IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1345 EDA 2004
(Consolidated with Nos. 1190, 1450, 1451 and 1517 EDA 2004)

PENNSYLVANIA ORTHOPAEDIC SOCIETY,
on behalf of its members and all others similarly situated individuals,
v.
INDEPENDENCE BLUE CROSS, *et al.*

ROBERT P. GOOD, M.D., on behalf of himself and all others similarly situated,
v.
INDEPENDENCE BLUE CROSS, *et al.*,

JOHN R. GREGG, M.D. and VINCENT J. DISTEFANO, M.D., on behalf of themselves and all others similarly situated,
v.
INDEPENDENCE BLUE CROSS, *et al*.

APPEAL OF THE AMERICAN MEDICAL ASSOCIATION

Appeal from the April 22, 2004 Order of the Philadelphia County Court of Common Pleas, No. 3482 December Term 2000, No. 0002 December Term 2002, No. 0005 December Term 2002

BRIEF OF APPELLANT THE AMERICAN MEDICAL ASSOCIATION

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I. STATEMENT OF JURISDICTION

The Superior Court of Pennsylvania has jurisdiction to hear this appeal under Pennsylvania Rules of Appellate Procedure 311(a)(4) (interlocutory appeal as of right from injunction) and 313(b) (appeal as of right from collateral order).[1]

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The appellate court review of Paragraph 6 of the Order below is to determine whether the lower court committed an error of law. For questions of law, the standard of review is "de novo," and the scope of review is "plenary." Buffalo Township v. Jones, 571 Pa. 637, 644, 813 A.2d 659, 664 (2002).

III. ORDER IN QUESTION

AND NOW, this 22nd day of April, 2004, upon consideration of Plaintiffs' Motion for Final Approval of the Settlement (Control No. 081034) ("Motion for Final Approval") (which includes a Motion for Certification of a Settlement Class), all Objections and opposition thereto, the plaintiffs' and defendants' opposition to those Objections, Plaintiffs' Reply in Support of Motion for Final Approval of Settlement, the testimony at the hearing conducted on August 21-22, 2003, the argument held on November 19, 2003, the proposed findings of fact and conclusions of law submitted by plaintiffs, defendants and objectors, and all matters of record, it is **ORDERED** that the Motion for Certification of a Settlement Class is **Granted**, that the Motion for Final Approval is **Granted**, and that all Objections, including those listed below, are **Overruled**:

(a) Objections of Martin D. Trichtinger, M.D., William W. Lander, M.D., Nancy S. Roberts, M.D., Beverly K. Dolberg, M.D. and the Pennsylvania Medical Society to Proposed Class Action Settlement;

(b) Objections of Kutztown Family Medicine, P.C. and Natalie M. Grider to Proposed Class Action Settlement;

(c) Objections of Rosalind Kaplan, M.D. to Proposed Class Action Settlement;

(d) Objections of Louis P. Bucky, M.D. to Proposed Class Action Settlement;

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[1] On October 27, 2004, Appellees filed a Motion to Quash this appeal, to which the AMA responded on November 12, 2004. Pursuant to the Court's Order of December 14, 2004, disposition of that Motion was deferred until consideration of the appeal on the merits. In addition to its Brief in Opposition to the Motion to Quash, the AMA addresses the jurisdictional issue in Part VII.C. herein.

(e) Objections of Robert B. Sklaroff and Physician Providers of the University of Medicine and Dentistry – Robert Wood Johnson Medical School to Proposed Class Action Settlement;

(f) Objections of Terrence R. Malloy, M.D. on behalf of the Certified Class of New Jersey Providers to Proposed Class Action Settlement;

(g) Objections of Joseph Fallon, M.D., Medical Society of the State of New York, South Caroline Medical Association and Tennessee Medical Association to Proposed Class Action Settlement;

(h) Objections of Pennsylvania Psychiatric Society and Dr. John Yardumian to Proposed Class Action Settlement; and,

(i) Objections of American Medical Association to Proposed Class Action Settlement.

FURTHER, upon consideration of the fact that three open motions are no longer pertinent, it is **ORDERED** that: (1) American Medical Association's Motion for Leave to File an Amicus Curiae Memorandum Regarding Proposed Settlement is **marked moot**, (2) the plaintiffs' Motion in Limine to Preclude and/or Limit the Objections of Louis P. Bucky, M.D. (Control No. 080890), is **marked moot**, (3) the plaintiffs' Motion in Limine to Preclude Non-Class Members from Objecting (Control No. 080891), is **marked moot**.

FURTHER, upon consideration of Defendants' Motion To Invalidate Opt-outs, For Approval Of Corrective Notice and a New Opt-out Period For Certain Class Members, and to Temporarily Restrain Communications Concerning the Class Action Settlement (Control No. 080860) ("Motion to Invalidate Opt-outs"), in which Class Representatives, the Pennsylvania Orthopaedic Society, Robert P. Good, M.D., John R. Gregg, M.D., and Vincent J. DiStefano, M.D. (collectively "Class Representatives"), and their counsel join, all opposition thereto, the argument held on November 19, 2003, and all matters of record, it is **ORDERED** that the Motion to Invalidate Opt-outs is **Granted**.

It is further **ORDERED** that:

1. All opt-outs submitted to date, including those identified in Exhibit(s) A-C to the Motion to Invalidate Opt-outs, are stricken, invalidated and declared void.

2. All class members who submitted, or are identified in, a timely opt-out ("Affected Class members") remain in the Class Action Settlement ("CAS"), subject to the paragraphs that follow. The 267 group opt-outs are deemed to be included.

3. The parties are required to disseminate the correspondence and notice in the form attached hereto as Exhibit A ("Notice") on the following web pages not later than April 26, 2004: www.ibx.com and www.paorthosociety.com. The parties shall also disseminate the Notice, or a summary thereof, via publication in the Philadelphia Inquirer on or before May 5, 2004, and on the Internet via www.businesswire.com or other similar Internet new distribution service by April 26, 2004.

4. Independence Blue Cross is required to disseminate the Notice via U.S. mail not later than May 7, 2004, to any and all Affected Class Members. Any and all class members who submitted an untimely opt-out shall not be entitled to receive Notice.

5. All persons to whom the Notice is sent shall have another opportunity to opt-out of the class ("Second Opt-out"). The Second Opt-out Period shall end on June 9, 2004. Requests to opt-out must be post-marked no later than June 9, 2004.

6. Effective immediately upon entry of this Order, and continuing thereafter until midnight, June 9, 2004, the New Jersey Lawyers,[2] medical societies/associations, including, but not limited to, the Pennsylvania Medical Society (hereinafter "PMS") and the Medical Society of New Jersey (hereinafter, "MSNJ"), and each of their partners, shareholders, attorneys, employees, agents, servants, representatives, members and **all others acting by or through them and/or on their behalf** are enjoined from communicating directly or indirectly or through or in concert with others with, or in any manner intended to reach, class members about the Class Action Settlement unless the communication is first approved by this court.

7. Upon further application by defendants, class counsel or other affected parties to the CAS, the court shall consider whether the New Jersey Lawyers and/or others should pay fees and costs reasonably incurred by defendants, class counsel or other affected parties in connection with responding to and/or remedying the improper communications with class members, including, but not limited to, fees and costs incurred in connection with (a) addressing and remedying the misuse of the AmeriHealth name in communications with class members, (b) preparing and filing the Motion to Invalidate Opt-outs, and (c) preparing, disseminating and mailing the new Notice.

BY THE COURT,

/s/
ALBERT W. SHEPPARD, JR., J.

[2] The New Jersey Lawyers shall include the following: Edith M. Kallas, Esquire, and the law firm of Milberg, Weiss, Bershad, Hynes & Lerach, LLP ("Milberg Weiss"); Frank Morris, Esquire, and the law firm of Morris and Morris, LLC; Donna Siegel Moffa, Esquire, and the law firm of Trujillo Rodriguez & Richards, LLC; and Kenneth J. Gogel, Esquire, and the law firm of Gogel & Gogel. [Footnote in original.]

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the lower court's restraint on communications between a medical society and its members regarding the members' participation in a class action settlement violate the procedural requirements of Pennsylvania law?

Answer of the court below: No.

2. Did the lower court violate federal and state constitutional rights of freedom of expression when it imposed an overbroad and unwarranted injunction against communications between a medical society and its members regarding participation in a class action settlement?

Answer of the court below: No.

3. Did the lower court violate federal and state due process requirements when it entered an injunction without the participation of an enjoined party in the hearing regarding the imposition of the injunction?

Answer of the court below: No.

V. STATEMENT OF THE CASE

A. Form of Action

The underlying case is a class action, originating from three lawsuits filed in the Philadelphia County Court of Common Pleas by various groups of physicians against health insurance companies for improperly denying and reducing reimbursements for certain medical procedures. (Findings of Fact, Discussion and Conclusions of Law at 5-7, ¶¶ 1-17.)[3] These lawsuits were consolidated before Judge Albert W. Sheppard, Jr., who issued the Order that is the subject of this appeal.

[3] Pursuant to Pa. R. App. P. 2111(a)(9), the lower court's April 22, 2004 Findings of Fact, Discussion and Conclusions of Law is attached hereto at Appendix "A".

Appellant, the American Medical Association (the "AMA"), appeals from the lower court's April 22, 2004 order (the "Order"), which granted: (1) Plaintiffs' Motion for Final Approval of the Settlement, (2) Parties' Motion for Certification of a Settlement Class, and (3) Defendants' Motion to Invalidate Opt-Outs, for Approval of Corrective Notice and a New Opt-Out Period for Certain Class Members, and to Temporarily Restrain Communications Concerning the Class Action Settlement ("Motion to Invalidate Opt-Outs"). (Order at 2-3.)[4] The AMA appeals only from Paragraph 6 of the Order, which enjoined the AMA and its representatives from communicating with its members regarding the settlement. (Order at 3, ¶6.)

B. Procedural History

On December 29, 2000, Drs. John R. Gregg and Vincent DiStephano sued Independence Blue Cross ("IBC"), QCC Insurance Company, Keystone Health Plan East, Inc., AmeriHealth HMO, Inc., and AmeriHealth, Inc. ("Defendants"), alleging that Defendants acted improperly in the way in which they reimbursed, or failed to reimburse, certain medical procedures. On December 2, 2002, Dr. Robert P. Good and the Pennsylvania Orthopaedic Society filed separate actions against Defendants based on similar allegations.

On June 19, 2003, the parties to all three lawsuits ("Appellees") jointly moved for preliminary approval of a class settlement (the "Settlement"). (Findings of Fact, Discussion and Conclusions of Law at 9, ¶ 22.) The lower court granted this motion, consolidated the three actions, and conditionally certified the plaintiff class on the same day. Id. at 11, ¶ 29; see also Order dated June 19, 2003. (R. 5a-7a.) On July 1, 2003, the lower court amended its June 19, 2003 order to provide for notice of the Settlement to the plaintiff class. (R. 8a-9a.) The opt-out deadline was set for August 1, 2003. (R. 7a.)

[4] Page references to the Order are to Part III supra of this Brief.

On July 28, 2003, the AMA filed its appearance and a Motion for Leave to File an *Amicus Curiae* Memorandum ("AMA Motion"). (R. 10a-12a, 13a-45a.) The AMA filed a Reply Brief in Support of its Motion for Leave to File an *Amicus Curiae* Memorandum on August 20, 2003, supported by Verified Statements of Mary J. Malone and Michael Beebe, employees of the AMA. (R. 105a-125a.)

On August 20, 2003, Defendants filed their Motion to Invalidate Opt-Outs. (R. 46a-99a.) The next day, the lower court held a fairness hearing on the proposed class settlement during which the court refused the proffered *amicus curiae* brief and supporting statements from the AMA. (R. 100a-104a.) It also barred the AMA from explaining why it wished to file the *amicus curiae* brief and from countering accusations of bias that had been made against it. (Id.) A subsequent hearing on Defendants' Motion to Invalidate Opt-Outs was held on November 19, 2003.

On April 22, 2004, the lower court unconditionally certified the plaintiff class and approved the Settlement, but invalidated all opt-outs and instituted a second opt-out period. In Paragraph 6 of the Order, the Court enjoined "medical societies/associations" and other classes of persons from communicating with members of the class about the Settlement, which is the portion of the Order from which the AMA appeals. (Order at 3, ¶6.) The Pennsylvania Medical Society, which was also subject to Paragraph 6, filed an Expedited and Emergency Petition for Reconsideration on April 22, 2004 (R. 129a-144a.), and the Medical Society of the State of New York filed an Emergency Application for Supersedeas Pending Appeal regarding Paragraph 6 on April 28, 2004. (R. 145a-157a.) Both of these motions were denied on April 30, 2004. (R. 158a, 159a-162a.) On May 5, 2004, the AMA filed its notice of appeal from the Order. This Court

consolidated the AMA appeal with appeals filed by certain objectors (together, the "Appellants") on June 15, 2004.

On September 1, 2004, the lower court entered its Final Order, Judgment and Discontinuance with Prejudice in the Litigation.

C. Summary of Pertinent Facts

The AMA is an Illinois not-for-profit corporation and the largest professional association of physicians in the United States. AMA Motion at 1. (R. 14a.) Its members practice in all fields of medical specialization and in all 50 states. Id. The AMA's purpose is to promote the science and art of medicine and the betterment of public health. Memorandum of Law in Support of AMA Motion at 2. (R. 30a.) As such, it seeks to be an essential part of the professional life of every physician and an essential force for progress in improving the nation's health.

One of the AMA's objectives is to advocate on behalf of physicians and patients by ensuring the integrity of the process by which physicians submit claims for reimbursement for services they have rendered to patients. This process includes claims submission, processing, adjudication, and payment. Verified Statement of Mary J. Malone ("Malone Statement"), ¶3. (R. 110a.) The AMA works with state, county, and national specialty medical societies to "provide fundamental fairness in the private sector so that physicians can practice effectively and provide quality patient care." Id., ¶2. (R. 110a.)

The AMA became involved in the underlying proceedings because of the potential impact of the Settlement on physicians. The plaintiff class was defined as:

> "All Providers (1) who submitted claims for payment or reimbursement to Independence Blue Cross and/or any Released Party for Medical services, procedures and/or products and (2) who have been, claim to have been, and/or may have been denied payment or reimbursement or have, claim to have, and/or may have received reduced payment or reimbursement on such claims. The Settlement Class includes, but is not limited to, all claims [sic] by Providers for downcoding and/or bundling, however described or characterized."

(Findings of Fact, Discussion and Conclusions of Law at 11, ¶30.) Many members of the plaintiff class are also AMA members.

Several key issues in the underlying action and the terms of the Settlement concerned the proper use and interpretation of Current Procedural Terminology ("CPT"), a listing of standardized descriptive terms and identifying codes widely used in the health care industry to describe medical, surgical, and diagnostic services and procedures. Malone Statement at ¶¶7-13 (R. 112a-113a.); AMA's proposed *Amicus Curiae* Memorandum at 5-7 (R. 22a-24a.) The AMA is the creator and owner of CPT and thus has extensive knowledge of and expertise concerning its proper application. Malone Statement, ¶5. (R. 111a.)

The AMA moved for leave to file an *amicus curiae* brief to advise the lower court on issues concerning CPT. AMA Motion at ¶ ¶ 4-5, 7 (R. 15a.)[5] The AMA also supported an extension of the opt-out deadline to allow for more time to clarify the terms of the settlement. AMA's proposed *Amicus Curiae* Mem. at 9-10 (R. 26a-27a.) The AMA filed a reply and verified statements from two of its employees in support of its motion. (R. 105a-125a.)

No further action was taken by the AMA in the lower court proceedings. Particularly, the AMA did not object to class certification or the Settlement,[6] and it did not seek to intervene.

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[5] The Settlement is replete with the use of medical coding terminology. The *amicus curiae* brief pointed out, inter alia, that the Settlement misused the medical coding terminology and was thus largely incomprehensible, even to the AMA, and unenforceable as part of a settlement agreement. AMA's proposed *Amicus Curiae* Memorandum at 5-7 (R. 22a-24a.)

[6] The lower court incorrectly states in its April 22, 2004 order that the AMA filed an objection in the underlying action, which the court then denied. Order at 2, ¶(i).

The lower court refused the AMA's offer to clarify the references to CPT in the settlement. (R. 100a-104a.) In fact, at the fairness hearing it refused to hear the AMA's arguments and evidence. Id. The following interchange occurred between the trial court and the AMA's lawyer at the fairness hearing:

> THE COURT: …The American Medical Society [*sic*] is a society. I don't think they have standing here unless, and what was the case that says, whether the society's necessary to insure adequate protection of the interests of that society.
>
> Now, we have all of these folks objecting who are all doctors, and Dr. Bucky's resume is that thick. I'm sorry he didn't come today. It's a great resume. But what I'm saying is I don't need the American Medical Society so I am going to deny the motion to intervene and I am not going to permit you to discuss the objections. I understand you're very unhappy....
>
> …
>
> MR. LEBOWITZ: Your Honor, in terms of the AMA, the AMA has not asked to intervene. It has merely submitted a paper as a –
>
> THE COURT: But it's also on the papers for the folks in Florida as a consultant?
>
> MR. LEBOWITZ: Can I address that, Your Honor?
>
> THE COURT: No. No. I don't want it. I don't believe they can be objective. Can I tell you that? I'm sorry, that's where my head is. And I am going to be objective, I am going to be fair, and I am not going to accept papers from the American Medical Society.
>
> MR. LEBOWITZ: Would the Court allow me to address those issues that were raised in the brief that the proponents of the settlement filed that purported to discuss the bias of the AMA?
>
> THE COURT: No.
>
> MR. LEBOWITZ: Because I don't believe that bias is accurate.
>
> THE COURT: The mere fact that it's questioned is enough for me. I have so much help here, sir, I don't need the American Medical Association ...

(Id.)

The lower court also refused to extend the opt-out deadline, and 7,293 opt-outs were submitted. (Findings of Fact, Discussion and Conclusions of Law at 13, ¶43.) Defendants moved to invalidate the opt-outs and institute a second opt-out period, claiming the first opt-out

period was tainted by "abuses" and "misleading communications." (R. 46a-99a.) Defendants also moved to restrict any communications to the plaintiff class about the Settlement during the second opt-out period. (Id.) Defendants' motion and supporting memorandum were not served on the AMA (R. 99a.) and Defendants cited no evidence of AMA misconduct. (R. 46a-98a.)[7]

On October 28, 2003, the lower court set a hearing date for the Motion to Invalidate Opt-Outs and the Motion for Final Approval of the Settlement for November 19, 2003. (R. 128a.)[8] The AMA did not participate in the hearing regarding the Motion to Invalidate Opt-Outs. The Court's opinion does not reflect that Defendants presented any evidence at the hearing pertaining to the AMA's conduct that could have justified the broad restraint subsequently imposed by the court. (Findings of Fact, Discussion and Conclusions of Law at 13-24, ¶¶42-96.)

On April 22, 2004, the Order invalidating all opt-outs, and ordering a second opt-out period was entered. Order, Part III. supra. The Order enjoined all "medical societies/associations," whether or not they had participated in the consolidated action, from communicating with the plaintiff class about the Settlement during the second opt-out period: Id. Paragraph 6 of the Order states:

> Effective immediately upon entry of this Order, and continuing thereafter until midnight, June 9, 2004, the…medical societies/associations, including but not limited to, the Pennsylvania Medical Society and the Medical Society of New Jersey, and each of their partners, shareholders, attorneys, employees, agents, servants, representatives, members and **all others acting by or through them and/or on their behalf** are enjoined from communicating directly or indirectly or through or in concert with others with, or in any manner intended to reach, class members about the Class Action Settlement unless the communication is first approved by this court.

(Emphasis in original; internal footnotes and parentheticals omitted.)

[7] The AMA was served with a copy of Plaintiffs' Reply Brief in Support of Motion to Invalidate Opt Outs on October 24, 2003.

[8] The AMA has no record of receiving service of the Order setting the hearing date.

The court attempted to justify this portion of the Order (the "Gag Clause") by finding that certain medical societies had "misled" class members with "misleading communications" and other "abuses," thereby interfering with the fairness of the class certification process. (Findings of Fact, Discussion and Conclusions of Law at 113-115.) The lower court, however, cited *no* evidence implicating the AMA, either directly or indirectly, with any of these alleged "abuses." (Id. at 115-16.)

On April 26, 2004, the Pennsylvania Medical Society ("PMS") and several individual physicians subject to Paragraph 6 filed an Expedited and Emergency Petition for Reconsideration. (R. 129a-144a.) The Medical Society of New Jersey, other state medical societies, and certain individual physicians filed an Emergency Application for Supersedeas Pending Appeal regarding Paragraph 6 on April 28, 2004. (R. 145a-157a.) The lower court denied both the Petition for Reconsideration and the Application for Supersedeas on April 30, 2004. (R. 158a, 159a-162a.) Soon thereafter, this Court also denied supersedeas.

Because of the Gag Clause, the AMA refrained from sharing its opinions of the Settlement with its members. The AMA also elected not to print any stories about the Settlement in its various publications. On May 5, 2004, the AMA filed its notice of appeal with this Court. (R. 163a-169a.) The AMA's docketing statement highlighted the following issue: "[w]hether the lower court erred by restraining and/or placing undue burdens upon communications by the AMA and its representatives with AMA members who are also class members concerning the class action settlement during the second opt-out period." The AMA does *not* appeal any portion of the Order dealing with class certification or settlement issues.

The AMA appeal was consolidated with the appeals filed by certain objectors/Appellants by order dated June 15, 2004. On September 1, 2004, the lower court entered its Final Order, Judgment and Discontinuance with Prejudice in the Litigation.

VI. SUMMARY OF ARGUMENT

The lower court's Gag Clause violated Rule 1713 of the Pennsylvania Rules of Civil Procedure by inappropriately restricting the AMA's communications with its members regarding the class settlement. In entering this Order, the lower court erred because the Gag Clause was not the narrowest possible relief to protect the parties and was not based on a specific record of the abuses that would have provided a justification for the broad prohibition on speech imposed below.

The Gag Clause also violated the United States and Pennsylvania Constitutions. It infringed freedom of speech, of the press, and of expressive association for the AMA and its members by preventing the AMA from communicating with its members on an issue of mutual concern, the class settlement. The Gag Clause also deprived the AMA of its due process rights by entering the Order restricting the AMA without the AMA's participation in any proceedings before the court on this issue.

Although the Gag Clause has now expired, the substantial question of public interest posed by the lower court's sweeping prohibition on speech, which is capable of repetition while evading appellate review, presents an exception to the mootness doctrine and warrants this Court's consideration. The Gag Clause is a collateral order that may be considered independent of the merits of the underlying class action settlement. The Order containing the Gag Clause reflects an error of law because of the lower court's undue expansion of the Gag Clause beyond that warranted by Rule 1713 and the record in this case; accordingly, the lower court should be reversed and the Gag Clause vacated.

VII. ARGUMENT

A. The Gag Clause Violated Pennsylvania Procedural Rules, and Its Entry Was Therefore Legally Erroneous.

The lower court justified its imposition of the Gag Clause by reference to Pennsylvania Rule of Civil Procedure 1713(a)(2), (4) and (6), as well as federal district court opinions in Georgine v. Amchem Products, Inc., 160 F.R.D. 478 (E.D. Pa. 1995); In re McKesson HBOC, Inc. Securities Litigation, 126 F. Supp. 2d 1239 (N.D. Cal. 2000); and Impervious Paint Industries, Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981). (Findings of Fact, Discussion and Conclusions of Law at 110.) None of these authorities supports the Gag Clause as written and as applied to the AMA.

As a threshold matter, Rule 1713(a)(4), which authorizes a court to impose conditions "on the representative party or an intervener," is not applicable to the AMA because AMA is neither a representative party nor an intervener. In fact, the lower court made clear that the AMA would not be allowed to intervene. (R. 102a-104a.) While Rules 1713(a)(2) and (a)(6) might arguably encompass an order like the Gag Clause, such orders are only authorized by Rule 1713 to the extent they are "appropriate."

As the lower court recognized, federal cases interpreting Fed. R. Civ. P. 23 provide guidance for Pennsylvania courts in their application of Pa. R. Civ. P. 1713, which is modeled after Fed. R. Civ. P. 23(d). Thus, the leading case for determining whether a restraint imposed under Pa. R. Civ. P. 1713 is appropriate is the United States Supreme Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).[9]

[9] Gulf Oil is the leading authority on Federal Rule of Civil Procedure 23(d), the rule on which Rule 1713(a) is based. The Analysis of the Rules in Appendix A of the Explanatory Notes for Rule 1713 states, "Rule 1713 copies Federal Rule 23(d)," with the exception of "the Federal provision for an order amending the pleadings."

In Gulf Oil, the Supreme Court considered a court's authority under the rules of procedure to impose limitations on communications with class members. The Court required a balancing of interests to curb abuses in communications with class members, insuring that class members be fully informed before deciding whether to become a member of a litigation class and protecting the legitimate rights of those that seek to communicate with the class.

The Court therefore held that:

> "[To] the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."

452 U.S. at 102 (quoting Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied, 434 U.S. 985 (1977)). Thus, to determine whether the Gag Clause was "appropriate," this Court must review whether the order was the "narrowest possible relief" to protect the parties and was based on a "specific record showing…of the particular abuses" the order is designed to address.

1. The Gag Clause Was Not Narrowly Drawn.

While the Gag Clause does not mention the AMA by name, it enjoins "medical societies/associations, including but not limited to, the Pennsylvania Medical Society and the Medical Society of New Jersey, and each of their … members and **all others acting … on their behalf**." (Underlined emphasis added; bold type in original). In addition to PMS and MSNJ, therefore, the Gag Clause extends to the medical societies/associations; members of PMS and MSNJ and other societies/associations; and all others acting on behalf of PMS, MSNJ and other societies/associations. Each such category, by its inclusion in the Gag Clause, broadened the

scope of the Gag Clause to include the AMA, either directly or through its membership, and extends far beyond any order necessary to address the issues that concerned the court.

The AMA is included within the scope of the Gag Clause because it is a "medical societ[y]/association." This conclusion is reinforced by the specific reference to the AMA in Paragraph (i) of the Order, of which the Gag Clause forms a part. Moreover, the AMA had been discussed at the fairness hearing when the defendants accused the AMA of being part of a biased conspiracy, with other medical societies, to undermine the Settlement, and the trial court refused to hear any discussion to the contrary. ("The mere fact that [the good faith of the AMA] is questioned is enough for me.") (R. 104a). The Gag Clause states expressly that its ambit of "medical societies/associations" is to extend beyond PMS and MSNJ, and nothing in the Gag Clause suggested that it was not intended to apply, as it does on its face, to the AMA.

In addition, in colloquy with the lower court on May 20, 2004, Mr. Hoffman and Mr. Whatley, attorneys representing state medical societies, sought to clarify the parties bound by the Gag Clause, making specific reference to the AMA. (R. 170a-174a.) Notwithstanding this direct request to the lower court to clarify or limit its Order, the court declined to do so, leaving the unmistakable conclusion that the AMA was subject to the order. (Id.) Particularly given the court's prior treatment of the AMA, in which the court suggested without any record support that the AMA was somehow complicit with others charged more directly with misconduct, the court's inclusion of the AMA within the "coterie of friends" of the Pennsylvania and New Jersey societies to whom the Order applies is obvious. (R. 174a.)

Thus, the overbroad order treats the AMA as if it were a party to the underlying action and should be bound by its terms. Persons not parties to an action are bound to observe the restrictions of an injunction if they know of the injunction and are within the class whose

conduct is to be restrained. Neshaminy Water Resources Authority v. Del-Aware Unlimited, Inc., 332 Pa. Super. 461, 470, 481 A.2d 879, 883 (1984); Brightbill v. Rigo, Inc., 274 Pa. Super. 315, 329, 418 A.2d 424, 430-31 (1980). The AMA knew of the Gag Clause, and it was within the class of persons named in it on its face. The lower court's express use of language that includes the AMA within its scope demonstrates that the Order is far from being narrowly drawn.[10]

That the Gag Clause was not the "narrowest possible relief which would protect the respective parties" is demonstrated by reference to the comparable order in McKesson, in which the court was responding to the actions of a law firm that made misleading contacts with putative class members to encourage them to bring separate lawsuits prior to class certification. In the order, the court enjoined the law firm, "its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them" from engaging in "further solicitation that fails to address the concerns expressed in this order." 126 F. Supp. 2d at 1247 (emphasis added). The court then listed seven specific actions or comments the law firm was precluded from doing. Id.

By contrast, the Gag Clause here sweeps much more broadly to ensnare innocent third parties within its scope. By enjoining not only those whom the court believed had made improper communications to the class, but also all "medical societies/associations" and "all

[10] The Gag Clause also applies to the "members" of PMS, MSNJ and other societies/associations, and thus applies also to individual physicians. The AMA has both the legal right and the moral responsibility to protest this infringement of its physicians' constitutional liberties. An association has standing to assert the legal rights of its members if at least one of those members is suffering injury from the challenged action and the relief sought does not require individual participation of each injured person. Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc., 280 F.3d 278 (3d Cir. 2002), cert. denied, 537 U.S. 881 (2002); North-Central Pa. Trial Lawyers Assoc. v. Weaver, 827 A.2d 550, 554 (Pa. Commw. 2003). The Gag Clause did so affect AMA members, and their individual participation is not required to determine whether they were properly enjoined. The AMA therefore has associational standing to challenge the Gag Clause on their behalf as well.

others acting by or through them and/or on their behalf," Judge Sheppard failed to limit his order, as the McKesson court did, to those "in active concert or participation with" the entity whose actions the court was addressing. Had the lower court's order been limited to those that had actively participated in the conduct complained of, the AMA would not have been implicated. This crucial difference marks the boundary between a proper restraint, such as in McKesson, and an erroneous one, as entered below.

Similarly, the conduct enjoined by the present order markedly contrasts with the conduct enjoined in McKesson. In McKesson, the order was narrowly designed to prevent the seven categories of abuses the court had found objectionable and specifically did not "enjoin any expression of opinion, negative or otherwise, about any order of this court or any action of any litigant (or its counsel) in this case." 126 F. Supp. 2d at 1247. Thus, apart from the specific restrictions of the order, the parties involved in McKesson were free to comment on all other issues arising from the case. Here, the lower court forbade all communications "directly or indirectly or through or in concert with others with, or in any manner intended to reach, class members" about any aspect of the class settlement. The lower court, far from crafting the "narrowest possible relief," appears to have accomplished the exact opposite – erection of an impenetrable barrier around the class through which no information could pass without court approval. This broad-brush restriction on speech is flatly impermissible.

In both the description of entities enjoined and the scope of communications precluded, the lower court's order fails the test set by the very authorities on which it relies. By the lower court's own standard, therefore, the entry of the Gag Clause constituted an error of law and should be reversed.

2. The Gag Clause Was Unsupported by a "Clear Record" and "Specific Findings."

A restraint on communication under Rule 1713 must be supported by a "clear record" and "specific findings" in which the court weighs the need for a restriction on communication against the potential interference with First Amendment rights. Gulf Oil, 452 U.S. at 101-02. Because the Gag Clause entered by the lower court includes the AMA within its ban on communications, the court was required to have made factual findings to support that restriction.

In the proceedings below, no portion of the record supports a finding that the AMA was likely to cause any harm by communication with the class that would outweigh the infringement to its free speech. In fact, the Defendants' Motion to Invalidate Opt-Outs and the lower court's Findings of Fact, Discussion and Conclusions of Law fail to cite a single improper act or statement made by the AMA. They offer no evidence to suggest that the AMA might potentially harm the plaintiff class or abuse the class certification process.

The Defendants and the lower court cite only communications made by other organizations. These include: (1) a July 11, 2003 letter from the attorneys in the New Jersey class action and a July 16, 2003 website posting by the same attorneys, (2) several statements made on the MSNJ website, (3) several statements made on the PMS website, (4) a July 25, 2003 facsimile sent by PMS, and (5) various communications by MSNJ, PMS, and county medical societies in New Jersey and Pennsylvania. (Findings of Fact, Discussion and Conclusions of Law at 100-107.) None of these communications was made by the AMA. Moreover, the Defendants never allege and the lower court never finds that the AMA had any role in the creation or dissemination of these communications.[11]

[11] These communications by other medical societies were in themselves wholly proper. While the July 11, 2003 letter and the July 16, 2003 website posting may have been improper, they were not made by a medical society.

Even Defendants' Motion to Invalidate Opt-Outs and the Memorandum in Support of the Motion do not assert that the AMA participated, either directly or indirectly, in the alleged "campaign to procure opt-outs."[12] Rather, the motion indicates that the "principal participants" of this effort were: "(1) certain financially-motivated lawyers and the Medical Society of New Jersey, (2) the Pennsylvania Medical Society and its lawyers, and (3) numerous county or specialty medical societies and other lawyers." Motion to Invalidate Opt-Outs at 3. (R. 63a.) The lower court's Findings of Fact, Discussion and Conclusions of Law, at 100-107, identify the same three groups of "participants."

In Gulf Oil, the trial court had banned all communications by parties and their counsel with potential class members without prior court approval, with the exception of "attorney-client communications initiated by the client, and communications in the regular course of business." 452 U.S. at 94-95. A panel of the United States Court of Appeals for the Fifth Circuit had affirmed the order, but the court *en banc* reversed the panel, holding that the order was an unconstitutional prior restraint.

The Supreme Court affirmed the Fifth Circuit *en banc* on non-constitutional grounds, holding that the district court exceeded its authority under Rule 23(d) by not basing its decision on adequate factual findings. Gulf Oil, 452 U.S. at 101, n.15 and 103-04. The Court reasoned, "[t]he district court failed to provide any record useful for appellate review. The court made neither factual findings nor legal arguments supporting the need for this sweeping restraint order." Id. at 102.

[12] Needless to say, the AMA supports the right of medical societies (and others) to inform class members of the benefits of opting out of a class action, even if the trial judge might disagree with the arguments advanced.

Like the district court in Gulf Oil, the lower court here exceeded its procedural authority by entering an order that restricted the AMA's right to communicate with its members. It provided no factual or legal justification for imposing a communication ban on the AMA. There is no "specific record showing" of the "particular abuses" by the AMA that threatened the judicial process. Id. at 102. Without such a showing, a restraint on communication is unjustified. Like Gulf Oil, "the record reveals no grounds on which the [lower court] could have determined that it was necessary or appropriate to impose this order" that restricted the AMA's conduct. Id. at 103.

Although the AMA criticized the settlement as drafted, that was insufficient to justify the Gag Clause entered below. Only abusive or unethical communications justify the type of restraint ordered here. In Payne v. Goodyear Tire & Rubber Co., 207 F.R.D. 16 (D. Mass. 2002), for example, a class of homeowners brought a product liability suit against the manufacturers of a rubber hose used in a radiant floor heating system. The plaintiffs moved to prohibit the manufacturer from communicating with potential class members, because they believed the manufacturer's website contained "false and misleading" information. Id. at 20. Specifically, the plaintiffs argued that the manufacturer's opinion of the functionality of the hose was "'factually incorrect and therefore misleading.'" Id. The court held that a communication ban was unjustified because the statements on the website were "disputed issues of fact in this case and may not for that reason alone be characterized as 'misleading'." Id. Thus, the court concluded, "the plaintiffs have failed to show that the defendant has engaged in any threatened or actual abusive or unethical communications with putative class members." Id. In addition, the court held that ex parte home inspections by manufacturers did not justify a communication ban because there was no factual record of actual or threatened coercion of class members. Id. at 21.

Here, although the AMA's comments, filed in support of its motion for requested *amicus* status, about the Settlement's inaccurate and imprecise reference to CPT are arguably in the record, this is not a communication with the class, much less an improper one, and does not justify a limit or ban on any future AMA statements to the class. Even if the lower court had made findings regarding the AMA's prior communications, it did not engage in a meaningful weighing of the potential abuses by the AMA against the interference with its rights. Some of the factors cited in Gulf Oil, which could have been relevant to determining the potential for abuse, are: "(1) the susceptibility of nonparty class members to solicitation amounting to barratry, (2) the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding, and (3) unapproved communications to class members that misrepresent the status or effect of the pending action." Williams v. United States Dist. Ct., S. District of Ohio, 658 F.2d 430, 436 (6th Cir. 1981), cert. denied sub nom., Southern R. Co. v. Williams, 454 U.S. 1128 (1981), citing Gulf Oil, 452 U.S. at 100 n.12. None of these factors apply here.

In particular, the lower court failed to distinguish between those with a financial interest that may foster miscommunications with the class and those with no such interest. In the cases relied upon by the court, for example, each of the parties subject to the injunction had a financial interest in the subject of its communications. In Georgine, the court was concerned with comments by law firms seeking to encourage class members to opt out of the settlement and to retain the firms to pursue individual actions. In Impervious Paint Industries, upon which the lower court relied, the contacts with class members were made by defendants' representatives, seeking to encourage class members to opt out. See also McKesson, 126 F.Supp. 2d at 1241 (solicitations by lawyers to represent potential class members); Kleiner v. The First National

Bank of Atlanta, 751 F.2d 1193, 1197-98 (11th Cir. 1985) (telephone calls by employees of defendant bank to customer-plaintiffs to urge opt out).

There was no suggestion here that the AMA had a financial interest in soliciting class members. As it was neither a party nor an attorney, it was not likely to "pressur[e] plaintiffs to opt out of the litigation" or present "inherent opportunities for coercion." Payne, 207 F.R.D. at 21. Rather, the AMA's interest directly paralleled that of the plaintiff class. Its attempted participation in the proceedings was based solely on its role as an association of physicians and its responsibility to advocate for physician and patient rights.

Because there was nothing even approaching a "clear record" to support the lower court's restriction on the AMA's speech, the Gag Clause could at most have been based on unsupported speculation. The "mere possibility of abuses," however, does not justify the adoption of a "communications ban." Gulf Oil, 452 U.S. at 104. The "mere possibility of abuses," however, does not justify "a communications ban" that prohibits a class from candidly assessing a proposed settlement under the Rules. Gulf Oil, 452 U.S. at 104. Since the record is devoid of any evidence directly or indirectly connecting the AMA to any miscommunication or abuse, the Gag Clause was unjustified.[13]

B. The Gag Clause Violated Rights Guaranteed under the First Amendment to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.

Should this Court find that the lower court did not err under Pennsylvania procedure in imposing the Gag Clause on the AMA, it should nonetheless reverse the Order, because the

[13] Pa. R. Civ. P. 1531 prohibits preliminary or special injunctions without written notice and a hearing, unless "immediate and irreparable injury" is threatened. The AMA did not participate in the hearing regarding the proposed restraining order. Nothing in the record suggested that the lower court attempted to give the AMA the opportunity to be heard on the issue prior to restricting the AMA's ability and right to communicate with its members. Generally, a judgment or decree entered against a person who was not provided notice or an opportunity to be heard is invalid. Shay v. Flight C. Helicopter Services, Inc., 2003 PA. Super. 86, 822 A.2d 1, 11 (2003). The Gag Clause therefore violated Rule 1531, as well as the class action procedures discussed above.

Order was an unconstitutional prior restraint of the AMA's right to communicate with its members. Under the United States Constitution and the Pennsylvania Constitution, any judicial order that prevents speech from occurring must be (1) justified by a "clear and present danger," (2) narrowly drawn to achieve a compelling state interest, and (3) issued with proper notice and hearing. New York Times v. Sullivan, 376 U.S. 254, 273 (1964); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181-84 (1968); Commonwealth v. Genovese, 337 Pa. Super. 485, 492-93, 487 A.2d 364, 367-68 (1984); 1621, Inc. v. Wilson, 402 Pa. 94, 103, 166 A.2d 271, 276 (1960). The Gag Clause met none of these requirements.

1. The Gag Clause Was a "Prior Restraint" that Impermissibly Restricted Freedoms of Speech, Press, and Expressive Association.

Under the First Amendment to the United States Constitution, "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. Const. amend. I. Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993). The "simple, most blatant form" of a prior restraint is a requirement that a speaker secure the prior approval of an official before speaking. Id. at 566 (Kennedy, J., dissenting); Staub v. City of Baxley, 355 U.S. 313, 322 (1958); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). "Prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

As much as prior restraints are disfavored under the United States Constitution, the Pennsylvania Constitution is even more stringent. Article I, Section 7 of the Pennsylvania Constitution states, "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being

responsible for the abuse of that liberty." Pa. Const. art. 1, § 7. These guarantees "prohibit the imposition of prior restraints upon the communication of thoughts and opinions." Commonwealth v. Tate, 495 Pa. 158, 170, 432 A.2d 1382, 1388 (1981), citing William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 88, 173 A.2d 59, 62, cert. denied, 368 U.S. 897 (1961).

Pennsylvania's state constitutional protection of free speech "is not mere window dressing or surplusage to federal protections of free speech." Bodack v. Law Enforcement Alliance of Am., Inc., 567 Pa. 606, 609, 790 A.2d 277, 278 (Pa. 2001) (Castille, J., dissenting from majority denial of application for extraordinary relief). Rather, "Article I, § 7 affords greater protection to speech and conduct than does its federal counterpart, the First Amendment." Pap's A.M. v. City of Erie, 553 Pa. 348, 367, 719 A.2d 273, 283 (1998) (Castille, J., concurring) (subsequent history omitted). In fact, Article I, Section 7 was specifically designed to protect against the imposition of prior restraints upon the communication of thoughts and opinions. Tate, 495 Pa. at 170, 432 A.2d at 1388, citing Goldman Theatres, 405 Pa. at 88, 173 A.2d at 62. Thus, a prior restraint may violate the Pennsylvania Constitution, even though it might not infringe the First Amendment to the U.S. Constitution. Id.

The Gag Clause was a prior restraint that violated freedom of speech and of the press.[14] It also violated freedom of expressive association, a fundamental right recognized under the First

[14] The AMA is the largest private publisher of medical literature in the world. Its flagship publication, the *Journal of the American Medical Association* ("*JAMA*"), is widely considered to be the most prestigious, influential medical journal in the world. In addition to technical articles of medical research, *JAMA* includes editorials and news articles on current events in the field of medicine, including legal matters that affect physicians. The court in Cukier v. AMA, 630 N.E.2d 1198, 1201 (Ill. App. Ct.), app. denied, 638 N.E. 2d 1114 (Ill. 1994), found that the AMA was a "reporter" and *JAMA* was a "news medium" under the Illinois Reporter's Privileges Act.

Besides *JAMA*, the AMA publishes, inter alia, *American Medical News*, *AMA Voice*, and *AMA eVoice*. *American Medical News* is a weekly newspaper for physicians that includes stories and editorials on professional, social, economic and policy issues concerning medicine. *AMA Voice* is a bimonthly advocacy publication that expresses views and opinions on significant issues that impact physicians. *AMA eVoice* is similar to *AMA Voice*, but it is published weekly and in an exclusively electronic format.

Amendment, Boy Scouts of America v. Dale, 520 U.S. 640, 647-48 (2000), and under the Pennsylvania Constitution, Philadelphia Fraternal Order of Correctional Officers v. Rendell, 558 Pa. 229, 236-37, 736 A.2d 573, 577 (1999); 1621, Inc. v. Wilson, 402 Pa. at 102-04, 166 A.2d at 275-76. See also Pa. Const. art. 1, §20.

2. The Gag Clause was not Justified by "a Clear and Present Danger."

A prior restraint must be justified by "a clear and present danger of the obstruction of justice." Sullivan, 376 U.S. at 273; Wood v. Georgia, 370 U.S. 375, 384 (1962) ("the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"). The issuing court is charged with the "heavy burden" of establishing this justification. New York Times v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). To meet this burden, the court must determine "the imminence and magnitude of the danger said to flow from the particular utterance sought to be prohibited and then balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Genovese, 337 Pa. Super. at 493, 487 A.2d at 368, citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-843 (1978).

In the present case, nothing in the record suggests that the AMA posed any threat to the fairness of the class certification proceedings. At best, the lower court based its decision to enter such an expansive order entirely on speculation. A prior restraint cannot be based on mere "assertion or conjecture." Rather, it must be "supported in all respects by evidence . . . presented during a hearing at which all parties are given an opportunity to participate." Genovese, 337 Pa. Super. at 493, 487 A.2d at 368 (prior restraint held unconstitutional; because of weak record court could only surmise by "conjecture and speculation" that such an "extraordinary remed[y]" as prior restraint was necessary).

In fact, the record affirmatively shows that the AMA did *not* threaten the judicial process. As the creator and owner of CPT and thus the most qualified expert on the topic, the AMA sought to file an *amicus curiae* brief on the specific issue of whether the settlement properly used CPT.[15] The AMA's interest was to see that the plaintiff class received the maximum benefit from the lawsuit and that the class members acted knowledgeably in deciding whether to opt out. A prior restraint issued against communications to a plaintiff class is unwarranted when the interests of the party to be restrained are identical to those of the protected class. Superior Beverage Co. v. Owens-Illinois, Inc., No. 83 C 512, 1988 U.S. Dist. LEXIS 9094, *3-5 (N.D. Ill. Aug. 16, 1988). Therefore, it is difficult to imagine how the AMA could have been deemed a "clear and present danger" to the class certification process. In the absence of such a finding, the restraint was unconstitutional.

3. The Gag Clause was not "Narrowly Tailored."

A prior restraint carries a "heavy presumption against its constitutional validity," and is thus subject to "strict scrutiny." See New York Times v. U.S., 403 U.S. at 714. To meet this standard of review, the issuing court must establish that the prior restraint was "tailored as precisely as possible to the exact needs of the case." Carroll, 393 U.S. at 183-84. A prior restraint is "narrowly tailored" if it is the "least restrictive means" of achieving the government's purpose. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000). Thus, a prior restraint "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." Carroll, 393 U.S. at 183.

[15] The AMA also sought to extend the opt-out period to allow time for clarification of the Settlement's terms to be made and communicated to members of the class.

The Gag Clause was not a "narrowly tailored" remedy. It provided no clear definition of the forms of communication it prohibited. As a result, it barred clearly innocent communications by the AMA to its members, such as an informative statement about the existence of the case, its issues, its status, and sources of further information, such as postings on the lower court's website. It prohibited political speech, such as an expression of the AMA's belief, right or wrong, that Judge Sheppard had acted abusively. Striking directly at the core of the AMA's relationship with its members, it prevented the AMA from providing unbiased, expert advice on an important matter of concern to its members falling squarely within the AMA's knowledge and experience.

Such a sweeping prohibition on speech was prompted by a record showing that a limited number of letters, which misidentified the letters' authors, was sent to a limited number of class members, and a web site briefly misidentified its sponsor. Those letters and that specific web site were the only arguable bases for a restriction on further communications with the plaintiff class.[16] The AMA had nothing to do with those letters or that web site, and nothing in the record suggests otherwise. If a prior restraint could have been justified at all, it should have been limited to an injunction against misidentification of the authors of communications, and it should have been limited to the attorneys who sent the original letters or posted the web site. Nothing in the record suggests that any broader restraint was necessary. Certainly, the prior restraint should not have included the AMA or its members. See Part VII. A. 1. supra.

The lower court maintained that the Gag Clause was "narrowly tailored" because: (1) it was temporary in duration, (2) it was limited in scope, as it prohibited only communications

[16] The record also includes Judge Sheppard's conclusion that certain other communications may have contained incorrect or incomplete information. Findings of Fact, Discussion and Conclusions of Law at 98-108. The AMA disputes those conclusions, but in any event those communications had no connection to the AMA and would not have justified the broad prior restraint issued here.

about the Settlement, and (3) it allowed communications that were approved by the court. A prior restraint of even the shortest duration, however, is still "extraordinarily grave." Genovese, 337 Pa. Super. at 492, 487 A.2d at 367. Furthermore, although the Gag Clause may have been directed to the Settlement, it prohibited all communications about the Settlement and therefore was too expansive. Moreover, the required submission of speech to an official for approval is the "simple, most blatant form" of a prior restraint. See Part VII.B.1. supra and cases cited therein. Thus, the Gag Clause's allowance of court approved communications does not lessen the severity of the infringement on the AMA's rights.

The lower court relies on Georgine for the proposition that a limitation on speech passes strict scrutiny when it protects class members from miscommunications. (Findings of Fact, Discussion and Conclusions of Law at 112-113.) The court in Georgine, however, concluded that the only remedy sufficiently "narrowly tailored" to cure the miscommunication made in that case was an invalidation of the opt-outs and institution of a second opt-out. Georgine, 160 F.R.D. at 515, 517. The court rejected the possibility of restraining the parties' speech or limiting their contact with the class: "this remedy does not restrain or burden speech prior to its articulation. It has no connection with, nor seeks to restrict, any other public avenues of protest of the Georgine settlement …" Id. at 517. In the present case, the lower court not only established a second opt-out period, but issued an overbroad prior restraint as well, with insufficient justification to meet constitutional standards.

The lower court also cited Hampton Hardware v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994), which upheld an order prohibiting the defendants from soliciting potential class members to opt out. The class members were customers of defendants, and the order was based on testimony of the "serious potential for harm" to the class from the communications,

particularly because of the business relationship between class members and defendants. 156 F.R.D. at 633. Hampton also involved "commercial speech," since the defendants had a financial interest in encouraging the opt-outs because fewer class members would reduce the amount of their damages. Id. In such a situation, the standard of review is "intermediate" and does not call "into play the full panoply of First Amendment safeguards against prior restraint." Id. In contrast, the AMA had no financial interest in seeking opt-outs.

In addition, the lower court cited In re School Asbestos Litig., 842 F.2d 671, 681-83 (3d Cir. 1988), for the proposition that a limitation on speech may "promote the court's interest to 'protect the integrity of the class and the administration of justice.'" (Conclusions of Law at 113.) School Asbestos, however, did not rule on any First Amendment issues. Rather, it held that the gag order was overly-broad and invalid because the court exceeded its discretion under Federal Rule 23(d): "Neither the nature of the harm identified by the district court nor the scope of its findings provides a basis for the kind of sweeping disclosure requirement imposed on SBA by Order No. 79." 842 F.2d at 683. The lower court in the present case erred by issuing the Gag Clause because "[a]bsent such findings and record evidence to support them, the broad requirement of [the Gag Clause] goes far beyond the [lower] court's discretion under Rule [1713]." Id. at 684. Indeed, the court made no findings whatsoever regarding the AMA, thus removing any discretion the court may have had to impose a restriction upon the AMA. Cf. Kleiner v. First Nat'l Bank, 751 F.2d at 1206-07 (order "narrowly drawn" because it did not impinge on communications in regular course of business and court could discern "no less restrictive alternative").

In all of these cases, the courts had identified the parties to be restrained in much more specific terms than the entire class of medical societies and associations restrained under the Gag

Clause. This broad restraint is not supported by the cases cited by the court and cannot withstand this constitutional challenge.

4. The Gag Clause was Issued Without Affording the AMA an Opportunity to Be Heard.

Not only must a prior restraint be justified by a clear and present danger and a compelling state interest, it also requires certain procedural safeguards. Carroll, 393 U.S. at 180. A prior restraint is valid "only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." Freedman v. Maryland, 380 U.S. 51, 57 (1965). Much like the procedures established in Gulf Oil for Rule 23(d) orders, a prior restraint requires proper notice and an adversary proceeding. Carroll, 393 U.S. at 180-85. Prior restraints issued without an adversary hearing are unconstitutional. Id. "[I]n the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." Id. at 183. Therefore, "[e]vidence must be presented during a hearing at which all parties are given an opportunity to participate." Genovese, 337 Pa. Super. at 493, 487 A.2d at 368.

At the August 21, 2003 fairness hearing, notwithstanding that the judge's opinion of the AMA had evidently been tainted by innuendo and misrepresentations, the lower court did not simply decline the participation of the AMA as *amicus* on the subject of the Settlement, but it adamantly refused to provide an opportunity for the AMA to rebut the negative comments that had influenced the court. (R. 102a-104a.) This failure may explain why the Gag Clause was not "narrowly drawn."

Moreover, the AMA was not served with the Defendants' Motion to Invalidate Opt-Outs. While the AMA was aware of the Motion and related proceedings, the AMA's conduct and its

communications with its members were not at issue in the Motion. Moreover, the court did not seek the AMA's participation in the hearing on November 19, 2003 regarding the Motion. Without the AMA's participation, it was error for the court to enter an order that enjoined the AMA's communications with its members.

Since a prior restraint "must be tailored as precisely as possible to the exact needs of the case, …[t]he participation of both sides is necessary for this purpose." Carroll, 393 U.S. at 184. "[F]ailure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure." Id. Once the lower court had determined to impose a restriction upon a non-party, it should have provided the AMA with a hearing before issuing its Order.

In Carroll, the Court reversed a restraining order of a planned "white supremacist" rally, because the order had been issued "without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings." The Court concluded, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." Id. at 180. Likewise, in the present case, the record shows that the Motion to Restrain Communications was not served on the AMA, and the AMA did not participate in the injunction proceedings prior to issuance of the restraint.[17]

[17] Enjoining the AMA's speech without its active participation in the briefing and hearing process also violates the AMA's due process rights under the Fourteenth Amendment to the United States Constitution. Apple Storage Co. v. Consumers Education and Protective Assoc., 441 Pa. 309, 314, 272 A.2d 496, 498 (1971). Having been excluded from the fairness hearing and not having been served with the Motion to Invalidate Opt Outs, the AMA reasonably concluded that its future communications were not at issue in the lower court's consideration of Defendants' Motion. The lower court erred by issuing an injunction that restricted the First Amendment rights of associations such as the AMA that were not before the court and did not have an opportunity to be heard on the nature and scope of the restrictions, and the rationale for imposing them upon those encompassed within the terms of the Order.

C. Substantial Legal and Constitutional Issues of Public Significance Warrant Review by This Court.

The Appellees moved to quash this appeal, contending that it was filed prematurely and that the AMA failed to cure this defect through an additional notice of appeal subsequent to the conclusion of the trial court proceedings. This motion was denied without prejudice to consideration by this Panel.

In general, the motion to quash should be denied because Paragraph 6 of the Order was appealable as a collateral order and as an appeal from entry of an injunction. To avoid repetition, the AMA incorporates herein by reference as if fully set forth the arguments raised in its opposition to the motion to quash.

In addition, this appeal is not moot, even though the Gag Clause expired months before adjudication of this appeal. An appeal is not moot if it involves a "substantial question" or "questions of public importance," In re Dorone, 349 Pa. Super. 59, 65, 502 A.2d 1271, 1274 (1985); or if "the question presented is capable of repetition and apt to elude appellate review." First Union Nat'l Bank v. Realty Investors Corp., 812 A.2d 719, 724 (Pa. Super. 2002); see also Commonwealth v. Lambert, 723 A.2d 684, 687 n.2 (Pa. Super. 1998); In re Duran, 769 A.2d 497, 502 (Pa. Super. Ct. 2001). The AMA's appeal of the Gag Clause falls within this doctrine.

This appeal raises a "substantial question" concerning judicial authority under the Pennsylvania Rules of Civil Procedure and the United States and Pennsylvania constitutions. Even though that question may be inherently procedural, pertaining to the appropriate interpretation of Pa. R. Civ. P. 1713, it may nevertheless be of "great public interest." In First Union, for example, a property owner appealed an order granting a mortgagee's request to proceed with a sheriff's sale of the owner's property. Prior to the hearing of the appeal, the owner paid off all amounts due and the court entered a consent order staying the sheriff's sale. A

panel of this Court held that the case was not moot because there was still a question as to whether the trial court had authority to enter the consent order; and "[i]ssues relating to service and jurisdiction are conceivably of great public interest." Id. at 725. Thus, a case involving "a fundamental question as to the nature and extent of judicial power" is of great public importance and not moot. Commonwealth v. Benn, 451 Pa. Super. 538, 542, 680 A.2d 896, 898 (1996). Because the present case also involves a question of judicial power, in that the AMA has challenged the lower court's authority to restrict the AMA's communications with its members under Pa. R. Civ. P. 1713, this appeal is not moot.

This Court has also held that an expired court order restricting speech involves a question that is "capable of repetition yet evading appellate review." In Lambert, the trial court enjoined counsel from speaking to the media about a post-conviction hearing. Several news outlets appealed the order, arguing that it impermissibly infringed on their First Amendment freedoms of speech and of the press. The order, however, was limited in duration, so it expired well before the appeal could be heard. Nonetheless, this Court without discussion held that the matter was "capable of repetition while evading appellate review." 723 A.2d at 687 n.2. Recognizing the First Amendment issue appealed by the news outlets as "[a] collateral order … separable from and collateral to the main cause of action," the Lambert court held that the right involved, implicating the First Amendment guarantees of freedom of speech and freedom of the press, was too important to be denied review. Likewise, in the present case the Gag Clause expired upon the completion of the second opt-out period. The nature of the free speech rights involved here, however, also ensures that the question involved in this appeal may be irreparably lost if review of the underlying order is denied. Id. at 688.

As in the cited cases, this issue is capable of repetition. It is an unfortunate aspect of modern life in the medical profession that disputes will arise between health care providers, such as physicians, and those that pay for their services, such as insurers. Thus, the limited settlement here, between one insurer and physicians who submit bills to that insurer, has not resolved all such claims in the state, and a similar issue could arise in other class actions involving the AMA's members, and certainly in class actions generally. If this appeal is deemed moot, this Court would be unable to delineate for these and other litigants whether restraints similar to the Gag Clause are appropriate and constitutional.

VIII. CONCLUSION

The American Medical Association sought nothing more below than clarification of a proposed settlement that was too vague and misleading to permit a reasoned decision by class members on whether to join the settlement class. Its efforts resulted in the AMA's being included in a blanket prohibition on communications with the class, many of whose members were also AMA members. The Order imposing this restriction is legally flawed and constitutionally infirm. Accordingly, for the benefit of those medical associations and other entities involved with future class action settlements, the AMA respectfully requests that this Court reverse the lower court's decision to include all medical societies and associations in Paragraph 6 of the Order and to vacate the Order as it pertains to the AMA as a violation of the

Pennsylvania Rules of Civil Procedure, the United States Constitution, and the Pennsylvania Constitution.

Respectfully submitted,

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