Health from those entities that lost immunity under the amendment. Both the appellate court and the legislature recognized Union Health's continued adherence to the tenets of the Voluntary Act as the rational basis for continuing its statutory immunity. See *American National*, 210 Ill. App. 3d at 426; see also 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 159-61.

Attempting to align Union Health with Anchor and Michael Reese, plaintiff cites Union Health's employment of physicians (response at 15), but that fact had nothing to do with the amendment. In making this argument plaintiff misconstrues Senator Jones' statements and ignores the appellate court's interpretation of the legislative history. (Response at 15.) Consistent with the amendatory language, Senator Jones observed that Union Health deserved immunity "[b]ecause it is a not-for-profit and it's not owned by a hospital." 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 160 (statements of Senator Jones). As a non-profit not owned or under the control of any hospital, Union Health differs from Michael Reese and Anchor, both of which were closely related to hospitals, a dynamic in which those corporations strayed from the form and function unique to a voluntary health services plan.

Senator Jones referred to physicians as employees of hospitals in passing, when he expressed concern over the influential roles hospitals played in the health services plans corporations that were affected by the 1988 amendment. Senator Jones observed that the amendment removed immunity from the "hospitals." 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 161 (statements of Senator Jones). Union Health is not a hospital, but both Michael Reese and Anchor arose out of relationships with hospitals. See *id*., see also *Moshe*, 199 Ill. App. 3d at 590. Plaintiff's argument that the

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employment status of hospital physicians is the "only basis" for the amendment (response at 15) ignores Senator Jones' conclusion that the amendment "takes care of the problem that we have as it relate[s] to HMO's ***." 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 161 (statements of Senator Jones). Plaintiff does not account for the appellate court's observation, from the legislative history, that the General Assembly intended to eliminate immunity for HMOs controlled by a hospital. See, *e.g., Moshe*, 199 Ill. App. 3d at 597-98. The problem was hospital control, not the employment of physicians.

II. Union Health's Continued Adherence to the Original Concept of a Voluntary Health Services Plan Warrants Immunity.

A. The HMO Act does not extinguish the rational basis for the Voluntary Act amendment.

Plaintiff concedes that Union Health's HMO certification does not preclude immunity under the Voluntary Act, but nevertheless argues that the HMO Act has effectively abolished the distinctiveness of a voluntary health services plan and eliminated the rational basis for immunity. (Response at 17-18.) Illinois law refutes plaintiff's flawed reasoning. The appellate court first sustained the constitutionality of the Act's immunity provision in 1986, twelve years after enactment of the Illinois HMO Act. See *Brown*, 150 Ill. App. 3d at 961-62. Thereafter, the First District repeatedly upheld the constitutionality of the immunity provision, even in instances where a voluntary health services plan corporation held an HMO certificate. See *Moshe*, 199 Ill. App. 3d at 596; *McMichael*, 259 Ill. App. 3d at 116-17.

None of the cases cited by plaintiff held that the HMO Act, by itself, rendered obsolete voluntary health services plans. *McMichael* did not conclude, as plaintiff claims,

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that the immunity provision constituted the only real difference between the Voluntary and HMO Acts. (Response at 18.) Rather, the *McMichael* court observed that whether Union Health conforms to the original concept of the Voluntary Act determines whether Union Health is entitled to immunity. 259 Ill. App. 3d at 119. Because the record did not permit such a determination, the *McMichael* court declined to answer the certified question. *Id.* Similarly, *American National* did not hold that all voluntary health services plan corporations "look like" HMOs. (Response at 17.) Rather, the appellate court in *American National* decided a narrow question: whether the original immunity provision, as applied to Anchor, was unconstitutional. 210 Ill. App. 3d at 426-27. Any overlap between the HMO Act and the Voluntary Act does not eliminate the distinctions that the appellate court in *Brown* found to provide a rational basis for the immunity provision. See 150 Ill. App. 3d at 961-62.

Despite the legislature's careful consideration of immunity as applied to Union Health, plaintiff now baselessly asks this Court to reject the General Assembly's conclusion that Union Health operates as "just a service organization" and, therefore, deserves continued immunity. See 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 161 (statements of Senator Jones). The legislature did not broadly amend the Voluntary Act to remove immunity from all voluntary plans also certified as HMOs. Instead, the legislature scrutinized Union Health's status and preserved its immunity because it adheres to the purpose of the Voluntary Act by providing affordable healthcare to union members. See 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 159-61; see also *Moshe*, 199 Ill. App. 3d at 597-98.

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Notably, plaintiff implicitly concedes that a rational basis for the Amendment exists. Plaintiff's argument that Union Health has deviated from the original concept of the Act, thereby disqualifying it from immunity, suggests that, if the legislature was correct in its assessment of Union Health's operations, the 1988 amendment would be supported by a rational basis. Plaintiff does not disagree with the distinction in principle; plaintiff only disagrees with the legislature's factual conclusions.

B. The record does not support plaintiff's characterization of Union Health as a hospital-controlled HMO.

Plaintiff relies on speculation and inaccurate factual statements and thus cannot meet her burden of establishing that no rational basis supports the legislature's conclusion that Union Health merited continued immunity. Ignoring the record, plaintiff boldly claims that "it is impossible" to determine when Union Health acts as a voluntary health services plan or an HMO. (Response at 12.) The record is clear that, with only a small fraction of its business involving the exercise of its HMO authority, less than 3%, Union Health operates almost exclusively as a voluntary health services plan. (C1289-90 V3.) Here, in fact, Union Health provided healthcare to plaintiff's decedent through a Voluntary Act plan offered by his union's welfare fund. (C1289-90 V3.) Mr. Aguilar, along with fellow service workers, was a member of S.E.U.I. Local 1. (*Id*.)

Plaintiff thus errs in contending that, "[f]rom the standpoint of the injured party," Union Health does not differ from any other non-profit healthcare organization. (Response at 14.) The type of healthcare services afforded to a subscriber such as plaintiff's decedent distinguishes a voluntary health services plan from an HMO: voluntary plans need not offer comprehensive healthcare benefits; by contrast, an HMO

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must. Compare 215 ILCS 165/6 with 215 ILCS 125/2-2(b)(4) (West 2014) and 215 ILCS 125/1-2(3); (C1288-89.) The flexibility of providing narrowly fashioned benefit packages enables voluntary plans to meet the particular needs of union health and welfare funds. (C1288-89.)

Relying on *American National*, plaintiff erroneously claims that Union Health's persona under the Voluntary Act gets lost within "several different categories of managed health care plans." (Response at 12.) *American National*, a case involving Anchor's deviation from the voluntary health services plan model, did not address and is not dispositive of whether Union Health adheres to the Act. See 210 Ill. App. 3d at 426.

Notably, plaintiff does not contend that the circuit court correctly analyzed the record and the applicable legal principles. Rather, plaintiff extensively cites a vacated circuit court opinion in an unrelated matter. In that case, *Sahlin v. Union Health*, the circuit court declared the immunity provision unconstitutional, but upon reconsideration vacated that ruling. (Response at 12 citing C1162-79 V2; C1271, C1285 V2.) Nothing in the vacated opinion supports plaintiff's conclusion that Union Health has "several different categories of managed health care plans." (Response at 12; C1176 V2.) The circuit court interpreted a sentence the court attributed to Union Health's website. (*Id*.) The cited excerpt describes Union Health "as many things, such as—a Voluntary Health Services Plans Corporation; a multi-specialty medical group; a not-for-profit health plan; or a staff-model managed care plan." (C1176 V2.) The cited phrases are consistent with Union Health's operation as a voluntary health services plan corporation. Under the Act,

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Union Health must, and does, operate on a non-profit basis.[1] (215 ILCS 165/5; C1290, C1295-1303 V3.) Describing Union Health as "a multi-specialty medical group" and "staff-model managed care plan" illustrates Union Health's function as both insurer and healthcare provider.

Relying exclusively on the *Sahlin* opinion, plaintiff erroneously claims that Union Health, like Anchor, markets itself as an HMO. (Response at 19 citing C1162-79 V2.) The record does not support any such contention. It does, however, demonstrate that Union Health holds itself out as a voluntary plan. In the quoted website excerpt, Union Health describes the manner in which it delivers healthcare services under the Voluntary Act by "directly provid[ing] insured health care services through our own staff of physicians." (C1176 V2.) Union Health informs website viewers of the provisions of the Act with which Union Health complies in rendering healthcare services: "[F]ree choice of any staff physician; the private physician-patient relationship; confidentiality; no restrictions on the physician's methods of diagnosis or treatment; and the inclusion of physicians in the company's top management." (*Id*.)

Plaintiff misconstrues Union Health's website as advertising to employers and employees. (Response at 19.) The vacated circuit court opinion quotes two excerpts the court attributed to Union Health's website demonstrating Union Health's adherence to the original concept of the Act where it describes itself as "a tradition of providing high quality and cost-effective benefits to *groups covering Chicago-area union members*." (C1176 V2 (emphasis added).) Both the legislature and the appellate court have found

[1] The HMO Act does not require a non-profit status to receive HMO certification. (C1288 V3; 215 ILCS /2-1(b).)

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the service of unions significant in the constitutional analysis. See *McMichael*, 259 Ill. App. 3d at 116-17; see also 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 161 (statements of Senator Jones).

Union Health's marketing thus differs dramatically from Anchor's. Anchor informed potential subscribers that it was a "federally qualified HMO and a state certified HMO and incorporated under the Voluntary Health Services Plans Act." *Moshe*, 199 Ill. App. 3d at 591. Anchor thus billed itself first as an HMO. As the First District observed, Anchor evolved from a service organization for union employees of Presbyterian-St. Luke's Medical Center to deriving 90% to 95% of its income as an HMO paid by private and public employers to cover their employees. *Id.* at 590. The hospital's union employees, for the most part, were out of the picture. *Id.*

In further contrast to Anchor, Union Health maintains strong ties to the union community not only in Union Health's service of union employees but also at the management level. Both at the time of plaintiff's decedent's care and currently, Union Health's board of trustees consists of three union executives, two owners of buildings who employ union members served by Union Health, and, as the Act requires, two physicians. (C1290 V3; 215 ILCS 165/5.) Nothing in the Voluntary Act requires the composition of Union Health's board of trustees to include union representatives.

C. Union Health's contractual relationships are consistent with operating in the unique capacity of both insurer and healthcare provider under the Act.

Plaintiff misstates the record in describing the relationships Union Health has with its physicians and Advocate Illinois Masonic Medical Center ("Advocate Illinois Masonic"). (Response at 19-21.) Contrary to plaintiff's sweeping conclusion that, during

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the time of plaintiff's decedent's care and treatment, Union Health is a contractor of "Illinois' largest Physician Organization, Advocate," the record shows that Union Health contracted with at least seven hospitals, only two of which are within the Advocate network. (C1151, C1156-61 V2.)

Further, nothing in the record supports plaintiff's erroneous conclusion that Union Health is an "independent contractor" of Advocate. (Response at 19.)[2] The provider service agreement evidences only that Advocate Illinois Masonic agreed to provide inpatient and outpatient services at the hospital as well as physician services through its emergency medicine department to Union Health plan members. (C1157, C1161 V2.) Under the authority granted to it by the Voluntary Act and consistent with its function as insurer, Union Health properly contracts with area hospitals. See 215 ILCS 165/17.

In derogation of Illinois Supreme Court Rule 341(h)(7), plaintiff cites facts not contained in the record for her insinuation that Union Health's provider service agreement with Advocate offers Union Health an improper reward for choosing Advocate to provide hospital-based services to its subscribers. (Response at 20-21.) Plaintiff mischaracterizes the agreement as providing for "reimbursement" to Union Health from Advocate. (Response at 20-21.)

The agreement reflects nothing more than the outcome of Union Health's careful negotiations to obtain advantageous pricing so that Union Health may reduce the cost of healthcare needed by the union members Union Health serves, at a savings to the subscribers' benefit. (C1291 V3.) The specific numbers cited by plaintiff, which are not

[2] Moreover, plaintiff does not meaningfully connect the alleged independent contractor status to Advocate's so-called "control" over Union Health.

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reflected in the record, lend no support to plaintiff's speculation that Union Health is "rewarded" in a fashion that translates into Advocate's "control" of Union Health. (Response at 20-21.)

Plaintiff also misapprehends the significance of Union Health's employment of physicians. In its role as healthcare provider, Union Health directly employs co-defendants Dr. Agnieszka Brukasz and Dr. Fakhruddin Adamji. (C1111 V3.) The Voluntary Act expressly permits voluntary plan corporations to enter into agreements with qualified physicians to fill subscribers' healthcare needs. 215 ILCS 165/17. Plaintiff misconstrues a provision in the agreement between Union Health and its medical staff as providing Union Health with the right to control a physician's methods of diagnosing and treating a patient. (Response at 20.) Reading the provision in its entirety and in the context of the agreement demonstrates that Union Health, as employer, retained the right to *manage operations of the business*, not to direct physicians in rendering medical care. (C1121-55 V2.) Plaintiff omits from her quotation the phrase "subject to the provisions of the Agreement." (C1149 V2.) The express purpose of the agreement was "to establish and maintain harmonious labor relations in order to provide the best health care, which may be obtained." (C1124 V2.) Union Health does not direct individual physicians in matters of medical judgment or otherwise control physician clinical decision making in treating plan members. (C1288 V3.) Doing so would violate the Voluntary Act; the Department of Insurance has never cited Union Health for such conduct. 215 ILCS 165/7. (C1289 V3.)

In another contention unsupported by citation to the record, plaintiff claims that "[n]either the doctor nor the patient retains [a] right to free choice relating to health care."

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(Response at 20.) To the contrary, Union Health complies with section 7 of the Act, which provides subscribers with "free choice of any physician, podiatric physician, dentist or dental surgeon who is rendering service" on behalf of Union Health. See 215 ILCS 165/7. Union Health makes physicians in a variety of specialties available to subscribers. (C1288 V3.)

D. Plaintiff has not demonstrated the existence of hospital control over Union Health.

Plaintiff does not describe a factual basis for supporting a conclusion of hospital control over Union Health. (Response at 19-21.) The rules of statutory construction require this Court to ascertain and give effect to the legislature's intent. See *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 43. The best indication of legislative intent is the plain, ordinary meaning of the statutory language. *Id.* A court should read a statute in light of its purpose. See *Munroe v. Brower Realty & Management Co.*, 206 Ill. App. 3d 699, 706 (1st Dist. 1990). The meaning of the word "control" in a statute depends on "the context and the subject matter." *Robinson v. Walker*, 63 Ill. App. 2d 204, 209 (1st Dist. 1965).[3] The term "control" in the immunity provision is neither defined in that section nor anywhere else in the Act, including the definitional section, 215 ILCS 165/2.

Plaintiff falls far short of showing that a hospital controls Union Health so as to remove it from application of the immunity provision. Plaintiff's citation to section 7 of the Voluntary Act, which prohibits a health services plan corporation from directing a physician in medical decision making, is irrelevant to hospital control over Union Health.

[3] In this context, the National Association of Insurance Commissioners has defined "control," other than through ownership, as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person ***." (C1291 V3.)

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(Response at 19.) Further, the unrebutted affidavit of W. Joe Garrett, Executive Director of Union Health, establishes that, in contrast to the legislature's conclusions regarding hospital control over the Anchor and Michael Reese HMOs, no hospital exercises management control over Union Health. (C1290-93 V3.) Its relationship with various hospitals is akin to a relationship with a vendor, not to a hospital that manages the operations of a voluntary health services plan corporation.

Working with a hospital to provide quality care is not the equivalent of a hospital exercising control over Union Health. The legislative history and case law confirm that the General Assembly was concerned about the influential roles hospitals played in Anchor and Michael Reese, which the legislature may have found to primarily operate as HMOs despite holding Voluntary Act charters. See *American National*, 210 Ill. App. 3d at 426-27; see also *Jolly*, 225 Ill. App. 3d at 131. The legislative debates concerning the 1988 amendment demonstrate that the legislature sought to repeal immunity for those voluntary health services plan corporations/HMOs influenced by or subject to the direction of hospitals. 85th Ill. Gen. Assem., Senate Proceedings, June 30, 1988, at 160-61. The First District 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 HMOs—into conformity with the legislative treatment given HMOs. See *Moshe*, 199 Ill. App. 3d at 597-98; see also *McMichael*, 259 Ill. App. 3d at 118.

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III. Union Health's Liability Insurance Does Not Negate Its Right to Statutory Immunity.

Arguing that Union Health's purchase of liability insurance waives statutory immunity, plaintiff relies on the case law pertaining to waiver of common law immunity as though it pertains to statutory immunity. (Response at 21-22.) 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).

Plaintiff acknowledges in her response that a court should not read exceptions, limitations or conditions into a statute, but then asks this Court to do exactly that. (Response at 22.) Nothing in the plain language of the statute indicates that the General Assembly intended the purchase of liability insurance to constitute a waiver of immunity. This Court should not add a waiver provision to the clear and unambiguous language of the statute. See *In re Estate of Shelton*, 2017 IL 121199, ¶ 36; see also *Hudson*, 377 Ill. App. 3d at 635.

Plaintiff ignores a significant fact in addressing the effect of Union Health's purchase of insurance: only a voluntary health services plan corporation receives immunity under the Act; employees and agents of the corporation do not. See 215 ILCS 165/27. Under the agreement with the medical staff, Union Health maintains group insurance for its employees who are not immune to malpractice claims. (C1111-12 V2.) As a result of negotiations with the medical staff, Union Health also agreed to provide physicians with medical malpractice insurance. (C1141-44 V2.)

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CONCLUSION

The carefully drafted immunity provision does not leave plaintiff without a remedy. The Voluntary Act eliminates a cause of action against a health services plan corporation, but not against practitioners found to commit malpractice. See 215 ILCS 165/26. The amended immunity provision is narrowly tailored. It exempts from civil liability those voluntary health services plan corporations that adhere to the Act and deliver the affordable healthcare needed by union member subscribers and their families.

Dated: June 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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 5,930 words.

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NOTICE OF FILING AND PROOF OF SERVICE

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

I further certify that I sent the above-mentioned pleading by email to the parties and attorneys of record at the email addresses listed below on June 5, 2018 at or before 5:00 p.m.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

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